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# MARTIN'S


## ANNUAL CRIMINAL CODE

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### 1997

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# 1997

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With Commentary by  
HOWARD L. GARDNER, LL.M.

with the assistance of

and

The Honorable J. C. Gauthier

WASC ROBINSON

of the House of Commons

CANADA LAW BOOKS LTD.

50 EDWARD STREET, A TORONTO, ONTARIO



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Being the text of the Criminal Code, the Canada Evidence Act, the Food and Drugs Act, the Narcotic Control Act, the Young Offenders Act and the Canadian Charter of Rights and Freedoms.

With Annotations by

**EDWARD L. GREENSPAN, Q.C.**

of the Ontario Bar

and

The Honourable Mr. Justice

**MARC ROSENBERG**

of the Court of Appeal of Ontario

**CANADA LAW BOOK INC.**

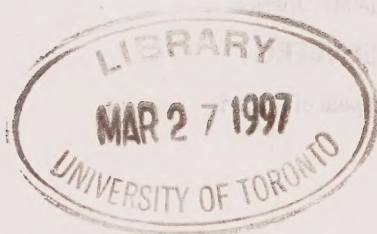
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MARTIN'S  
ANNUAL CRIMINAL CODE  
1997

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## PREFACE

This edition of *Martin's Annual Criminal Code* contains the annotated Criminal Code, Canada Evidence Act, Food and Drugs Act, Narcotic Control Act and Young Offenders Act as enacted by R.S.C. 1985, and excerpts from the Constitution Act, 1982. At the time of printing, the new Controlled Drugs and Substances Act (Bill C-8) had not yet been passed by Parliament. That Act, when brought into force, repeals the Narcotic Control Act and effects substantial amendments to the Food and Drugs Act and some amendments to the Code. These proposed amendments are included in this volume. When the **Controlled Drugs and Substances Act** receives Royal Assent, subscribers will be provided with the full text in a supplement.

This edition is updated with all **statutory amendments**. The text of any amendments which have not been brought into force are printed in *italics* and subscribers will be notified in **supplements** when the provisions are brought into force. Any other amendments which receive Royal Assent before the next edition is published will also be included in the supplements. At the date of printing, the important amendments to the Criminal Code from S.C. 1995, c. 22 (Bill C-41) have not yet been brought into force and are therefore printed in *italics*. Bill C-41, *inter alia*, replaces Part XXIII - SENTENCING and contains important procedural and substantive changes to the sentencing part of the Code. Amendments to the Criminal Code effected by 1995, c. 39 (Bill C-68) an Act Respecting Firearms and Other Weapons are of course included in the Criminal Code. The complete text of the new Firearms Act, S.C. 1994-95, c. 39, is included in the 1996-97 edition of *Martins Related Criminal Statutes*.

This edition contains **annotations** of all relevant decisions reported to April 30, 1996. In addition, unreported decisions of particular significance which have come to our attention prior to April 30, 1996 are also included. Where there is a large volume of case law under a section, headings are included to make the annotations more accessible. The annotations under the Charter of Rights sections are of general application. Cases dealing with a specific provision (of the Criminal Code, for example) are noted under that section.

After many years of experience with the Charter of Rights, it is apparent that the Canadian Bill of Rights is of limited use in the criminal law context and therefore the Bill of Rights is not included in this edition. Those needing to refer to the Bill of Rights should see *Martin's Annual Criminal Code*, 1990 or *Martin's Related Criminal Statutes*, 1996-97.

The practice initiated in the very first edition of *Martin's Criminal Code* (1955) of including **cross-references** has been continued in this edition in order to assist the user in locating related provisions.

A **synopsis** of all but the simplest sections is also included, along with the cross-references and annotations.

This edition continues a new feature, an **Offence Grid** which is based upon charts prepared by the Provincial Judges' Association of British Columbia. We wish to acknowledge the kind offer of the Association to permit us to include these charts in this



edition of Martin's. We also wish to thank Alison Wheeler of Greenspan & Associates for her assistance in updating the Offence Grid.

A comprehensive **Index**, updated by Ken Chasse, is included in this edition. We are sure users will find this of significant value.

We would also like to thank Marie Henein of Greenspan & Associates for her thorough research which has contributed to the completeness, currency and accuracy of this book.

We are also grateful to Sharon Gibson, Maggie Tyson and Fran Cudlipp of Canada Law Book for their able assistance in the preparation of this edition.

EDWARD L. GREENSPAN, Q.C.

Marc Rosenberg

Toronto, Ontario

May, 1996

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# CRIMINAL CODE CONCORDANCE

This Table sets out all sections of the Criminal Code, R.S.C. 1970, c. C-34 as amended to December 1988 and the corresponding numbering in R.S.C. 1985, c. C-46 as amended to February, 1995. References to subsections, paragraphs and subparagraphs appear only when the numbering has been changed in the R.S.C. 1985 Code. The numbers listed under the heading "R.S.C. 1985" reflect the numbering scheme set out in the main volumes of the Revised Statutes of Canada, 1985, the First, Second, Third and Fourth Supplements and amendments.

Locate the number under the heading R.S.C. 1970, c. C-34 and cross-refer to the number that appears in the opposite column under the heading R.S.C. 1985, c. C-46. Where a case cites provisions from the 1970 Code, consult the R.S.C. 1985 column for the corresponding 1985 Code section numbers. Where contemporary cases cite the 1985 Code, consult the R.S.C. 1970 column for the corresponding 1970 Code numbers.

**Note: Users should bear in mind, however, that the Concordance is not a citator and has been assembled only as a guide to the numbering of the 1985 Code.**

R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46	R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46
1	1	3(7)	4(6)
2	2	3(8)	4(7)
2 "magistrate"	[rep. R.S.C. 1985, c. 27 (1st Supp.), s. 2(4)]	4	5
		5	6
		6	7
2 "peace officer"	2 "peace officer"	6(1.1)	7(2)
		6(1.2)	7(3)
2(d.1)	2(e)	6(1.3)	7(3.1)
2(e)	2(f)	6(1.4)	7(3.2)
2(f)	2(g)	6(1.5)	7(3.3)
2 "superior court of criminal jurisdiction"	2 "superior court of criminal jurisdiction"	6(1.6)	7(3.4)
		6(1.7)	7(3.5)
		6(1.8)	7(3.6)
		6(1.9)	7(3.7)
2(d)	2(e)	6(1.91)	7(3.71)
2(e)	2(d)	6(1.92)	7(3.72)
2(f)	2(f)	6(1.93)	7(3.73)
2(g)	2(g)	6(1.94)	7(3.74)
2.1	3	6(1.95)	7(3.75)
		6(1.96)	7(3.76)
Part I	Part I	6(1.97)	7(3.77)
3	4	6(2)	7(4)
3(1)	repealed	6(3)	7(5)
3(2)	4(1)	6(3.1)	7(5.1)
3(3)	4(2)	6(4)	7(6)
3(4)	4(3)	6(5)	7(7)
3(5)	4(4)	6(6)	7(8)
3(6)	4(5)	6(7)	7(9)

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R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46	R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46
6(8)	7(10)	81	83
6(9)	7(11)		
7	8	Part II.1	Part III
7(1)(a)	8(1)(b)	82	84
7(1)(b)	8(1)(a)	83	85
8	9	84	86
9	10	85	87
10	11	86	88
11	12	87	89
12	13	88	90
13	repealed	—	90.1 [en. 1991, c. 40, s. 4(3)]
14-33	14-33	89	91
—	33.1 [en. 1995, c. 32, s. 1]	—	91.1 [en. 1991, c. 40, s. 6]
34-45	34-45	90	92
Part II	Part II	91	93
46-55	46-55	92	94
56	repealed	93	95
57	56	—	95.1 [en. 1991, c. 40, s. 9]
58	57	94	96
59	58	95	97
60	59	96	98
61	60	97	99
62	61	98	100
63	62	98(11) “appeal court”	100(11) “ap- peal court”
64	63	98(11)(a)	100(11)(d)
65	64	98(11)(b)	100(11)(b.1) [rep. 1992, c. 51, s. 33(1)]
66	65		100(11)(a)
67	66	98(11)(b.1)	100(11)(b)
68	67	98(11)(c)	100(11)(c)
69	68	98(11)(d)	100(11)(c)
70	69	98(11)(e)	repealed
71	70	98(11)(f)	100(11)(e)
72	71	99	101
73	72	100	102
74	73	101	103
75	74	102	104
76	75	103	105
76.1	76	104	106
76.2	77	104 [1976-77, c. 53, s. 47(3)]	106(3) new
76.3	78	104(3)	106(4)
—	78.1 [en 1993, c. 7, s. 4]	104(4)	106(5)
77	79		
78	80		
79	81		
80	82		

R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46	R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46
104(5)	106(6)	126	138
104(6)	106(7)	127	139
104(7)	106(8)	128	140
104(8)	106(9)	129	141
104(9)	106(10)	130	142
104(10)	106(11)	131	143
104(11)	106(12)	132	144
104(12)	106(13)	133	145
105	107	133(7)	145(7) [rep. R.S.C. 1985, c. 27 (1st Supp.), s. 20(2)]
106	108		
106.1	109		
106.2	110		
—	109.1 [en. 1991, c. 40, s. 22]	134	146
106.3	111	135	147
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106.5	113	137	149
106.6	114	Part IV	Part V
106.7	115	138	150
106.8	116	139	150.1
106.9	117	140	151
		141	152
		142-145	repealed
Part III	Part IV	146	153
107	118	147	154 [rep. R.S.C. 1985, c. 19 (3rd Supp.), s. 1]
108	119		
109	120		
110	121		
111	122	148 and 149	repealed
112	123	150	155
113	124	151-153	156-158 [rep. R.S.C. 1985, c. 19 (3rd Supp.), s. 2]
114	125		
115	126		
116	127	154	159
117	128	155	160
118	129	156	repealed
119	130	157 and 158	161 and 162 [rep. R.S.C. 1985, c. 19 (3rd Supp.), s. 4]
120	131		
121	132		
122	133		
122.1	134		
123	135 [rep. R.S.C. 1985, c. 27 (1st Supp.), s. 17]	—	161 [en. 1993, c. 45, s. 1]
		159	163
124	136	159(6)	163(6) [rep. 1993, c. 46, s. 1(2)]
125	137		

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R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46	R.S.C. 1970, c. C-34	R.S.C. 1985, c. C-46
—	163.1 [en. 1993, c. 46, s. 2]	—	184.1 [en. 1993, c. 40, s. 4]
160	164	178.12	185
160(8) "court"	164(8) "court"	178.12(1)(e.1)	185(1)(f)
160(8)(a)	164(8)(a)	178.12(1)(f)	185(1)(g)
160(8)(a.1)	164(8)(b)	178.12(1)(g)	185(1)(h)
160(8)(b)	164(8)(c)	178.13	186
160(8)(c)	164(8)(d)	178.13(1.1)	186(2)
161	165	178.13(1.2)	186(3)
162	166 [rep. 1994, c. 44, s. 9]	178.13(2)	186(4)
		178.13(2.1)	186(5)
163	167	178.13(3)	186(6)
164	168	178.13(4)	186(7)
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166	170	178.15	188
167	171	178.15(3)	188(3) [rep. 1993, c. 40, s. 8(3)]
168	172		
168(2)	172(2) [rep. R.S.C. 1985, c. 19 (3rd Supp.), s. 6]	178.15(4)(a), (b)	188(4)(a), (b)
		178.15(4)(b.1)	188(4)(e.1)
169	173	178.15(4)(c)	188(4)(f.1)
170	174	178.15(4)(c.1)	188(4)(d)
171	175	178.15(4)(c.2)	188(4)(c)
172	176	178.15(4)(d)	188(4)(e)
173	177	178.15(4)(e)	188(4)(f)
174	178	178.15(4)(f)	188(4)(g)
175	179	178.15(4)(g)	188(4)(h)
175(1)(a) to (c)	repealed	—	188.1 [en. 1993, c. 40, s. 9]
175(1)(d)	179(1)(a)	—	188.2 [en. 1993, c. 40, s. 9]
175(1)(e)	179(1)(b)		
175(2)	179(2)	178.16	189
175(3)	repealed	178.16(1)-(3)	189(1)-(3)
176	180		[rep. 1993, c. 40, s. 10(1)]
177	181		
178	182	178.16(3.1)	189(4) [rep. 1993, c. 40, s. 10(1)]
Part IV.1	Part VI		
178.1	183	178.16(4)	189(5)
—	183.1 [en. 1993, c. 40, s. 2]	178.16(5)	189(6)
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178.11(3)	184(3) [rep. 1993, c. 40, s. 3(3)]	178.18	191
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—	193.1 [en. 1993, c. 40, s. 12]	192	209
178.21	194	193	210
178.22	195	194	211
178.22(2)(g.1)	195(2)(h)	195	212
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188	204	214	231
188(6.1)	204(7)	214(6)	231(6) [rep. R.S.C. 1985, c. 27 (1st Supp.), s. 35]
188(6.2)	204(8)	215	232
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191	208 [rep. R.S.C. 1985, c. 27 (1st Supp.), s. 32]	223	240
		224	241
		225	repealed
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231	247		1992, c. 38,
232	248		s. 1]
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—	264 [en. 1993,	Health”	ter of
	c. 45, s. 2]		Health”
243.4	264.1	251(6)(a)	287(6)(a)
244	265	251(6)(a.1)	287(6)(d)
245	266	251(6)(b)	287(6)(c)
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# THE CRIMINAL CODE

## R.S.C. 1985, Chap. C-46

Amended R.S.C. 1985, c. 2 (1st Supp.); to come into force on the day as provided for by R.S.C. 1985, c. 27 (1st Supp.), s. 188

Amended R.S.C. 1985, c. 11 (1st Supp.)

Amended R.S.C. 1985, c. 27 (1st Supp.); originally proclaimed in force as follows: ss. 1 to 35, 37 to 93, 96 to 126, 128 to 186, 188 and 203 to 208 proclaimed in force December 4, 1985; parts of s. 36 enacting ss. 249 to 253, 254(1), (3) to (6), 255(1) to (4) and 256 to 261 with the exception of s. 258(1)(c)(i) and (g)(iii)(A) of the Criminal Code proclaimed in force December 4, 1985; s. 258(1)(c)(i) and (g)(iii)(A) to come into force on proclamation; part of s. 36 enacting s. 254(2) of the Criminal Code proclaimed in force December 4, 1985 in each of the provinces; part of s. 36 enacting s. 255(5) of the Criminal Code proclaimed in force December 4, 1985 in New Brunswick, Manitoba, Prince Edward Island, Alberta, Saskatchewan, Yukon Territory and Northwest Territories, proclaimed in force January 1, 1988 in Nova Scotia, and to come into force on proclamation in the remaining provinces; s. 94 in force June 20, 1985 in New Brunswick, Manitoba, Ontario, Yukon Territory, Northwest Territories, proclaimed in force September 1, 1987 in Nova Scotia, P.E.I. and Saskatchewan and with respect to indictable offences in Saskatchewan, into force on proclamation in the remaining provinces; and s. 127 proclaimed in force September 1, 1988

Amended R.S.C. 1985, c. 31 (1st Supp.), s. 61

Amended R.S.C. 1985, c. 47 (1st Supp.)

Amended R.S.C. 1985, c. 51 (1st Supp.)

Amended R.S.C. 1985, c. 52 (1st Supp.)

Amended R.S.C. 1985, c. 1 (2nd Supp.), s. 213

Amended R.S.C. 1985, c. 24 (2nd Supp.), ss. 45 to 47

Amended R.S.C. 1985, c. 27 (2nd Supp.), s. 10, Sch. item 6(1) to (16)

Amended R.S.C. 1985, c. 35 (2nd Supp.), s. 34

Amended R.S.C. 1985, c. 10 (3rd Supp.)

Amended R.S.C. 1985, c. 19 (3rd Supp.), ss. 1 to 16

Amended R.S.C. 1985, c. 30 (3rd Supp.), ss. 1 and 2

Amended R.S.C. 1985, c. 34 (3rd Supp.), ss. 9 to 13

Amended R.S.C. 1985, c. 1 (4th Supp.), ss. 13 to 17; originally in force February 4, 1988

Amended R.S.C. 1985, c. 23 (4th Supp.); originally ss. 1 to 3 and 7 proclaimed in force October 1, 1988, ss. 4, 5 and that part of s. 6 which enacts s. 727.9 proclaimed in force July 31, 1989, s. 8 proclaimed in force November 1, 1989, remainder to come into force on proclamation

Amended R.S.C. 1985, c. 29 (4th Supp.), s. 17

Amended R.S.C. 1985, c. 30 (4th Supp.), s. 45

- Amended R.S.C. 1985, c. 31 (4th Supp.), ss. 94 to 97; s. 96 proclaimed in force September 15, 1988, s. 97 proclaimed in force February 1, 1989, remainder in force as noted
- Amended R.S.C. 1985, c. 32 (4th Supp.), ss. 55 to 62
- Amended R.S.C. 1985, c. 40 (4th Supp.), s. 2
- Amended R.S.C. 1985, c. 42 (4th Supp.), ss. 1 to 8
- Amended R.S.C. 1985, c. 50 (4th Supp.)
- Amended 1989, c. 2, s. 1; in force June 29, 1989
- Amended 1990, c. 15; brought into force July 1, 1990 by SI/90-83, *Can. Gaz., Part II*, July 4, 1990
- Amended 1990, c. 16, ss. 2 to 7; brought into force July 1, 1990 by SI/90-90, *Can. Gaz., Part II*, July 18, 1990 (but see s. 24)
- Amended 1990, c. 17, ss. 7 to 15; brought into force September 1, 1990 by SI/90-106, *Can. Gaz., Part II*, August 29, 1990 (but see s. 45)
- Amended 1990, c. 44, s. 15; brought into force February 4, 1991 by SI/91-18, *Can. Gaz., Part II*, February 13, 1991 (but see s. 20)
- Amended 1991, c. 1, s. 28; in force January 17, 1991
- Amended 1991, c. 4; in force January 17, 1991
- Amended 1991, c. 28, ss. 6 to 12; brought into force October 3, 1991 by SI/91-136, *Can. Gaz., Part II*, October 23, 1991
- Amended 1991, c. 40, ss. 1 to 20, 21(2) and 22 to 41; s. 28 brought into force March 26, 1992, remainder, except ss. 3, 5(1) and (2), 8, 10(1), 14, 18, 19(1) to (7), 20, 22, 23, 39, 40 and 42, brought into force August 1, 1992 by SI/92-138, *Can. Gaz., Part II*, July 29, 1992, *however*, by SI/92-144, *Can. Gaz., Part II*, August 12, 1992, s. 2(3) and that part of s. 2(6) which enacts s. 84(1.2) are brought into force July 27, 1992; ss. 5(1) and (2), 10(1), 23(1), (2), (3), (5) and 42 brought into force October 1, 1992; that part of s. 3 which enacts s. 86(3), ss. 14, 18, 19(1), (2), (5) to (7), 20, 22, 23(4), 39 (except s. 39(4)(a)) and 40 to come into force January 1, 1993; s. 19(3) and (4) were to come into force July 1, 1993 all by SI/92-156, *Can. Gaz., Part II*, September 9, 1992 but amended by P.C. 1993-1446, so that s. 19(3) and (4) were to come into force January 1, 1994, *however*, by SI/94-7, *Can. Gaz., Part II*, January 26, 1994, s. 106(2)(c) as enacted by s. 19(3) to be in force (a), in Alberta, British Columbia, Ontario, Prince Edward Island, Quebec and the Yukon Territory on January 1, 1994, and (b), in Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia and Saskatchewan on April 1, 1994, *however*, the coming into force in the Northwest Territories and Saskatchewan was deferred to September 1, 1994, but by SI/94-108, *Can. Gaz., Part II*, September 7, 1994 the coming into force in the Northwest Territories was again deferred to June 1, 1995, and yet further, by SI/95-74, *Can. Gaz., Part II*, July 12, 1995, the coming into force in the Northwest Territories was next deferred to January 1, 1996 and still further, by SI/96-8, the coming into force in the Northwest Territories now fixed as January 1, 1997; the order bringing ss. 8 and 39(4)(a) into force on January 1, 1993 has been amended so that s. 8 now in force on January 1, 1995 and s. 39(4)(a) is to come into force on some future, unspecified date; that part of s. 3 which enacts s. 86(2) to come into force by order of the Governor in Council
- Amended 1991, c. 43, ss. 1 to 10; brought into force, except that part of s. 4 which enacts ss. 672.64 to 672.66, ss. 5, 6 and 10(8), February 4, 1992 by SI/92-9, *Can. Gaz., Part II*, February 12, 1992; that part of s. 4, ss. 5, 6 and 10(8) to come into force by order of the Governor in Council
- Amended 1992, c. 1, ss. 58 and 59; in force February 28, 1992
- Amended 1992, c. 11, ss. 14 to 17; in force May 15, 1992
- Amended 1992, c. 20, ss. 199 to 204, 215, 216, 228 and 229; brought into force, except

s. 204, November 1, 1992; s. 204 to come into force by order of the Governor in Council  
 Amended 1992, c. 21, s. 9; brought into force June 30, 1992 by SI/92-126, *Can. Gaz., Part II*, July 15, 1992  
 Amended 1992, c. 22, s. 12; brought into force July 24, 1992 by SI/92-134, *Can. Gaz., Part II*, July 29, 1992  
 Amended 1992, c. 27, s. 90(1)(i); brought into force November 30, 1992  
 Amended 1992, c. 38; brought into force August 15, 1992 by SI/92-136, *Can. Gaz., Part II*, July 29, 1992  
 Amended 1992, c. 41; in force July 23, 1992 (but see s. 7)  
 Amended 1992, c. 47, ss. 68 to 72; to come into force by order of the Governor in Council  
 Amended 1992, c. 51, ss. 32 to 43; brought into force January 30, 1993  
 Amended 1993, c. 7; brought into force September 1, 1993  
 Amended 1993, c. 25, ss. 93 to 95; s. 93 deemed in force January 1, 1993; ss. 94 and 95 in force June 10, 1993  
 Amended 1993, c. 28, s. 78; in force December 15, 1994  
 Amended 1993, c. 34, s. 59(1); to come into force on the day after the day on which 1993, c. 34, s. 142 is brought into force  
 Amended 1993, c. 37, ss. 21 and 32; brought into force September 1, 1993  
 Amended 1993, c. 40, ss. 1 to 18; brought into force August 1, 1993  
 Amended 1993, c. 45, ss. 1 to 14 and 16 to 19; ss. 1 to 14 brought into force August 1, 1993; ss. 16 to 19 to come into force as noted  
 Amended 1993, c. 46, ss. 1 to 5; brought into force August 1, 1993  
 Amended 1994, c. 12, s. 1; brought into force July 1, 1994  
 Amended 1994, c. 13, s. 7(1)(b); in force May 12, 1994  
 Amended 1994, c. 38, ss. 14 and 25; brought into force January 12, 1995  
 Amended 1994, c. 44, ss. 1 to 84 and 103; brought into force, except ss. 8(2), 39 to 43 and 84, February 15, 1995; ss. 8(2), 39 to 43 and 84 brought into force April 1, 1995  
 Amended 1995, c. 5, s. 25(1)(g); brought into force May 13, 1995  
 Amended 1995, c. 19, ss. 37 to 41; brought into force December 1, 1995  
 Amended 1995, c. 22, ss. 1 to 12, 14, 15 and 19 to 24; to come into force by order of the Governor in Council (but see s. 26)  
 Amended 1995, c. 27, ss. 1 and 3; in force July 13, 1995  
 Amended 1995, c. 29, ss. 39 and 40; to come into force by order of the Governor in Council (but see s. 40)  
 Amended 1995, c. 32; brought into force September 15, 1995  
 Amended 1995, c. 39, ss. 138 to 157, 163, 164, 188(a) and (b) and 190; that part of s. 139 which replaces s. 85 and ss. 141 to 150 brought into force January 1, 1996, remainder to come into force by order of the Governor in Council or as provided by s. 193  
 Amended 1995, c. 42, ss. 73 to 76, 86 and 87; brought into force January 24, 1996  
 Amended 1996, Bill C-8, ss. 65 to 76; to come into force by order of the Governor in Council (but see ss. 61 to 63), however, Bill C-8 has not yet received Royal Assent

## GENERALLY

**NOTE:** 1992, c. 20, s. 215(2) provides as follows:

(2) Wherever the expression "Parole Act" occurs in any order, regulation or other statutory instrument, there shall in every case be substituted the expression "Part II of the Corrections and Conditional Release Act".

**NOTE:** 1992, c. 20, s. 216(2) provides as follows:

(2) Wherever the expression "Penitentiary Act" occurs in any order, regulation or



other statutory instrument, there shall in every case be substituted the expression "Part I of the Corrections and Conditional Release Act".

**NOTE:** 1995, c. 22, s. 18 (to come into force by order of the Governor in Council) provides as follows:

18. Wherever in any Act of Parliament other than this Act or a provision referred to in column I of Schedule I, II or III to this Act, a reference is made to a provision of the *Criminal Code* set out in column I of an item of Schedule IV to this Act, it shall be replaced by a reference to the provision set out in column II of that item.

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## **An Act respecting the Criminal Law**

### **SHORT TITLE**

1. This Act may be cited as the *Criminal Code*. R.S., c. C-34, s. 1.

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### **INTERPRETATION**

**DEFINITIONS** / "Act" / "Attorney General" / "Bank-note" / "Canadian Forces" / "Cattle" / "Clerk of the court" / "Complainant" / "Counsel" / "Count" / "Court of appeal" / "Court of criminal jurisdiction" / "Day" / "Document of title to goods" / "Document of title to lands" / "Dwelling-house" / "Every one" / "Person" / "Owner" / "Explosive substance" / "Her Majesty's Forces" / "Highway" / "Indictment" / "Internationally protected person" / "Justice" / "Mental disorder" / "Military" / "Military law" / "Motor vehicle" / "Municipality" / "Newly-born child" / "Night" / "Offender" / "Offensive weapon" / "Peace officer" / "Prison" / "Property" / "Prosecutor" / "Provincial court judge" / "Public department" / "Public officer" / "Public stores" / "Steal" / "Superior court of criminal jurisdiction" / "Territorial division" / "Testamentary Instrument" / "Trustee" / "Unfit to stand trial" / "Valuable security" / "Weapon" / "Wreck" / "Writing".

**2. In this Act,**

"Act" includes

- (a) an Act of Parliament,
- (b) an Act of the legislature of the former Province of Canada,
- (c) an Act of the legislature of a province, and
- (d) an Act or ordinance of the legislature of a province, territory or place in force at the time that province, territory or place became a province of Canada;

"Attorney General"

- (a) with respect to proceedings to which this Act applies, means the Attorney General or Solicitor General of the province in which those proceedings are taken and includes his lawful deputy, and
- (b) with respect to
  - (i) the Northwest Territories and the Yukon Territory, or
  - (ii) proceedings commenced at the instance of the Government of Canada and conducted by or on behalf of that Government in respect of a contravention of, a conspiracy or attempt to contravene or counselling the contravention of any Act of Parliament other than this Act or any regulation made under any such Act.

means the Attorney General of Canada and includes his lawful deputy;

**NOTE:** Definition "Attorney General" amended 1993, c. 28, s. 78 by re-enacting para.

(b)(i) (to come into force April 1, 1999). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

(i) *the Yukon Territory, the Northwest Territories and Nunavut, or*

“bank-note” includes any negotiable instrument

(a) issued by or on behalf of a person carrying on the business of banking in or out of Canada, and

(b) issued under the authority of Parliament or under the lawful authority of the government of a state other than Canada,

intended to be used as money or as the equivalent of money, immediately on issue or at some time subsequent thereto, and includes bank bills and bank post bills;

“bodily harm” means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;

“Canadian Forces” means the armed forces of Her Majesty raised by Canada;

“cattle” means neat cattle or an animal of the bovine species by whatever technical or familiar name it is known, and includes any horse, mule, ass, pig, sheep or goat;

“clerk of the court” includes a person, by whatever name or title he may be designated, who from time to time performs the duties of a clerk of the court;

“complainant” means the victim of an alleged offence;

“counsel” means a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of a province to do or perform in relation to legal proceedings;

“count” means a charge in an information or indictment;

“court of appeal” means

(a) in the Province of Prince Edward Island, the Appeal Division of the Supreme Court, and

(b) in all other provinces, the Court of Appeal;

“court of criminal jurisdiction” means

(a) a court of general or quarter sessions of the peace, when presided over by a superior court judge,

(a.1) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,

(b) a provincial court judge or judge acting under Part XIX, and

(c) in the Province of Ontario, the Ontario Court of Justice;

“day” means the period between six o’clock in the forenoon and nine o’clock in the afternoon of the same day;

“document of title to goods” includes a bought and sold note, bill of lading, warrant, certificate or order for the delivery or transfer of goods or any other valuable thing, and any other document used in the ordinary course of business as evidence of the possession or control of goods, authorizing or purporting to authorize, by endorsement or by delivery, the person in possession of the document to transfer or receive any goods thereby represented or therein mentioned or referred to;

“document of title to lands” includes any writing that is or contains evidence of the title, or any part of the title, to real property or to any interest in real property, and any notarial or registrar’s copy thereof and any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada with respect to registration of titles that relates to title to real property or to any interest in real property;

“dwelling-house” means the whole or any part of a building or structure that is kept or occupied as a permanent or temporary residence, and includes

- (a) a building within the curtilage of a dwelling-house that is connected to it by a doorway or by a covered and enclosed passageway, and
- (b) a unit that is designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence;

“every one”, “person”, “owner”, and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;

“explosive substance” includes

- (a) anything intended to be used to make an explosive substance,
- (b) anything, or any part thereof, used or intended to be used, or adapted to cause, or to aid in causing an explosion in or with an explosive substance, and
- (c) an incendiary grenade, fire bomb, molotov cocktail or other similar incendiary substance or device and a delaying mechanism or other thing intended for use in connection with such a substance or device;

“feeble-minded person” [*Repealed*. 1991, c. 43, s. 9.]

**NOTE:** Definition “firearm” enacted 1995, c. 39, s. 138(2) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

“Firearm”.

*“firearm” means a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;*

“Her Majesty’s Forces” means the naval, army and air forces of Her Majesty wherever raised, and includes the Canadian Forces;

“highway” means a road to which the public has the right of access, and includes bridges over which or tunnels through which a road passes;

“indictment” includes

- (a) information or a count therein,
- (b) a plea, replication or other pleading, and
- (c) any record;

“internationally protected person” means

- (a) a head of state, including any member of a collegial body that performs the functions of a head of state under the constitution of the state concerned, a head of a government or a minister of foreign affairs, whenever that person is in a state other than the state in which he holds that position or office,
- (b) a member of the family of a person described in paragraph (a) who accompanies that person in a state other than the state in which that person holds that position or office,
- (c) a representative or an official of a state or an official or agent of an international organization of an intergovernmental character who, at the time when and at the place where an offence referred to in subsection 7(3) is committed against his person or any property referred to in section 431 that is used by him, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity, or
- (d) a member of the family of a representative, official or agent described in para-



graph (c) who forms part of his household, if the representative, official or agent, at the time when and at the place where any offence referred to in subsection 7(3) is committed against the member of his family or any property referred to in section 431 that is used by that member, is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity;

“justice” means a justice of the peace or a provincial court judge, and includes two or more justices where two or more justices are, by law, required to act or, by law, act or have jurisdiction;

“magistrate” [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 2(4).*]

“mental disorder” means a disease of the mind;

“military” shall be construed as relating to all or any of the Canadian Forces;

“military law” includes all laws, regulations or orders relating to the Canadian Forces;

“motor vehicle” means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment;

“municipality” includes the corporation of a city, town, village, county, township, parish or other territorial or local division of a province, the inhabitants of which are incorporated or are entitled to hold property collectively for a public purpose;

“newly-born child” means a person under the age of one year;

“night” means the period between nine o’clock in the afternoon and six o’clock in the forenoon of the following day;

“offender” means a person who has been determined by a court to be guilty of an offence, whether on acceptance of a plea of guilty or on a finding of guilt;

“offensive weapon” has the same meaning as “weapon”;

“peace officer” includes

- (a) a mayor, warden, reeve, sheriff, deputy sheriff, sheriff’s officer and justice of the peace,
- (b) a member of the Correctional Service of Canada who is designated as a peace officer pursuant to Part I of the *Corrections and Conditional Release Act*, and a warden, deputy warden, instructor, keeper, jailer guard and any other officer or permanent employee of a prison other than a penitentiary as defined in Part I of the *Corrections and Conditional Release Act*,
- (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process,
- (d) an officer or person having the powers of a customs or excise officer when performing any duty in the administration of the *Customs Act*, or the *Excise Act*,
- (e) a person designated as a fishery guardian under the *Fisheries Act* when performing any duties or functions under that Act and a person designated as a fishery officer under the *Fisheries Act* when performing any duties or functions under that Act, or the *Coastal Fisheries Protection Act*,
- (f) the pilot in command of an aircraft
  - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
  - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,while the aircraft is in flight, and



- (g) officers and non-commissioned members of the Canadian Forces who are
- (i) appointed for the purposes of section 156 of the *National Defence Act*, or
  - (ii) employed on duties that the Governor in Council, in regulations made under the *National Defence Act* for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;

“prison” includes a penitentiary, common jail, public or reformatory prison, lock-up, guard-room or other place in which persons who are charged with or convicted of offences are usually kept in custody;

“property” includes

- (a) real and personal property of every description and deeds and instruments relating to or evidencing the title or right to property, or giving a right to recover or receive money or goods,
- (b) property originally in the possession or under the control of any person, and any property into or for which it has been converted or exchanged and anything acquired at any time by the conversion or exchange, and
- (c) any postal card, postage stamp or other stamp issued or prepared for issue under the authority of Parliament or the legislature of a province for the payment to the Crown or a corporate body of any fee, rate or duty, whether or not it is in the possession of the Crown or of any person;

“prosecutor” means the Attorney General or, where the Attorney General does not intervene, means the person who institutes proceedings to which this Act applies, and includes counsel acting on behalf of either of them;

“provincial court judge” means a person appointed or authorized to act by or pursuant to an Act of the legislature of a province, by whatever title that person may be designated, who has the power and authority of two or more justices of the peace and includes the lawful deputy of that person;

“public department” means a department of the Government of Canada or a branch thereof or a board, commission, corporation or other body that is an agent of Her Majesty in right of Canada;

“public officer” includes

- (a) an officer of customs or excise,
- (b) an officer of the Canadian Forces,
- (c) an officer of the Royal Canadian Mounted Police, and
- (d) any officer while the officer is engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation;

“public stores” includes any personal property that is under the care, supervision, administration or control of a public department or of any person in the service of a public department;

“railway equipment” means

- (a) any machine that is constructed for movement exclusively on lines of railway, whether or not the machine is capable of independent motion, or
- (b) any vehicle that is constructed for movement both on and off lines of railway while the adaptations of that vehicle for movement on lines of railway are in use;

“steal” means to commit theft;

“superior court of criminal jurisdiction” means

- (a) in the Province of Ontario, the Court of Appeal or the Ontario Court (General Division),
- (b) in the Province of Quebec, the Superior Court,
- (c) in the Province of Prince Edward Island, the Supreme Court,
- (d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Appeal or the Court of Queen's Bench,
- (e) in the Provinces of Nova Scotia, British Columbia and Newfoundland, the Supreme Court or the Court of Appeal,
- (f) in the Yukon Territory, the Supreme Court, and
- (g) in the Northwest Territories, the Supreme Court;

**NOTE:** Definition "superior court of criminal jurisdiction" amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by striking out the word "and" at the end of para. (f), by adding the word "and" at the end of para. (g) and by enacting para. (h). The text of para. (h), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(h) *in Nunavut, the Supreme Court;*

"territorial division" includes any province, county, union of counties, township, city, town, parish or other judicial division or place to which the context applies;

"testamentary instrument" includes any will, codicil or other testamentary writing or appointment, during the life of the testator whose testamentary disposition it purports to be and after his death, whether it relates to real or personal property or to both;

"trustee" means a person who is declared by any Act to be a trustee or is, by the law of the province, a trustee, and without restricting the generality of the foregoing, includes a trustee on an express trust created by deed, will or instrument in writing, or by parol;

"unfit to stand trial" means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel;

"valuable security" includes

- (a) an order, exchequer acquittance or other security that entitles or evidences the title of any person
  - (i) to a share or interest in a public stock or fund or in any fund of a body corporate, company or society, or
  - (ii) to a deposit in a savings bank or other bank,
- (b) any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money,
- (c) a document of title to lands or goods wherever situated,
- (d) a stamp or writing that secures or evidences title to or an interest in a chattel personal, or that evidences delivery of a chattel personal, and
- (e) a release, receipt, discharge or other instrument evidencing payment of money;

"weapon" means

- (a) anything used, designed to be used or intended for use in causing death or injury to any person, or
- (b) anything used, designed to be used or intended for use for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes any firearm as defined in subsection 84(1);

**NOTE:** Definition "weapon" replaced 1995, c. 39, s. 138(1) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

"Weapon".

*"weapon" means any thing used, designed to be used or intended for use*

*(a) in causing death or injury to any person, or*

*(b) for the purpose of threatening or intimidating any person*

*and, without restricting the generality of the foregoing, includes a firearm;*

"wreck" includes the cargo, stores and tackle of a vessel and all parts of a vessel separated from the vessel, and the property of persons who belong to, are on board or have quitted a vessel that is wrecked, stranded or in distress at any place in Canada;

"writing" includes a document of any kind and any mode in which, and any material on which, words or figures, whether at length or abridged, are written, printed or otherwise expressed, or a map or plan is inscribed. R.S., c. C-34, s. 2; 1972, c. 13, s. 2, c. 17, s. 2; 1973-74, c. 17, s. 9; 1974-75-76, c. 19, ss. 1, 2, c. 48, s. 24, c. 93, s. 2; 1976-77, c. 35, s. 21; 1978-79, c. 11, s. 10; 1980-81-82-83, c. 125, s. 1; R.S.C. 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), s. 2, c. 31 (1st Supp.), s. 61; c. 1 (2nd Supp.), s. 213(4), c. 27 (2nd Supp.), s. 10, c. 35 (2nd Supp.), s. 34; c. 32 (4th Supp.), s. 55; c. 40 (4th Supp.), s. 2; 1990, c. 17, s. 7; 1991, c. 1, s. 28; 1991, c. 43, ss. 1, 9; 1991, c. 40, s. 1; 1992, c. 20, s. 216; 1992, c. 51, s. 32; 1993, c. 28, s. 78; 1994, c. 44, s. 2; 1995, c. 29, ss. 39, 40.

## CROSS-REFERENCES

In addition to the definitions set out in this section which are applicable to the Criminal Code as a whole, certain provisions contain their own definitions of particular words or phrases. Some Parts of the Criminal Code also contain definition sections as follows: Part III, firearms and other offensive weapons, s. 84; Part IV, offences against the administration of law and justice; Part V, sexual offences, public morals and disorderly conduct, s. 150; Part VI, invasion of privacy, s. 183; Part VII, disorderly houses, gaming and betting, s. 197; Part VIII, offences against the person and reputation, ss. 214, 254; Part IX, offences against rights of property, s. 321; Part X, fraudulent transactions relating to contracts and trade, s. 379; Part XI, wilful and forbidden acts in respect of certain property, s. 428; Part XII, offences relating to currency, s. 448; Part XII.1, instruments and literature for illicit drug use, s. 462.1; Part XII.2, proceeds of crime, s. 462.3; Part XVI, compelling appearance of accused before a justice and interim release, s. 493; Part XIX, indictable offences – trial without jury, s. 552; Part XXI, appeals – indictable offences, s. 673; Part XXIII, punishment, fines, forfeitures, costs and restitution of property, s. 716; Part XXIV, dangerous offenders, s. 752; Part XXV, effect and enforcement of recognizances, s. 762; Part XXVII, summary convictions, s. 785.

Refer also to the newly enacted Part XX.1 of the Criminal Code containing definitions for the following: accused, assessment, chairperson, court, justice, dual status offender, hospital, medical practitioner, party, placement decision, prescribed, Review Board and verdict of not criminally responsible on account of mental disorder, s. 672.1; protected statements, s. 672.21; psychosurgery, s. 672.61(2); electro-convulsive therapy, s. 672.61(2); Minister, s. 672.68(1).

Reference should also be made to the Interpretation Act, R.S.C. 1985, c. I-21, which, pursuant to s. 3(1) of that Act, applies to every federal enactment, "unless a contrary intention appears". That Act, in addition to codifying certain rules of interpretation, also defines certain terms in s. 35. Other federal enactments may also contain definitions of words or phrases which are applicable to the Criminal Code by virtue of s. 4(4) of the Code and s. 15(2) of the Interpretation Act which provides that, "where an enactment contains an interpretation section or provision, it shall be read and construed . . . as being applicable to all other enactments relating to the same subject-matter unless contrary intention appears". For example, s. 747(1) makes reference to "parole" which, however, is defined only in s. 2 of the Parole Act, R.S.C. 1985, c. P-2. Throughout the Criminal Code in th



note of related sections, an attempt has been made to identify these related sections in other enactments.

## ANNOTATIONS

**“Attorney General”** / *also see definition of prosecutor, infra* – It is clear that Parliament may constitutionally vest exclusive jurisdiction in the Attorney General of Canada to prosecute offences which do not depend for their validity on s. 91(27) of the Constitution Act, 1867: *R. v. Hauser* (1979), 46 C.C.C. (2d) 481, [1979] 1 S.C.R. 984, 8 C.R. (3d) 89 (5:2). It would also seem that Parliament may also vest prosecutorial authority in the federal Attorney General under this section even where the offence depends for its validity on the criminal law power in s. 91(27): *A.-G. Can. v. Canadian National Transportation, Ltd.*; *A.-G. Can. v. Canadian Pacific Transport Co. Ltd.* (1983), 7 C.C.C. (3d) 449, 38 C.R. (3d) 97, [1983] 2 S.C.R. 206 (the court splitting 4:3 on the issue) with respect to the Combines Investigation Act, R.S.C. 1970, c. C-23; and *R. v. Wetmore and A.-G. Ont.* (1983), 7 C.C.C. (3d) 507, 38 C.R. (3d) 161, [1983] 2 S.C.R. 161 (6:1) with respect to the Food and Drugs Act, R.S.C. 1970, c. F-27.

Where the Attorney General of Canada does not intervene in a prosecution, such as for an offence under the Fisheries Act, R.S.C. 1970, c. F-14, then counsel for the provincial Attorney General may conduct the prosecution: *R. v. Sacobie and Paul* (1979), 51 C.C.C. (2d) 430, 28 N.B.R. (2d) 288 (C.A.), *affd* 1 C.C.C. (3d) 446n, 47 N.R. 59, [1983] 1 S.C.R. 241 (7:0).

It was open to the Crown Attorney by letter to appoint a federal prosecutor as an *ad hoc* counsel or agent for the provincial Attorney General to prosecute an offence under the Criminal Code which was jointly charged with an offence under the Narcotic Control Act: *R. v. Luz* (1988), 5 O.R. (3d) 52 (H.C.J.).

Proceedings under the Narcotic Control Act are commenced at the instance of the Government of Canada if charges are laid pursuant to agreed procedures which confer general authority on officers of a municipal police force to institute or commence proceedings on behalf of the Government of Canada. It is not necessary that counsel for the Attorney-General of Canada be consulted specifically with respect to each particular charge or that there be specific authority to lay that charge: *R. v. King* (1987), 40 C.C.C. (3d) 359 (Ont. C.A.).

**“bank-note”** – Most offences relating to currency are found in Part XII which also defines certain terms in s. 448. Under s. 35(1) of the Interpretation Act, R.S.C. 1985, c. I-21, “bank” means a bank to which the Bank Act, R.S.C. 1985, c. B-1, applies.

**“Canadian Forces”** – Note definition of “peace officer” in this section. Reference may also be made to National Defence Act, R.S.C. 1985, c. N-5.

**“cattle”** – The principal offences relating to injury to cattle and other animals are in ss. 444 to 447.

An information charging the accused with wilfully killing a “heifer” properly charged the offence contrary to s. 444 of wilfully killing “cattle”, heifer” being the familiar name for a young cow: *R. v. Allen* (1974), 17 C.C.C. (2d) 549, 8 N.B.R. (2d) 131 (S.C. App. Div.).

**“clerk of the court”** – The definition of this position is wide enough to include a person describing himself as a Deputy Clerk: *Ex p. Leclerc* (1972), 7 C.C.C. (2d) 346 (Que. Q.B.).

**“counsel”** – In light of this definition, reference must be made to the applicable provincial legislation which will define the matters which barristers and solicitors are required to do. Note also s. 10(b) of the Charter of Rights and Freedoms giving a person arrested or detained the right to “counsel”.



**"dwelling-house"** – A motel unit is a dwelling house: *R. v. Henderson*, [1975] 1 W.W.R. 360 (B.C. Prov. Ct.).

**"Curtilage"** is not a term of normal usage in Canada, but has been extensively considered in the United States because of the Fourth Amendment protection against unreasonable search and seizure. In *United States v. Potts*, 297 F. 2d 68 (6th Cir. 1961), curtilage was defined to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling and is habitually used for family purposes.

**"day"** – "Day" as defined in this section refers to "day" as distinguished from "night" and has no application to provisions which, for example, require that a notice be served within seven clear days: *R. ex rel. McLearn v. Meagher* (1956), 117 C.C.C. 198, 26 C.R. 48, 39 M.P.R. 142 (N.S.S.C.). Thus, this definition would apply where there is a requirement that a certain act be done "by day" as in execution of a search warrant in s. 488. For other definitions relating to periods of time, see Interpretation Act, R.S.C. 1985, c. I-21, s. 35: "local time", "month", "standard time", s. 37: "year". As to calculation of time periods, see ss. 26, 27, 28 and 29 of the Interpretation Act, especially s. 27 relating to calculation of number of days where the time is expressed in terms of "clear days" or "at least" a number of days.

**"every one" / "person", "owner" and similar expressions / Liability of corporation** – In the case of true criminal offences requiring proof of *mens rea*, liability is attributed to the corporate accused through the identification theory of liability. This theory produces the element of *mens rea* in the corporate entity. The theory establishes the identity between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee. The identity of the directing mind and the corporation coincide and the corporation is liable so long as the actions of the directing mind are performed by the manager within the sector of operation assigned to him by the corporation. The sector may be functional or geographic or may embrace the entire undertaking of the corporation. The act in question must be done by the directing force of the company when carrying out his assigned function in the corporation. Acts of the ego of a corporation taken within the assigned managerial area may give rise to corporate criminal responsibility whether or not there be formal delegation; whether or not there be awareness of the activity in the board of directors or the officers of the company, and whether or not there be express prohibition from the board of directors. The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else to whom the board of directors has delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation. Accordingly, a corporation may have more than one directing mind. However, the outer limit of the delegation doctrine is reached and exceeded when the directing mind ceases completely to act, in fact or in substance, in the interests of the corporation. The identification doctrine, accordingly, only operates where the Crown demonstrates that the action taken by the directing mind was within the field of operation assigned to him, was not totally in fraud of the corporation and was by design or result partly for the benefit of the company: *Canadian Dredge & Dock Co. Ltd. et al. v. The Queen* (1985), 19 C.C.C. (3d) 1, 45 C.R. (3d) 289, [1985] 1 S.C.R. 662 (8:0).

In *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299, Dickson, J., for the Court considered the issue of corporate responsibility with respect to a strict liability offence for which proof of due diligence would be a defence. Dickson, J., pointed out that where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking rea-

sonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

**Liability of the Crown and Crown corporations** – In determining the liability of the Crown or a Crown corporation for alleged criminal acts, reference must be made to s. 17 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that, “No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.”

The definitions of “person” and “every one” in this section were held to apply to the C.B.C. which was charged with broadcasting an obscene film contrary to s. 163, although the Corporation, as a Crown corporation, is an agent of Her Majesty. It is only when the C.B.C. is lawfully executing the powers entrusted to it by the Broadcasting Act, R.S.C. 1985, c. B-9, that it is deemed to be a Crown agent and entitled to Crown immunity. When the Corporation exercises its powers in a manner inconsistent with the purposes of the Broadcasting Act, it steps outside its agency role: *Canadian Broadcasting Corporation v. The Queen* (1983), 3 C.C.C. (3d) 1, [1983] 1 S.C.R. 339, 145 D.L.R. (3d) 42 (7:0).

The Crown was held to be immune from prosecution under the former Combines Investigation Act. This immunity also extends to Crown corporations who are agents of the Crown for all their purposes, acting within their authorized purposes: *R. v. Eldorado Nuclear Ltd.-Eldorado Nucleaire Ltée*; *R. v. Uranium Canada Ltd.-Uranium Canada Ltée* (1983), 8 C.C.C. (3d) 449, [1983] 2 S.C.R. 551, 4 D.L.R. (4th) 193, 77 C.P.R. (2d) 1, 50 N.R. 120 (5:2).

Where, from an examination of the statute as a whole, it is apparent that Parliament’s intention was that the Crown be bound then, notwithstanding the Crown is not expressly referred to, it will be bound by the statute. Thus it was apparent from the provisions of the Criminal Code with respect to costs in summary conviction appeal matters that both the Crown and the defendant were to be treated equally with respect to costs and accordingly the court had power to award costs against the Crown in summary conviction appeals notwithstanding the applicable provisions of the Criminal Code did not expressly mention the Crown: *R. v. Ouellette* (1980), 52 C.C.C. (2d) 336, [1980] 1 S.C.R. 568, 15 C.R. (3d) 372.

**person** – “person” is also defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21, to include a corporation and it was held in *R. v. Township of Richmond* (1983), 4 D.L.R. (4th) 189, [1984] 4 W.W.R. 191 (B.C.C.A.), that “corporation” included a municipal corporation which could therefore be charged with an offence contrary to the Fisheries Act, R.S.C. 1985, c. F-14, which prohibits the doing of certain acts by any “person”.

**“explosive substance”** – The principle provisions relating to liability for the handling of explosives are found in ss. 79 to 82.

**“highway”** – A road in a company town, owned by the company but which the public have a *de facto* right to use, was held to constitute a highway for the purposes of the intimidation offence in s. 423: *R. v. Stockley et al.* (1977), 36 C.C.C. (2d) 387, 38 C.R.N.S. 368 (Nfld. C.A.).

A logging road, however, built and maintained by the company which controls access to the road by means of a permit system, is not a highway: *R. v. Sahonovitch* (1969), 69 W.W.R. 674 (B.C.S.C.).

**“indictment”** – See definition of “count” above. As to provisions respecting sufficiency of indictments and informations, see ss. 581 to 601.

**“mental disorder”** – The definition of “mental disorder” as a disease of the mind clearly

imports the terminology used to define insanity under the previous provisions of s. 16. Therefore, see the notes under s. 16.

**"military" and "military law"** – See definition of "Canadian Forces" above. Reference may also be made to National Defence Act, R.S.C. 1985, c. N-5, and the Regulations made thereunder, especially the Queen's Regulations.

**"motor vehicle"** – This definition contemplates a kind of vehicle, not whether the vehicle is actually operable or effectively functionable: *Saunders v. The Queen*, [1967] 3 C.C.C. 278, [1967] S.C.R. 284, 1 C.R.N.S. 249. Thus, an automobile which is out of gas is still a motor vehicle: *R. v. Lloyd*, [1988] 4 W.W.R. 423, 66 Sask. R. 100, 6 M.V.R. (2d) 240 (C.A.).

**"municipality"** – See notes under "person", *supra*.

**"night"** – See notes under "day", *supra*.

**"offensive weapon"** – See notes under "weapon", *infra*.

**"peace officer" / municipal enforcement officers** – In an interesting and lengthy judgment, applying the interpretation tests, it was found that a municipal by-law enforcement officer was not entitled to enforce the provisions of the Criminal Code: *R. v. Laramée* (1972), 9 C.C.C. (2d) 433, [1972] 6 W.W.R. 30 (N.W.T. Mag. Ct.). *Folld: Wright v. The Queen*, [1973] 6 W.W.R. 687 (Sask. D.C.).

In *R. v. Jones and Huber* (1975), 30 C.R.N.S. 127, [1975] 5 W.W.R. 97 (Y.T. Mag. Ct.) it was held that an animal control officer appointed under a municipal by-law enacted pursuant to the Municipal Ordinance, R.O.Y.T. 1971, c. M-12 is a peace officer within the Code as is a poundkeeper appointed under a municipal by-law: *Moore v. The Queen*, [1983] 5 W.W.R. 176, 21 Man. R. (2d) 77 (Co. Ct.).

**Territorial limits** – A peace officer is limited territorially by the authority which appoints him: *R. v. Soucy* (1975), 23 C.C.C. (2d) 561, 36 C.R.N.S. 129 (N.B.S.C. App. Div.).

**Military Police** – A military police officer is not a peace officer within the meaning of para. (f)(i) when exercising authority over persons not subject to the Code of Service Discipline. He is, however, a peace officer within the meaning of para. (f)(ii) if the circumstances fall within s. 22.01(2) of the Queen's Regulations which sets out duties of a kind as to necessitate the officers and men performing them to have the powers of peace officers, including duties performed as a result of established military action or practice related to the maintenance of law and order, protection of property and persons, and the arrest or custody of persons. This would include the detection and arrest of an impaired driver and making of a breathalyzer demand after the driver, a civilian, was stopped, albeit on a public highway, for breach of a traffic regulation on an armed forces base: *R. v. Nolan* (1987), 34 C.C.C. (3d) 289, 58 C.R. (3d) 335, [1987] 1 S.C.R. 1212 (7:0).

A military police officer, appointed pursuant to s. 156 of the National Defence Act, R.S.C. 1985, c. N-5, is a peace officer within the meaning of this section when exercising authority over a person, such as a regular member of the armed forces, who is subject to the Code of Service Discipline even where the offence was committed by that person off a military establishment: *R. v. Courchene* (1989), 52 C.C.C. (3d) 375, 22 M.V.R. (2d) 1, 36 O.A.C. 29 (C.A.).

**Gaoler** – The word "permanent" in para. (b) of the definition does not apply to the words "keeper, gaoler, guard" and therefore a person hired as a temporary guard is a peace officer: *R. v. Burtasson* (1982), 64 C.C.C. (2d) 268, 25 C.R. (3d) 331 (Ont. H.C.J.).

**Game wardens and wildlife enforcement officers** – Similarly, a wildlife officer appointed under the Wildlife Act, 1979 (Sask.), c. W-13.1 is a peace officer: *R. v. Rutt*



(1981), 59 C.C.C. (2d) 147, 123 D.L.R. (3d) 121 (Sask. C.A.), as is a game warden appointed under the Fish and Wildlife Act, 1980 (N.B.), c. F-14: *R. v. Rushton* (1981), 62 C.C.C. (2d) 403 (N.B.C.A.); and a conservation officer appointed under the Game and Fish Act, R.S.O. 1970, c. 186; *R. v. Renz* (1972), 10 C.C.C. (2d) 250 (Ont. C.A.).

**Band constable / Indian reserve** – A band constable on an Indian reserve appointed as a special constable to enforce certain provisions of the Indian Act, such as s. 97 which involves drunkenness on the reserve, is a person “employed for the preservation and maintenance of the public peace” and thus within the definition of “peace officer”: *R. v. Whiskeyjack and Whiskeyjack* (1984), 17 C.C.C. (3d) 245, [1985] 2 W.W.R. 481 (Alta. C.A.).

**in flight** – This term is defined in s. 7(8).

**“prison”** – This definition would override the narrower definition of “prison” in the Prisons and Reformatory Act, R.S.C. 1985, c. P-20. The term “penitentiary” is defined in s. 2 of the Penitentiary Act, R.S.C. 1985, c. P-5.

**“property”** – A promissory note falls within this definition and is also “anything” capable of being stolen within the meaning of s. 322: *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.).

**“prosecutor”** – Notwithstanding the accused elects trial by provincial court judge, where the offence charged is an indictable offence he is tried under the provisions of Part XIX and it is the definition of “prosecutor” in this section which applies rather than the definition in Part XXVII. Accordingly, a police officer who is neither the informant nor counsel may not conduct the prosecution: *R. v. Edmunds* (1981), 58 C.C.C. (2d) 485, 29 Nfld. & P.E.I.R. 345, 35 N.R. 611 (S.C.C.) (4:1).

However, a police officer, as agent of the Attorney-General, may communicate to the court the Attorney-General’s decision as to whether or not to proceed by indictment on a Crown option offence and the officer is not at that stage a prosecutor: *R. v. Parsons* (1984), 14 C.C.C. (3d) 490, 50 Nfld. & P.E.I.R. 9 (Nfld. C.A.), leave to appeal to S.C.C. refused November 22, 1984.

Absent flagrant impropriety, the Attorney General has the right to intervene in any private prosecution: *R. v. Kowalski* (1990), 57 C.C.C. (3d) 168, 107 A.R. 60, 75 Alta. L.R. (2d) 110 (Prov. Ct.).

**“public officer”** – This definition is not exhaustive and therefore an officer who reports to a provincial or municipal government such as a municipally appointed agricultural inspector is a public officer for the purposes of the offence contrary to s. 129 of the Criminal Code: *R. v. Cartier*; *R. v. Libert* (1978), 43 C.C.C. (2d) 553 (Que. S.C.).

Also see definition in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

**“unfit to stand trial”** – The definition of “unfit to stand trial” statutorily entrenches the extensive case-law in the area. Any individual who is unable to understand either the nature or object of the proceedings, the possible consequences or to communicate with counsel as a result of a mental disorder is rendered “unfit to stand trial”. The terminology provides clarification of the conflicting case-law by requiring the issue of fitness to be raised solely in the context of a mental disorder and at any stage in the proceedings prior to the rendering of a verdict. Reference should also be made to ss. 672.22 to 672.33 relating to the trial of the issue of fitness.

**“valuable security”** – A travellers cheque is a valuable security, its value being the amount paid for it by the owner: *R. v. Pennell*, [1966] 1 C.C.C. 258, 47 C.R. 200 (B.C.C.A.); *R. v. Zinck* (1986), 32 C.C.C. (3d) 150 (N.B.C.A.).

**“weapon”** – A firearm as defined in s. 84 will always fall within the definition of weapon. It is not necessary to prove that the accused used it or intended to use it for



causing death or injury or for a purpose of threatening or intimidation: *R. v. Felawka*, [1993] 4 S.C.R. 199, 85 C.C.C. (3d) 248, 25 C.R. (4th) 70.  
Also see the definitions in s. 84.

### DESCRIPTIVE CROSS-REFERENCES.

3. Where, in any provision of this Act, a reference to another provision of this Act or a provision of any other Act is followed by words in parenthesis that are or purport to be descriptive of the subject-matter of the provision referred to, the words in parenthesis form no part of the provision in which they occur but shall be deemed to have been inserted for convenience of reference only. 1976-77, c. 53, s. 2.

### CROSS-REFERENCES

Other rules of interpretation may be found in the Interpretation Act, R.S.C. 1985, c. I-21. See especially s. 14 relating to marginal notes and historical references.

### SYNOPSIS

This section is designed to avoid confusion arising from the use of *descriptive cross-references* within sections. It states that such words, which appear in parentheses, are not intended to have any interpretative value and are solely added for ease of cross-reference. (For an example of a descriptive cross-reference, see s. 183 – definition section within the “wiretap” section of the Criminal Code.)

## Part I / GENERAL

**POSTCARD A CHATTEL, VALUE / Value of valuable security / Possession / Expressions taken from other Acts / Sexual intercourse / Proof of service by affidavit / Attendance for examination.**

4. (1) For the purposes of this Act, a postal card or stamp referred to in paragraph (c) of the definition “property” in section 2 shall be deemed to be a chattel and to be equal in value to the amount of the postage, rate or duty expressed on its face.
- (2) For the purposes of this Act, the following rules apply for the purpose of determining the value of a valuable security where value is material:
  - (a) where the valuable security is one mentioned in paragraph (a) or (b) of the definition “valuable security” in section 2, the value is the value of the share, interest, deposit or unpaid money, as the case may be, that is secured by the valuable security;
  - (b) where the valuable security is one mentioned in paragraph (c) or (d) of the definition “valuable security” in section 2, the value is the value of the lands, goods, chattel personal or interest in the chattel personal, as the case may be; and
  - (c) where the valuable security is one mentioned in paragraph (e) of the definition “valuable security” in section 2, the value is the amount of money that has been paid.
- (3) For the purposes of this Act,
  - (a) a person has anything in possession when he has it in his personal possession or knowingly
    - (i) has it in the actual possession or custody of another person, or
    - (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
  - (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

(4) Where an offence that is dealt with in this Act relates to a subject that is dealt with in another Act, the words and expressions used in this Act with respect to that offence have, subject to this Act, the meaning assigned to them in that other Act.

(5) For the purposes of this Act, sexual intercourse is complete on penetration to even the slightest degree, notwithstanding that seed is not emitted.

(6) For the purposes of this Act, the service of any document and the giving or sending of any notice may be proved by oral evidence given under oath by, or by the affidavit of, the person claiming to have served, given or sent it.

(7) Notwithstanding subsection (6), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service. R.S., c. C-34, s. 3; 1980-81-82-83, c. 125, s. 2; R.S.C. 1985, c. 27 (1st Supp.), s. 3; 1994, c. 44, s. 3.

## CROSS-REFERENCES

**Subsec. (1)** – “property” is defined in s. 2.

**Subsec. (2)** – “valuable security” is defined in s. 2.

**Subsec. (3)** – The definition of possession in this subsection is applicable to all offences. However, s. 358 enacts a special provision relating to possession for the purposes of ss. 342, 354 and 356(1)(b). Also note the rule in s. 588 respecting deemed ownership of property.

**Subsec. (4)** – Also see similar rule in s. 15(2) of the Interpretation Act, R.S.C. 1985, c. I-21, and note under s. 2, *supra*.

**Subsec. (5)** – With the gradual amendment to the sexual offences, sexual intercourse as an element of an offence is now rare. However, it is still relevant to the incest offence in s. 156.

**Subsecs. (6), (7)** – As to service of subpoena, see ss. 509(2) and 701.

As to service of summons, see s. 509.

**Note:** This section formerly provided the formula for determining when a person gained a certain age. Resort must now be had to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. The effect of that provision is that, for example, a person attains the age of 16 years on the day of the anniversary of her birthday rather than the following day as was the effect of the former Code provision.

## ANNOTATIONS

**Subsec. (3) / personal possession** – To constitute possession for purposes of the criminal law, in a case of manual handling of the object, there must also be knowledge of what that thing is; and both these elements must be co-existent with some act of control (outside public duty): *Beaver v. The Queen* (1957), 118 C.C.C. 129, 26 C.R. 193 (S.C.C.).

There can exist circumstances where there is no possession in law notwithstanding there is a right of control with knowledge of the presence and character of the thing if there is no intent to exercise control over it, as where the accused manually handles the thing to destroy it or turn it over to the police: *R. v. Christie* (1978), 41 C.C.C. (2d) 282, 21 N.B.R. (2d) 261 (App. Div.).

Whether or not the inference of possession from the presence of fingerprints on the contraband can be drawn is not subject to a hard and fast rule. It is a question of fact which depends on all of the circumstances of the case and all of the evidence adduced: *R. v. Lepage*, [1995] 1 S.C.R. 654, 95 C.C.C. (3d) 385, 36 C.R. (4th) 145.

**Constructive possession** – In *R. v. Terrence* (1983), 4 C.C.C. (3d) 193, 33 C.R. (3d) 193, [1983] 1 S.C.R. 357 (7:0), the Court held that for para. (b) to apply there must be evidence of a measure of control on the part of the accused. In upholding the acquittal of the accused, a passenger in the stolen motor vehicle, the Court noted that there was no such evidence and no evidence that he was a party to the offence of the person actually in possession (the driver) pursuant to s. 21.

The requisite element of control can be found in the fact that the contraband was in

the accused's room and she had the right to grant or withhold her consent to the contraband being stored there: *Re Chambers and The Queen* (1985), 20 C.C.C. (3d) 440 (Ont. C.A.).

**Application** – The definition of “possession” in this subsection is applicable to all proceedings under the Criminal Code and is not limited to possession offences. Possession of certain articles may link the accused to pieces of evidence in respect of a crime, such as robbery, in which their possession is not, otherwise, a material element: *R. v. Lovis and Moncini* (1974), 17 C.C.C. (2d) 481, 47 D.L.R. (3d) 732 (S.C.C.) (8:0).

An accused may be found in possession as a party by virtue of s. 21. The accused's liability is not confined to this subsection: *Zanini v. The Queen*, [1968] 2 C.C.C. 1, [1967] S.C.R. 715, 2 C.R.N.S. 219 (5:0).

**Subsec. (5)** – When intercourse “complete”: “. . . for the purposes of [s. 4(5)] of the Code sexual intercourse is complete upon the penetration of the labia, either labia majora or labia minora, no matter how little, even though the hymen is never touched nor is there any penetration of the vagina”: *R. v. Johns* (1956), 25 C.R. 153, 20 W.W.R. 92 (B.C. Co. Ct.).

**Subsec. (6)** – A certificate of analysis under s. 258 is a document within the meaning of this section and therefore proof of service may be made by way of affidavit: *R. v. Spreen* (1987), 40 C.C.C. (3d) 190, 8 M.V.R. (2d) 148, 82 A.R. 318 (C.A.).

## CANADIAN FORCES NOT AFFECTED.

**5. Nothing in this Act affects any law relating to the government of the Canadian Forces. R.S., c. C-34, s. 4.**

## CROSS-REFERENCES

The terms “Canadian Forces”, “Her Majesty's Forces”, “military” and “military law” are defined in s. 2. In addition, in certain circumstances, members of the armed forces come within the definition of “peace officer” in s. 2 and officers of the Canadian Forces are within the definition of “public officer” in s. 2. As to offences involving the military, see ss. 46, 50, 52, 53, 62, 269.1, 419, 420. As to immunity of armed forces personnel from firearms and weapons provisions, see ss. 92, 98.

## SYNOPSIS

This section states that the Criminal Code does not affect other laws relating to the *Canadian Forces*. The National Defence Act and its regulations set out a full Code of Service Discipline and it also provides that a breach of an offence under the Criminal Code may be tried by court martial. However, neither this section of the Criminal Code nor the National Defence Act exempt members of the armed forces from trial by a civilian court for a Criminal Code offence committed in Canada.

## PRESUMPTION OF INNOCENCE / Offences outside Canada / Definition of “enactment”.

**6. (1) Where an enactment creates an offence and authorizes a punishment to be imposed in respect of that offence,**

- (a) a person shall be deemed not to be guilty of the offence until he is convicted or discharged under section 736 of the offence; and**
- (b) a person who is convicted or discharged under section 736 of the offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.**

**(2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.**

**(3) In this section, “enactment” means**



(a) an Act of Parliament, or

(b) an Act of the legislature of a province that creates an offence to which Part XXVII applies,

or any regulation made thereunder. R.S., c. C-34, s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 4.

**NOTE:** Subsections (1)(a), (b) and (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

#### CROSS-REFERENCES

**Subsec. (1)** – As to presumption of innocence, see s. 11(d) of the Canadian Charter of Rights and Freedoms.

**Subsec. (2)** – For offences committed on territorial sea or inland waters of Canada, see s. 477. As to definition of territorial sea, see Territorial Sea and Fishing Zones Act, R.S.C. 1985, c. T-8.

Those sections providing for trial in Canada of offences committed outside Canada are as follows: s. 7(1), offence committed on Canadian aircraft; s. 7(2), hijacking and offences relating to aircraft where accused found in Canada; s. 7(3), certain offences against internationally protected person committed on Canadian aircraft or ships, by Canadian citizen or against internationally protected person performing duties on behalf of Canada; s. 7(3.1), hostage taking in certain circumstances; s. 7(3.2) to (3.6), offences involving nuclear material; s. 7(3.7), torture; s. 7(3.71) to (3.77), war crimes and crimes against humanity; s. 7(4), indictable offences by employee within meaning of Public Service Employment Act; s. 57, passport offences; s. 58, offences in relation to certificate of citizenship or naturalization; s. 74, piracy; s. 75, piratical acts; s. 290, bigamy; s. 342, possession in Canada of credit card obtained by crime outside Canada; s. 354, possession in Canada of goods obtained by crime outside Canada; s. 357, bringing into Canada property obtained by crime; s. 462.31, laundering proceeds of offences committed outside Canada; s. 465(1)(a), conspiracy to commit murder outside Canada; s. 465(4), conspiracy outside Canada to commit offence inside Canada.

#### SYNOPSIS

Subsection (1)(a) provides a legislative statement of the *presumption of innocence*, first articulated in the Common Law and now enshrined in the Canadian Charter of Rights and Freedoms. If the accused is convicted, or found guilty and discharged under s. 736, subsec. (1)(b) states that the only punishment which can be imposed is that set out in the enactment creating the offence. The enactment, as defined in subsec. (3), may be either the Criminal Code, another federal statute or a provincial statute creating a summary conviction offence.

Subsection (2) states the rule limiting the *territorial application* of Canadian criminal law to those offences committed in Canada, unless Canadian jurisdiction is specifically extended by federal law. For an example of such a provision, see s. 7. If the relevant legislation does not extend jurisdiction, it will be necessary to show that there is a *real and substantial link* between the offence and Canada.

#### ANNOTATIONS

**Subsec. (1)(a)** – In *R. v. Negridge* (1980), 54 C.C.C. (2d) 304, 17 C.R. (3d) 14 (Ont. C.A.) reference was made to this subsection when the Court held that an accused was not liable to the increased minimum penalties for a second or subsequent “offence” when the second or subsequent offence was committed before the earlier conviction although after the commission of the offence that led to the earlier conviction.

**Subsec. (1)(b)** – Where the offence with which the accused was charged has been repealed and new offences created which would apply to the accused’s conduct, had it occurred after enactment of these new offences, then the accused is entitled to the benefit of the lesser maximum punishment prescribed for the new offences. This results not



from s. 11(i) of the Charter of Rights and Freedoms but s. 44(c) of the Interpretation Act, R.S.C. 1985, c. I-21: *R. v. B.(J.W.)* (1989), 51 C.C.C. (3d) 35 (P.E.I.S.C.).

**Subsec. (2)** – All that is necessary to make an offence subject to the jurisdiction of Canadian courts is that a significant portion of the activities constituting that offence take place in Canada. It is sufficient that there is a real and substantial link between the offence and this country. For this purpose, the court must take into account all relevant facts that take place in Canada that may legitimately give this country an interest in prosecuting the offence. The court must then consider whether there is anything in those facts that offends international comity and it may be that the outer limits of the test of a real and substantial link are coterminous with the requirements of international comity. Where the evidence with respect to charges of fraud and conspiracy was that the fraudulent inducements were made by persons in Canada, albeit over the telephone, to residents of the United States, and that some of the proceeds found their way back to Canada, then the charges were properly tried in Canada: *R. v. Libman* (1985), 21 C.C.C. (3d) 206, 21 D.L.R. (4th) 174 (S.C.C.) (7:0).

**OFFENCES COMMITTED ON AIRCRAFT** / *Idem* / Offences against fixed platforms or international maritime navigation / Offences against fixed platforms or navigation in the internal waters or territorial sea of another state / Offence against internationally protected person / Offence of hostage taking / Offences involving nuclear material / *Idem* / *Idem* / *Idem* / Definition of "nuclear material" / Jurisdiction / Jurisdiction: war crimes and crimes against humanity / Procedure and evidence / Defences / Conflict with internal law / Attorney General of Canada / Definitions / "conventional international law" / "crime against humanity" / "war crime" / Meaning of "act or omission" / Offences by Public Service employees / Jurisdiction / Appearance of accused at trial / Where previously tried outside Canada / Consent / Definition of "flight" and "in flight" / Definition of "in service" / Certificate as evidence / *Idem*.

7. (1) Notwithstanding anything in this Act or any other Act, every one who
  - (a) on or in respect of an aircraft
    - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
    - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft registered in Canada under those regulations,
 while the aircraft is in flight, or
  - (b) on any aircraft, while the aircraft is in flight if the flight terminated in Canada, commits an act or omission in or outside Canada that if committed in Canada would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.
- (2) Notwithstanding this Act or any other Act, every one who
  - (a) on an aircraft, while the aircraft is in flight, commits an act or omission outside Canada that if committed in Canada or on an aircraft registered in Canada under regulations made under the *Aeronautics Act* would be an offence against section 76 or paragraph 77(a),
  - (b) in relation to an aircraft in service, commits an act or omission outside Canada that if committed in Canada would be an offence against any of paragraphs 77(b), (c) or (e),
  - (c) in relation to an air navigation facility used in international air navigation, commits an act or omission outside Canada that if committed in Canada would be an offence against paragraph 77(d)
  - (d) at or in relation to an airport serving international civil aviation, commits an act or omission outside Canada that if committed in Canada would be an offence against paragraph 77(b) or (f), or
  - (e) commits an act or omission outside Canada that if committed in Canada

would constitute a conspiracy or an attempt to commit an offence referred to in this subsection, or being an accessory after the fact or counselling in relation to such an offence,

shall be deemed to have committed that act or omission in Canada if the person is, after the commission thereof, present in Canada.

(2.1) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform attached to the continental shelf of any state or against or on board a ship navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 78.1, shall be deemed to commit that act or omission in Canada if it is committed

- (a) against or on board a fixed platform attached to the continental shelf of Canada;
- (b) against or on board a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (c) by a Canadian citizen;
- (d) by a person who is not a citizen of any state and who ordinarily resides in Canada;
- (e) by a person who is, after the commission of the offence, present in Canada;
- (f) in such a way as to seize, injure or kill, or threaten to injure or kill, a Canadian citizen; or
- (g) in an attempt to compel the Government of Canada to do or refrain from doing any act.

(2.2) Notwithstanding anything in this Act or any other Act, every one who commits an act or omission outside Canada against or on board a fixed platform not attached to the continental shelf of any state or against or on board a ship not navigating or scheduled to navigate beyond the territorial sea of any state, that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit an offence against, or being an accessory after the fact or counselling in relation to an offence against, section 78.1, shall be deemed to commit that act or omission in Canada

- (a) if it is committed as described in any of paragraphs (2.1)(b) to (g); and
- (b) if the offender is found in the territory of a state, other than the state in which the act or omission was committed, that is
  - (i) a party to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988, in respect of an offence committed against or on board a ship, or
  - (ii) a party to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988, in respect of an offence committed against or on board a fixed platform.

(3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission against the person of an internationally protected person or against any property referred to in section 431 used by that person that if committed in Canada would be an offence against section 235, 236, 266, 267, 268, 269, 271, 272, 273, 279, 279.1, 280 to 283, 424 or 431 shall be deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft

- (i) registered in Canada under regulations made under the *Aeronautics Act*, or
- (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;
- (c) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada; or
- (d) the act or omission is against
  - (i) a person who enjoys the status of an internationally protected person by virtue of the functions that person performs on behalf of Canada, or
  - (ii) a member of the family of a person described in subparagraph (i) who qualifies under paragraph (b) or (d) of the definition "internationally protected person" in section 2.

(3.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 279.1 shall be deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft
  - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
  - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under such regulations;
- (c) the person who commits the act or omission
  - (i) is a Canadian citizen, or
  - (ii) is not a citizen of any state and ordinarily resides in Canada;
- (d) the act or omission is committed with intent to induce Her Majesty in right of Canada or of a province to commit or cause to be committed any act or omission;
- (e) a person taken hostage by the act or omission is a Canadian citizen; or
- (f) the person who commits the act or omission is, after the commission thereof, present in Canada.

(3.2) Notwithstanding anything in this Act or any other Act, where

- (a) a person, outside Canada, receives, has in his possession, uses, transfers the possession of, sends or delivers to any person, transports, alters, disposes of, disperses or abandons nuclear material and thereby
  - (i) causes or is likely to cause the death of, or serious bodily harm to, any person, or
  - (ii) causes or is likely to cause serious damage to, or destruction of, property, and
- (b) the act or omission described in paragraph (a) would, if committed in Canada, be an offence against this Act,

that person shall be deemed to commit that act or omission in Canada if paragraph (3.5)(a), (b) or (c) applies in respect of the act or omission.

(3.3) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute

- (a) a conspiracy or an attempt to commit,
- (b) being an accessory after the fact in relation to, or
- (c) counselling in relation to,

an act or omission that is an offence by virtue of subsection (3.2) shall be deemed to commit the act or omission in Canada if paragraph (3.5)(a), (b) or (c) applies in respect of the act or omission.



(3.4) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would constitute an offence against, a conspiracy or an attempt to commit or being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against,

- (a) section 334, 341, 344 or 380 or paragraph 362(1)(a) in relation to nuclear material,
  - (b) section 346 in respect of a threat to commit an offence against section 334 or 344 in relation to nuclear material,
  - (c) section 423 in relation to a demand for nuclear material, or
  - (d) paragraph 264.1(1)(a) or (b) in respect of a threat to use nuclear material
- shall be deemed to commit that act or omission in Canada if paragraph (3.5)(a), (b) or (c) applies in respect of the act or omission.

(3.5) For the purposes of subsections (3.2) to (3.4), a person shall be deemed to commit an act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft
  - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
  - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations; or
- (c) the person who commits the act or omission is a Canadian citizen or is, after the act or omission has been committed, present in Canada.

(3.6) For the purposes of this section, “nuclear material” means

- (a) plutonium, except plutonium with an isotopic concentration of plutonium-238 exceeding eighty per cent,
  - (b) uranium-233,
  - (c) uranium containing uranium-233 or uranium-235 or both in such an amount that the abundance ratio of the sum of those isotopes to the isotope uranium-238 is greater than 0.72 per cent,
  - (d) uranium with an isotopic concentration equal to that occurring in nature, and
  - (e) any substance containing anything described in paragraphs (a) to (d),
- but does not include uranium in the form of ore or ore-residue.

(3.7) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against, section 269.1 shall be deemed to commit that act or omission in Canada if

- (a) the act or omission is committed on a ship that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (b) the act or omission is committed on an aircraft
  - (i) registered in Canada under regulations made under the *Aeronautics Act*, or
  - (ii) leased without crew and operated by a person who is qualified under regulations made under the *Aeronautics Act* to be registered as owner of an aircraft in Canada under those regulations;
- (c) the person who commits the act or omission is a Canadian citizen;
- (d) the complainant is a Canadian citizen; or
- (e) the person who commits the act or omission is, after the commission thereof, present in Canada.



(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

- (a) at the time of the act or omission,
  - (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
  - (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
  - (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
- (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.

(3.72) Any proceedings with respect to an act or omission referred to in subsection (3.71) shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

(3.73) In any proceedings with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

(3.75) Notwithstanding any other provision of this Act, no proceedings may be commenced with respect to an act or omission referred to in subsection (3.71) without the personal consent in writing of the Attorney General or Deputy Attorney General of Canada, and such proceedings may only be conducted by the Attorney General of Canada or counsel acting on his behalf.

(3.76) For the purposes of this section, "conventional international law" means

- (a) any convention, treaty or other international agreement that is in force and to which Canada is a party, or
- (b) any convention, treaty or other international agreement that is in force and the provisions of which Canada has agreed to accept and apply in an armed conflict in which it is involved;

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, con-

stitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

(3.77) In the definitions “crime against humanity” and “war crime” in subsection (3.76), “act or omission” includes, for greater certainty, attempting or conspiring to commit, counselling any person to commit, aiding or abetting any person in the commission of, or being an accessory after the fact in relation to, an act or omission.

(4) Every one who, while employed as an employee within the meaning of the *Public Service Employment Act* in a place outside Canada, commits an act or omission in that place that is an offence under the laws of that place and that, if committed in Canada, would be an offence punishable by indictment shall be deemed to have committed that act or omission in Canada.

(5) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(5.1) For greater certainty, the provisions of this Act relating to

- (a) requirements that an accused appear at and be present during proceedings, and
- (b) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (5).

(6) Where a person is alleged to have committed an act or omission that is an offence by virtue of this section and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if that person had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, that person shall be deemed to have been so tried and dealt with in Canada.

(7) No proceedings shall be instituted under this section without the consent of the Attorney General of Canada if the accused is not a Canadian citizen.

(8) For the purposes of this section, of the definition “peace officer” in section 2 and of sections 76 and 77, “flight” means the act of flying or moving through the air and an aircraft shall be deemed to be in flight from the time when all external doors are closed following embarkation until the later of

- (a) the time at which any such door is opened for the purpose of disembarkation, and
- (b) where the aircraft makes a forced landing in circumstances in which the owner or operator thereof or a person acting on behalf of either of them is not in control of the aircraft, the time at which control of the aircraft is restored to the owner or operator thereof or a person acting on behalf of either of them.

(9) For the purposes of this section and section 77, an aircraft shall be deemed to be in service from the time when pre-flight preparation of the aircraft by ground personnel or the crew thereof begins for a specific flight until

- (a) the flight is cancelled before the aircraft is in flight,
- (b) twenty-four hours after the aircraft, having commenced the flight, lands, or
- (c) the aircraft, having commenced the flight, ceases to be in flight,

whichever is the latest.

(10) If in any proceedings under this Act a question arises as to whether any person is a person who is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity, a certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs stating any fact relevant to that question is admissible in evidence in those proceedings without proof of the

signature or authority of the person appearing to have signed it and, in the absence of evidence to the contrary, is proof of the fact so stated.

(11) A certificate purporting to have been issued by or under the authority of the Minister of Foreign Affairs stating

- (a) that at a certain time any state was engaged in an armed conflict against Canada or was allied with Canada in an armed conflict,
- (b) that at a certain time any convention, treaty or other international agreement was or was not in force and that Canada was or was not a party thereto, or
- (c) that Canada agreed or did not agree to accept and apply the provisions of any convention, treaty or other international agreement in an armed conflict in which Canada was involved,

is admissible in evidence in any proceedings without proof of the signature or authority of the person appearing to have issued it, and is proof of the facts so stated. R.S., c. C-34, s. 6; 1972, c. 13, s. 3; 1974-75-76, c. 93, s. 3; 1980-81-82-83, c. 125, s. 3; R.S.C. 1985, c. 27 (1st Supp.), s. 5; R.S.C. 1985, c. 10 (3rd Supp.), s. 1, c. 30 (3rd Supp.), s. 1; 1992, c. 1, s. 58; 1993, c. 7, s. 1; 1995, c. 5, s. 25.

**NOTE:** Subsection (11) amended 1995, c. 5, s. 25(1)(g) (to come into force by order of the Governor in Council) by replacing the expression "Secretary of State for External Affairs" with the expression "Minister of Foreign Affairs".

#### CROSS-REFERENCES

This section deals with some, but not all, of the circumstances where offences may be tried in Canada although the act may have been committed outside Canada. Thus, see note of related sections under s. 6, *supra*. As to other terms referred to in this section, see the following s. 2, definition of "internationally protected person"; Citizenship Act, R.S.C. 1985, c. C-29, definition of Canadian citizen; s. 465, definition and punishment of conspiracy; s. 24, definition of attempt; s. 463, punishment for attempt; s. 23, definition of accessory after fact; s. 463, punishment of accessory after fact; s. 22, definition of counselling; s. 464, punishment of counselling; s. 21, parties generally; s. 2, definition of "territorial divisions"; Part XVI, commencement of proceedings and compelling appearance; ss. 607 to 610, *autrefois* pleas, especially limitation on plea of *autrefois* in s. 607(6).

#### SYNOPSIS

This section extends Canadian criminal law jurisdiction to cover a number of offences which often have international law implications such as air piracy, offences against diplomats, protection of nuclear material, torture, war crimes and crimes against humanity. A number of the offences referred to in this section, such as torture (s. 269.1) or crimes against internationally protected persons (s. 431), were created to fulfil Canada's obligations under international treaties aimed at preventing and suppressing certain types of offences.

Section 7 permits such offences to be tried in Canada as if the offence had occurred here. The bulk of the section contains definitions and deeming provisions to facilitate the trial within Canada of these offences when they have occurred largely or entirely outside Canada. Section 7(4) extends Canadian jurisdiction to permit the trial in Canada of offences committed outside Canada by *public service employees*, while so employed, as long as the conduct would be an indictable offence if it had occurred here.

To preserve defences otherwise available if the accused had been tried elsewhere, s. 7(6) makes the *special pleas* of *autrefois acquit*, *convict* and *pardon* applicable. This means that, if an accused had previously been tried and acquitted, convicted or pardoned elsewhere in connection with the same conduct which led to the Canadian prosecution, the accused could rely on the special plea as if the prior trial had been in Canada.

Section 7(7) prevents the institution of proceedings under this section against *non-citizens without the consent* of the federal Attorney General.



## ANNOTATIONS

**War crimes and crimes against humanity / Subsec. (3.71)** – The definition of war crimes and crimes against humanity is not so vague as to violate s. 7 of the Charter. While the effect of these provisions of the Criminal Code is to create two new offences, namely crimes against humanity and war crimes, retroactive application of these provisions does not violate s. 7 or s. 11(g) of the Charter. These laws are retroactive only in the sense that individual criminal responsibility is established for acts which, at the time, the law provided only collective responsibility. The fact that the provisions apply only to crimes committed outside Canada does not violate either s. 7 or s. 15 of the Canadian Charter of Rights and Freedoms. The apparent difference in treatment is not based on a personal characteristic but on the location of the crime: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265.

A Canadian court has jurisdiction to try individuals living in Canada for crimes allegedly committed on foreign soil only where certain requirements are made out, the most important of these being that the alleged crime constitutes a war crime or a crime against humanity. The stigma attaching to persons who have committed crimes against humanity or war crimes is overwhelming and, before a person may be convicted of such crime, elements in addition to the underlying offence such as manslaughter or unlawful confinement must be proved. With respect to crimes against humanity, the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people. With respect to war crimes, the additional element is that the action constitutes a violation of the rules of conflict. These elements must be established, both in order for a Canadian court to have the jurisdiction to try the accused and in order to convict the accused of the offence. These issues must be left to the jury to determine: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265.

It is not sufficient that the Crown merely prove the *mens rea* for the underlying offence such as manslaughter or unlawful confinement. The requisite mental element of a war crime or a crime against humanity must be based on a subjective test. While it is not necessary to prove that, for example, the accused knew that his actions were inhumane, the accused must be aware of the facts or circumstances which would bring the acts within the definition of a crime against humanity or a war crime as the case may be. Alternatively, the *mens rea* requirement would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his actions within the provisions of these offences. Proof that the accused committed a war crime or a crime against humanity is an integral and essential aspect of the offence. It is not sufficient simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant a conviction: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265.

The Crown must not only prove the elements of the substantive offences allegedly committed by the accused under the Criminal Code in force at the time the acts were committed, but knowledge of the circumstances or facts which bring the act within the definition of a war crime or crime against humanity. This mental element does not, however, depend on how the accused personally would have characterised his acts, nor on his personal moral code or perception of the international law: *R. v. Finta*, *supra*.

On a prosecution for war crimes and crimes against humanity alleged to have occurred in Europe during the Second World War, it was open to the trial judge to admit hearsay evidence, in favour of the accused, consisting of testimony given at a judicial proceeding when the accused was tried in Europe *in absentia* for war crimes. The declarant was deceased and the evidence exhibited sufficient *indicia* or reliability to justify its admission in favour of the accused: *R. v. Finta*, *supra*.

The 1907 *Hague Convention*, on the laws and customs of war on land, prohibited the use of prisoners of war and nationals of the hostile party from being compelled to take part in labour having connection with the operations of the war or in taking part in mili-



tary operations against their own country. Thus, using civilian prisoners from allied countries to take an active part in the production of the V-2 rocket, whose purpose and eventual use was to cause death and destruction among the civilian populations of the allied countries during World War II, fell within the prohibition in the *Hague Convention*. Such actions also were contrary to customary international law. That customary international law, as set out in the *Charter of the International Military Tribunal*, established following the War and as affirmed by the United Nations in 1946, recognized as war crimes the ill treatment or deportation to slave labour of civilian population and the ill treatment of prisoners of war as crimes against humanity, the enslavement, deporation and other inhumane acts against civilian populations: *Rudolph v. Canada (Minister of Employment and Immigration)* (1992), 73 C.C.C. (3d) 442, 91 D.L.R. (4th) 686, 14 C.R. (4th) 169 (Fed. C.A.).

**Subsec. (3.74)** – The peace officer defence under s. 25(2) and the defence of obedience to superior orders are distinct from the defence of obedience to the law in force at that time and place. The defence of compliance with the laws of the country where the alleged offence took place will be available if the laws of that country at the time of the offences are held to be valid. Even if the laws are invalid, it may still be open to the members of the military or police to rely on the defence of obedience to superior orders or the peace officer defence. Those defences are not available where the orders in question were manifestly unlawful and where the accused had no moral choice as to whether to follow the order. An order from a superior is manifestly unlawful where it offends the conscience of any reasonable, right thinking person, being an order which is obviously and flagrantly wrong. Even if it could be established that the order was manifestly illegal and that the subordinate was aware of the illegality, the person may be compelled to obey either because of natural causes placing the individual in a condition of danger or because of pressure which is brought to bear on him by another person. The threat however must be so imminent, real, and inevitable as to deprive the subordinate of any real moral choice. In any event, this subsection gives the court a discretion to deny a defence of reliance on laws in force at the time and in the place of commission of the offence: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265.

The war crimes and crimes against humanity provisions of the *Criminal Code* do not violate the Charter. Removal of the defence of obedience to *de facto* law by s. 7(3.74) does not violate the principles of fundamental justice under s. 7 of the Charter. Section 7(3.74) is permissive rather than mandatory and there may well be situations where the law is not manifestly unlawful, and as a consequence the accused may be able to argue mistaken belief in the validity of the law successfully. Removal of a defence when to permit the defence would be inconsistent with the offence proscribed does not violate s. 7. It would be illogical and senseless to permit an accused to rely on the laws of a sovereign state which violate international law by legislating the commission of crimes against humanity on the grounds of the laws themselves justified criminal conduct: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265.

#### APPLICATION TO TERRITORIES / Application of criminal law of England / Common law principles continued.

- 8. (1)** The provisions of this Act apply throughout Canada except
- (a) in the Yukon Territory, in so far as they are inconsistent with the *Yukon Act*; and
  - (b) in the Northwest Territories, in so far as they are inconsistent with the *Northwest Territories Act*.

**NOTE:** Subsec. (1) amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by striking out the word “and” at the end of para. (a), by adding the word “and” at the end of para. (b) and by enacting para. (c). The text of para. (c), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(c) in Nunavut, in so far as they are inconsistent with the Nunavut Act.

(2) The criminal law of England that was in force in a province immediately before April 1, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament. R.S., c. C-34, s. 7.

#### CROSS-REFERENCES

**Subsec. (1)** – Definition of “Attorney General” for the Territories is the Attorney General of Canada pursuant to s. 2.

**Subsecs. (2), (3)** – The combined effect of this section and s. 9 is to abolish criminal liability, except as provided in a Canadian statute. The only common law crime which has been preserved is contempt of court. On the other hand, this section preserves any common law defence, except as it may be inconsistent with a statutory provision. The purpose of preserving the criminal law of England was to provide for gaps in procedure or rules of evidence not provided for in the Criminal Code. However, it should be noted that it is the criminal law of England which was in force in the province in 1955 and this varies somewhat between provinces because of the different dates of reception of the law of England. [See 1955 *Martin’s* at p. 34.] As far as procedure, this can have little practical effect since the Criminal Code, to a large extent, codifies the procedure and renders obsolete the criminal procedure in England. On the other hand, very recently it was held in *R. v. Jacobson*, noted under s. 672, *infra*, that a trial judge had jurisdiction to exercise the common law power to arrest judgment where it was discovered after conviction, but prior to sentence, that the accused had been convicted of an offence unknown to law. As regards the rules of evidence, these are largely a creature of common law which is declared by the various courts in Canada from time to time. The most important effect of this section is to preserve the common law defences and excuses. These, of course, are not tied to any date and will continue to evolve with the common law. Thus, the Supreme Court of Canada has recognized a common law “defence” of entrapment although, as noted below, the House of Lords has clearly rejected such a defence.

Many defences and excuses of general application have been at least partially codified as follows: s. 15, obedience to *de facto* law; s. 16, insanity; ss. 17, 18, compulsion by threats; s. 19, ignorance of the law is no excuse; s. 25, use of force in administration or enforcement of law; s. 27, use of force to prevent commission of certain offences; s. 28, execution of warrant; ss. 30, 31, detention or arrest for breach of peace; s. 32, use of force to suppress riot; ss. 34, 35, 37, self-defence; s. 37, use of force to defend person under accused’s protection; s. 38 to 42, defence of property; s. 43, correction of child or pupil; s. 44, use of force by ship’s master; s. 45, reasonable surgical operation.

As to the so-called *Kienapple* defence, see notes under ss. 12 and 613, *infra*. As to double jeopardy, including *res judicata* and *issue estoppel*, see notes under s. 613, *infra*. The pleas of *autrefois* are dealt with in ss. 607 to 610. As to abuse of process, see notes under s. 579. As to mistake of fact and mistake of law, see notes under s. 19, *infra*.

#### SYNOPSIS

This section explains where within Canada the Criminal Code applies and its relationship to the Common Law. Section 8(1) makes the Criminal Code applicable throughout Canada except that, in the Yukon and Northwest Territories, it has no effect if it is inconsistent with the Acts creating those jurisdictions.

Section 8(2) permits the *English criminal law* which was in force *before* the major 1953-54 Criminal Code revision came into force to continue, *except* as changed by the Criminal Code or other federal legislation.

The key aspect of this section is s. 8(3) which *retains all common law defences*, excuses and justifications, except as altered by or to the extent that they are inconsistent with the

Criminal Code or other federal enactments. It is under this provision that defences such as necessity, due diligence, intoxication, mistake of fact and entrapment have remained an uncoded part of our criminal law. Recently, s. 7 of the Charter has also been used to interpret the scope of these defences.

## ANNOTATIONS

**Necessity defence** – The common law defence of necessity is preserved by s. 8(3): *R. v. Morgentaler* (1975), 20 C.C.C. (2d) 449, [1976] 1 S.C.R. 616.

In *R. v. Perka* (1984), 14 C.C.C. (3d) 385, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113 (5:0) Dickson J., for the majority, set out the elements of the necessity defence as follows:

- (1) necessity is an excuse rather than a justification and operates by virtue of this subsection;
- (2) the criterion is the moral involuntariness of the wrongful action;
- (3) this involuntariness is measured on the basis of society's expectation of appropriate and normal resistance to pressure;
- (4) negligence or involvement in criminal or immoral activity does not disentitle the actor to the excuse of necessity;
- (5) actions or circumstances which indicate that the wrongful deed was not truly involuntary do disentitle;
- (6) the existence of a reasonable legal alternative similarly disentitles; to be involuntary the act must be inevitable, unavoidable and afford no reasonable opportunity for an alternative course of action that does not involve a breach of the law;
- (7) the defence only applies in circumstances of imminent risk where the action was taken to avoid a direct and immediate peril;
- (8) the defence cannot excuse the infliction of a greater harm so as to allow the actor to avert a lesser evil; and
- (9) where the accused places before the court sufficient evidence to raise the issue, the onus is on the Crown to meet it beyond a reasonable doubt.

The defence of necessity was not made out to a charge of "over 80" contrary to s. 253 where the accused, although believing an attacker was pursuing her, was not in immediate danger and had other options available besides getting into her car and driving away. Her act of driving while intoxicated was not realistically unavoidable: *R. v. Berriman* (1987), 62 Nfld. & P.E.I.R. 239, 45 M.V.R. 165 (Nfld. C.A.).

The common law defence of necessity was not available to accused charged with contempt of court as result of their violation of a court order against interfering with the operation of an abortion services clinic. The defence of necessity is only available to those whose wrongful acts are committed under pressure which no reasonable person could withstand. The accused's genuine belief that abortion is immoral could not change the fact that it could not be said that no reasonable person could withstand the pressure to defy the court order: *R. v. Bridges* (1989), 48 C.C.C. (3d) 535, 61 D.L.R. (4th) 126 (B.C.S.C.), affd (1990), 62 C.C.C. (3d) 455, 78 D.L.R. (4th) 529 (B.C.C.A.).

**Entrapment defence** – In *R. v. Mack* (1988), 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, [1988] 2 S.C.R. 903 (7:0) the court laid down both the elements of the entrapment defence and the procedure to be followed. The important holdings may be summarized as follows:

1. Entrapment arises either when the authorities provide an opportunity to persons to commit an offence without reasonable suspicion or acting *mala fides* for dubious motives unrelated to the investigation and repression of crime or, having a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence;
2. As regards the latter form of entrapment the court should consider whether an average person in the position of the accused would have been induced to commit the offence;



3. As far as possible an objective assessment is to be made of the conduct of the police and their agents;
4. The pre-disposition of the accused is relevant only in considering whether the authorities were justified in providing the accused an opportunity to commit the offence;
5. In considering whether the police have used means which go further than providing an opportunity the court will consider a number of factors such as the following:
  - (a) the type of crime being investigated and the availability of other investigative techniques;
  - (b) whether an average person with both the strengths and weaknesses in the position of the accused would be induced into the commission of a crime;
  - (c) the persistence and number of attempts made by the police;
  - (d) the type of inducement used by the police including deceit, fraud, trickery or reward;
  - (e) the timing of the police conduct;
  - (f) whether the police conduct involved an exploitation of human characteristics such as friendship;
  - (g) whether the police appear to have exploited a particular vulnerability of a person such as mental handicap or substance addiction;
  - (h) the proportionality between the police involvement as compared to the accused;
  - (i) the existence of any threats implied or expressed made to the accused by the police or their agents; and
  - (j) whether the police conduct is directed at undermining other constitutional values;
6. The entrapment issue is to be tried by the judge after the Crown has proved beyond a reasonable doubt that the accused is guilty;
7. In a jury case the jury determines guilt or innocence and then the judge determines the entrapment issue;
8. The burden of proof of entrapment is on the accused on a balance of probabilities and while he need not show that the police conduct shocks the community the defence will only be made out in the clearest of cases;
9. Where the defence is made out the appropriate remedy is a stay of proceedings, not an acquittal.

In *R. v. Barnes* (1991), 63 C.C.C. (3d) 1, [1991] 2 W.W.R. 673, 3 C.R. (4th) 1 (S.C.C.) (8:1) the court considered the defence of entrapment based on the fact that the officer was not engaged in a *bona fide* inquiry, but rather so-called “random virtue testing”. While the basic rule is that the police may only present the opportunity to commit a particular crime to an individual who arouses a suspicion of involvement in that crime, there is an exception when the police undertake a *bona fide* investigation directed in an area where it is reasonably suspected that criminal activity is occurring. When such location is defined with sufficient precision, the police may present any person associated with the area with the opportunity to commit the particular offence. Random virtue testing only arises when an officer presents a person with the opportunity to commit an offence without a reasonable suspicion that the person is already engaged in a particular activity or that the physical location with which the person is associated is a place where the particular criminal activity is likely occurring. In this case, the court approved an investigation which included offering to persons anywhere within a six-block pedestrian mall the opportunity to sell drugs to an undercover officer. The mall as a whole was responsible for a substantial number of the drug offences in the city.

The defence of entrapment is available to an accused who had no contact with the undercover officer, if the officer was at the time engaged in impermissible random virtue testing: *R. v. Kenyon* (1990), 61 C.C.C. (3d) 538 (B.C.C.A.).



**Due diligence defence** – In *R. v. Sault Ste. Marie (City)* (1978), 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, [1978] 2 S.C.R. 1299 (9:0), the Court in considering provincial pollution legislation held that there are three categories of offences created by statute distinguished as follows: (1) full *mens rea* offences requiring proof by the prosecution of a positive state of mind such as intent, knowledge or recklessness; (2) strict liability offences in which there is no necessity for the prosecution to prove *mens rea* but which leave it open to the accused to avoid liability by proving that he took all reasonable care; and (3) offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal in the true sense fall in the first category. “Public welfare offences” are *prima facie* in the second category unless the statute includes the words such as “wilfully” evidencing an intent that the offence be placed in the first category. Offences in the third category would be those in respect of which the Legislature has made it clear that guilt would follow proof merely of the proscribed act.

Shifting the burden to the defendant, charged with a regulatory offence, to prove on a balance of probabilities that he acted with due diligence is a reasonable limit on the guarantee to the presumption of innocence: *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799n (S.C.C.).

**Intoxication defence** – The rules in *D.P.P. v. Beard* (1920), 14 Cr. App. R. 159 (H.L.) violate ss. 7 and 11(d) of the Charter because they limit the defence of intoxication to the capacity of an accused to form the specific intent. Before a trial judge charges a jury on the issue of intoxication, the judge must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused’s foresight of consequences sufficient to raise a reasonable doubt. Once this threshold test is met, the judge must make clear to the jury that the issue is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In most circumstances, a one-step charge which omits any reference to “capacity” or “capability” and focuses the jury on the question of “intent in fact” is appropriate. Consequently, the jury must consider whether the accused possessed the requisite specific intent having regard to the evidence of intoxication, along with all of the other evidence in the case. In certain cases, however, in light of the facts of the case and/or the admission of expert evidence, a two-step charge may be appropriate. In this case, the jury is charged both with regard to the capacity to form the requisite intent and with regard to the need to determine in all of the circumstances whether the requisite intent was in fact formed by the accused. In these circumstances, the jury might be instructed that their overall duty is to determine whether or not the accused possessed the requisite intent for the crime. If, on the basis of the expert evidence, the jury is left with a reasonable doubt as to whether, as a result of the consumption of the alcohol, the accused had the capacity to form the requisite intent then that ends the inquiry and the accused must be acquitted of the offence and consideration must then be given to any included lesser offences. If the jury is not left with a reasonable doubt as a result of the expert evidence as to the capacity to form the intent, then they must consider and take into account all the surrounding circumstances and the evidence pertaining to those circumstances in determining whether or not the accused possessed the requisite intent for the offence. Furthermore, the presumption that a person intends the natural consequences of their act refers only to a common-sense and logical inference that the jury can but is not compelled to make. Where there is some evidence of intoxication, the trial judge must link the instructions on intoxication with the instruction on the common-sense inference so that the jury is specifically instructed that evidence of intoxication can rebut the inference: *R. v. Robinson* (unreported, March 21, 1996, S.C.C.) [096/085/063-70 pp.]. See also *R. v. McMaster* (unreported, March 21, 1996, S.C.C.) [096/085/062-26 pp.].

Where the accused not only understood the nature and quality of his acts and knew that they were wrong but had formed the specific intent required for the offence, the fact that, by reason of consumption of drugs, he had entered a psychotic state which had caused a loss of self-control or an irresistible impulse did not constitute a defence of self-

induced intoxication: *R. v. Courville* (1982), 2 C.C.C. (3d) 118 (Ont. C.A.), affd 19 C.C.C. (3d) 97, [1985] 1 S.C.R. 847, 46 C.R. (3d) 90 (7:0).

Extreme drunkenness inducing a state akin to insanity or automatism is a defence to a general intent offence such as sexual assault. However, the burden is on the accused to prove the defence on a balance of probabilities and the accused's testimony would have to be supported by expert evidence: *R. v. Daviault*, [1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165.

Section 7 of the Charter does not require that the intoxication defence be available for all offences and, thus, it was open to Parliament to create an offence such as impaired care or control as defined in s. 253 for which intoxication is no defence: *R. v. Penno* (1990), 59 C.C.C. (3d) 344, [1990] 2 S.C.R. 865, 80 C.R. (3d) 97.

**Alibi Defence** – Where the accused fails to disclose the alibi defence to the Crown in advance of the trial, the trier of fact may draw an adverse inference when weighing the alibi evidence heard at trial. Improper disclosure can, however, only weaken alibi evidence, but cannot exclude the alibi. The alibi need not be disclosed at the time of arrest or at the first possible opportunity. It is sufficient if it was disclosed at a time and in a manner which would permit a meaningful investigation. Furthermore, there is no requirement that the alibi be disclosed by the accused himself: *R. v. Cleghorn*, [1995] 3 S.C.R. 175, 100 C.C.C. (3d) 393, 41 C.R. (4th) 282 (3:2).

An alibi which is disbelieved does not have any evidentiary value whereas an alibi which is proven to be false can be evidence of consciousness of guilt. If the evidence adduced by the Crown is capable of supporting the inference that an accused concocted a false alibi, an alibi notice professing an intention to advance that alibi at trial would be relevant in that it would tend to support the inference of consciousness of guilt. Before this inference is available, however, there must be evidence from which a reasonable jury could infer that the alibi was deliberately fabricated and that the accused was a party to that fabrication. Mere rejection of an alibi as untruthful or unreliable does not constitute affirmative evidence of guilt: *R. v. Witter* (unreported, February 6, 1996, Ont. C.A.) [096/043/004-23 pp.].

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## CRIMINAL OFFENCES TO BE UNDER LAW OF CANADA.

**9. Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 736**

- (a) of an offence at common law,
  - (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
  - (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,
- but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court. R.S., c. C-34, s. 8; R.S.C. 1985, c. 27 (1st Supp.), s. 6.

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

## CROSS-REFERENCES

Rights of appeal from finding of contempt of court and from sentence are set out in s. 10. The notes under s. 10 deal with procedural issues relating to contempt of court.

As noted under s. 8, the only common law offence for which a person may now be convicted is the offence of criminal contempt of court. This is not to say that contempt of court is wholly a common law offence. Certain aspects of contempt of court have been codified as offences or the court's power to deal with the misconduct has been codified, thus see: ss. 119, 120, offences relating to bribery of judicial officers; s. 127, disobeying lawful order of court; ss. 131 to 137, perjury and

related offences; s. 139, attempt to obstruct justice; s. 484, preserving order in court; s. 545, witness at preliminary inquiry refusing to be sworn or testify; s. 605(2), failing to comply with order respecting testing of exhibits; ss. 648 to 649, offences relating to juries; s. 708, witness failing to attend.

## SYNOPSIS

This section *prohibits prosecution for common law offences*, offences under British law or the law in force in the provinces before they joined Canada. The *only exception* is the retention of the *common law* power of judges to punish for *contempt of court*.

The common law offence of contempt of court can be divided into two broad categories of civil and criminal contempt. The former lies essentially in disobeying the order of a court or a judgment in civil proceedings. However, as the case of *Poje v. A.-G. B.C.*, [1953] 1 S.C.R. 516 illustrates, even disobedience of a civil injunction can amount to criminal contempt if the conduct of the accused in disobeying the order amounts to a public challenge to the court's authority. In general, criminal contempt can be described as conduct likely to obstruct the administration of justice or to bring discredit onto the administration of justice. As a common law crime, contempt of court suffers from lack of clarity of definition of procedure and of the elements of the offence. Criminal contempt can, however, be subdivided into two types, contempt in the face of the court [*in facie*], for example, disruption of the proceedings in the courtroom, failure of counsel to attend court as required, or refusal of a witness to be sworn or to answer questions, and contempt out of the face of the court [*ex facie*].

The most troublesome aspect of criminal contempt is contempt out of the face of the court. It involves essentially three different types of conduct: (1) breach of the *sub judice* rule, *e.g.*, publication of material likely to interfere with the fair trial of the case; (2) obstruction of justice, *e.g.*, interfering with a witness or a juror; and (3) scandalizing the court, *i.e.*, criticism of a court or a judge. While the elements of these three types of contempt are not well-defined, it is suggested that case law supports the following propositions:

**Breach of the *sub judice* rule** – Until recently, this has been considered a strict liability offence if not virtually an absolute liability offence, the offence being described as requiring proof only that the words were calculated to interfere with the course of justice in the sense that they had that tendency. It was not necessary to find either that the words were intended to have that effect or that they did in fact interfere with the course of justice. Moreover, liability has been attributed to persons such as the editor or publisher on a vicarious basis, if they were responsible for the publication of the newspaper, for example, even if they had no prior knowledge of the contemptuous remarks. It is not sufficient, however, that there be a mere possibility of interference with the due administration of justice, the conduct must present a real risk to the due administration of justice. [A somewhat lesser standard adopted by the House of Lords in the *Times Newspapers* case, [1974] A.C. 273 probably does not represent the law in Canada.] It is suggested that, in light of the Charter of Rights and Freedoms and in particular the fundamental justice guarantee in s. 7 as interpreted by the Supreme Court of Canada in *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, it can no longer be confidently stated that liability can be imposed on a vicarious basis or that no intent to interfere with the administration of justice is required. At least the accused should probably be able to defend the case by demonstrating that he was without fault, perhaps because he exercised due diligence or was operating under an honest (and perhaps reasonable) mistake of fact. Finally, it would seem that a contempt can be made out even if there was no real risk of interference in the due administration of justice by the particular publication, if the accused intended to produce such prejudice. Perhaps such conduct is more accurately described as an attempt but the cases do not make any such distinction.



**Obstruction of justice** – The elements of this offence are similar to those for breach of the *sub judice* rule, and, in fact, the former may be considered simply a special example of this form of contempt which has been described as anything done that is calculated to obstruct or interfere with the due course of justice or the lawful process of the courts. Again “calculated” does not mean intended but merely “fixed, suited, apt”. In *B.C.G.E.U. v. British Columbia (Attorney General)* (1988), 44 C.C.C. (3d) 289 (S.C.C.) Chief Justice Dickson adopted the following list of acts which could fall into this category: victimizing jurors, witnesses and other persons; obstructing person officially connected with court or its process; interference with person under the special protective jurisdiction of the court; breach of duty by persons officially connected with the court or its process; forging; altering or abusing the process of the court; divulging the confidences of the jury-room; preventing access by the public to courts of law, service of process in the precinct of the court and disclosing the identity of witnesses. Again, the Charter may have implications for the *mens rea* of the offence, bearing in mind, however, that it could be argued that some limits on Charter guarantees may be upheld under s. 1 because of the close connection of this form of contempt to the fundamental principle of the rule of law.

**Scandalizing the court** – This is the one form of contempt which does not bear a clear, direct relationship to the administration of justice. It has been defined as any act done or writing published, calculated to bring a court into contempt or lower its authority. Thus, conduct which could have no possible effect on any particular case may nevertheless come within this definition. The difficulty with this form of contempt has always been to distinguish between contemptuous comment and fair criticism of the courts and the judiciary. The basis for this form of contempt lies in the assumption that public confidence in the administration of justice would be undermined by comments that tend to lower the authority of the court. Perhaps the clearest examples of this form of contempt would be comments attributing improper motives to a court or allegations of corruption, partiality and attempts to pervert the course of justice by a judge. It is equally clear that reasonable argument or expostulation offered against any judicial act as contrary to law or the public good is not contempt. [*Re Duncan*, [1958] S.C.R. 41]. The impact of the Charter of Rights and Freedoms has been felt in relation to this form of contempt, a majority of the Ontario Court of Appeal holding in *R. v. Kopyto*, *infra* that, as presently framed, contempt by scandalizing the court is not a reasonable limit on the guarantee to freedom of expression. The defect in the common law definition appeared to lie in the fact that there was no requirement of proof of any real danger, present or future, to the fair and effective administration of justice. Interestingly, the dissenting members of the court would be prepared to uphold the constitutionality of this form of contempt because, in their view, it required proof of an intent to bring the administration of justice into disrepute and truth would be a defence. Further, the *actus reus* of the offence requires proof that, by reason of the statement, there was a serious risk that the administration of justice would be interfered with.

## ANNOTATIONS

**Grounds for finding contempt of court / Violation of court orders** – An unincorporated union is capable of being found in criminal contempt of court for violation of a court order. The fact that criminal contempt is not codified does not result in a violation of ss. 7 or 11(a) or (g) of the Charter. To establish criminal contempt, the Crown must prove beyond a reasonable doubt that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The necessary *mens rea* may however be inferred from the circumstances and since an open and public defiance of a court order will tend to depreciate the authority of the court, when it is clear that the accused must have known her act of defiance would be public, it may be inferred that she was at least reckless as to whether the authority of the court



would be brought into contempt. While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, but rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt. While it would seem that a judge entertaining a motion for contempt of an order made by a judge of the court, as opposed to an inferior tribunal, would not have the power to go behind the order. The validity of the order is not an issue on the contempt hearing. Unless the order has been set aside for want of jurisdiction, the judge hearing the motion on criminal contempt must accept it as valid: *U.N.A. v. Alberta (Attorney General)* (1992), 71 C.C.C. (3d) 225, 13 C.R. (4th) 1, [1992] 1 S.C.R. 901 (4:3).

The accused were properly found in contempt of court for their flagrant disobedience of an injunction. While the accused sought to argue that the injunction was overbroad and infringed their rights under the Charter, the injunction was valid until set aside and the accused had taken no steps to challenge the injunction: *Everywoman's Health Centre Society* (1988) v. *Bridges* (1990), 62 C.C.C. (3d) 455, 78 D.L.R. (4th) 529 (B.C.C.A.). Also see: *R. v. Toth* (1991), 63 C.C.C. (3d) 273 (B.C.C.A.).

The defence of necessity was not available to accused charged with violating a court injunction prohibiting obstruction of logging crews. The necessity defence cannot operate to excuse conduct which has been specifically enjoined. An application to the court, which could be heard on short notice, would have determined whether the circumstances were sufficient to engage the defence of necessity. In addition, the defence of necessity can never operate to avoid a peril that is lawfully authorized by the law. Similarly, s. 27 of the Criminal Code was not available. Section 27 does not contemplate the justification of force or other conduct which the court has already specifically enjoined: *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217, 113 D.L.R. (4th) 368, 90 B.C.L.R. (2d) 24 (C.A.), leave to appeal to S.C.C. refused 23 C.R.R. (2d) 192n (Pulker app'n granted).

An allegation of contempt of court is criminal, or at least *quasi-criminal*, in character and therefore the elements of the offence must be proved beyond a reasonable doubt. Where the allegation is based on failure to comply with a court order, there must be proof of knowledge of the order alleged to have been breached. Service of a court order on the solicitor for a Minister of the Crown did not fix the Minister with actual knowledge in the absence of evidence from which that knowledge could be inferred as where there were circumstances which reveal a special reason for bringing the order to the Minister's attention. Further, the Minister could not be held liable for contempt of court on the basis of the doctrine of vicarious liability, delegation or the identification theory: *Bhatnager v. Canada (Minister of Employment and Immigration)* (1990), 71 D.L.R. (4th) 84, [1990] 2 S.C.R. 217, 111 N.R. 185 (9:0).

**Interference with access to courts** – Any action to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt of court: *N.A.P.E. v. Newfoundland (Attorney-General)* (1988), 44 C.C.C. (3d) 186, [1988] 2 S.C.R. 204, 53 D.L.R. (4th) 39 (6:0); *B.C.G.E.U. v. British Columbia (Attorney General)* (1988), 44 C.C.C. (3d) 289, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1 (6:0).

**Scandalizing the court** – In determining contempt scandalizing a court or judge it is not the effect that the author intended his article to have but the effect the article itself was calculated to have: *R. v. Murphy*, [1969] 4 C.C.C. 147, 6 C.R.N.S. 353 (N.B.S.C. App. Div.).

It is *prima facie* legitimate to criticize a judge's conduct in a particular case or to criticize any particular decision given by the courts if done without casting any aspersions on the motives of a judge or court, and without abuse: *R. v. Dalke* (1981), 59 C.C.C. (2d) 477, 21 C.R. (3d) 380 (B.C.S.C.).

It was held in *R. v. Kopyto* (1987), 39 C.C.C. (3d) 1, 61 C.R. (3d) 209 (C.A.) (3:2),

that the offence of contempt of court by scandalizing the court, as presently understood, is unconstitutional by reason of the guarantee of freedom of expression in s. 2(b) of the Charter of Rights. It would seem, however, that if the offence were redefined to require proof that the accused's remarks created a real, significant, and present or imminent danger to the fair and effective administration of justice then the offence might be valid. The dissenting members of the court held that properly understood the offence did not violate s. 2(b) but that the Crown would have to prove an intention to bring the administration of justice into disrepute and that by reason of the statement made there was a serious risk that the administration of justice would be interfered with. As well, truth would be a defence.

It was held in *R. v. Edmonton Sun Publishing Ltd. et al.* (1981), 62 C.C.C. (2d) 318, 16 Alta. L.R. (2d) 246 (Q.B.) that for the court to find that an editorial cartoon concerning a court case was a contempt of court it must be proved that it tended to obstruct or defeat the administration of justice or that it showed disrespect of the court process or that it tended to bring the court into disrespect.

**Publicity** – In *Re Regina and Carocchia* (1973), 15 C.C.C. (2d) 175 (Que. C.A.), the publication of a police press release which was of such a nature as to influence the result of a non-jury criminal case was held to be an interference of the administration of justice and a contempt of court.

A broadcaster was properly found in contempt of court for broadcasting during the accused's trial details of other criminal conduct by the accused, even though in the end the same information was placed before the jury through evidence called during the defence. The issue in every case is whether there has been a real risk of prejudice to the course of justice, not simply to the accused. Thus, substantial interference with the trial process by causing undue delay and expense or by creating an appearance of substantial unfairness at any stage of the proceedings may result in a conviction for contempt, regardless of prejudice to the accused. Finally, it was also not improper for the trial judge to base the amount of the fine on the costs thrown away as a result of contempt: *R. v. CHEK TV Ltd.* (1987), 33 C.C.C. (3d) 24 (B.C.C.A.).

The public's vital interest in knowing the facts as protected by freedom of expression, including freedom of the press in s. 2(b) of the Charter, will be assessed differently in the context of an accused who is in custody awaiting trial than it will be where a dangerous suspect is at large and public assistance may be required to apprehend the suspect. Publication of the criminal record of an accused who is not at large and who does not constitute a danger to the community is *prima facie* a contempt of court: *Alberta (Attorney-General) v. Interwest Publications Ltd.* (1990), 58 C.C.C. (3d) 114, 73 D.L.R. (4th) 83, [1990] 5 W.W.R. 498 (Q.B.).

Although a contempt of court charge brought as a result of violation of the *sub judice* rule infringes a publisher's freedom of expression as guaranteed by s. 2(b) of the Charter of Rights, the *sub judice* is a reasonable limit on freedom of expression, being required to ensure the fair trial of the accused. Contempt of court will lie only where there is proof of either a clear intent to influence the fair trial of an accused or where the publication presents a real risk that the article will prejudice the fair hearing of the accused, and the *sub judice* rule only delays publication until completion of the trial: *R. v. Robinson-Blackmore Printing & Publishing Co.* (1989), 47 C.C.C. (3d) 366, 73 Nfld. & P.E.I.R. 46 (Nfld. S.C.).

Publication of a summary of the evidence given on the preliminary issue of the accused's fitness to stand trial, in violation of the trial judge's order that it not be published was held to constitute contempt of court: *R. v. Southam Press (Ontario) Ltd. et al.* (1976), 31 C.C.C. (2d) 205 (Ont. C.A.).

**Counsel's failure to attend court** – In *R. v. Hill* (1976), 33 C.C.C. (2d) 60, 73 D.L.R. (3d) 621 (B.C.C.A.) affirming 25 C.C.C. (2d) 348, 62 D.L.R. (3d) 692 (Co. Ct.), it was held that conduct, in this case by a lawyer, which is calculated to delay, disrupt and

bring the judicial process into contempt will constitute criminal contempt and it need not be further proved that the accused intended to disrupt, hinder or delay the course of justice.

In considering whether or not a lawyer is guilty of contempt the court must consider the apology tendered by the lawyer at the contempt hearing: *R. v. Kopyto* (1981), 60 C.C.C. (2d) 85, 21 C.R. (3d) 276 (Ont. C.A.), leave to appeal to S.C.C. refused 38 N.R. 540n.

However, the lawyer's apology did not negative his contempt where his conduct in failing to appear at court showed a serious indifference to his obligation to the court and to his client and when he again failed to attend court on the following day as directed by the judge: *R. v. Anders* (1982), 67 C.C.C. (2d) 138, 136 D.L.R. (3d) 316 (Ont. C.A.).

The *actus reus* of criminal contempt is conduct which seriously interferes with, or obstructs, the administration of justice or would cause a serious risk of that occurring. While the failure, of a lawyer who has undertaken to appear in court, to attend is capable of constituting contempt, the court should consider the consequences of failing to appear. Conduct that had little or no effect on the administration of justice could not support a conviction for contempt. The *mens rea* of contempt requires proof of deliberate or intentional conduct, or indifference akin to recklessness: *R. v. Glasner* (1994), 93 C.C.C. (3d) 226, 19 O.R. (3d) 739, 119 D.L.R. (4th) 113 (C.A.).

Before an absent lawyer may be found in contempt he must first be brought before the court and given the right to make full answer and defence which at a minimum requires that he be given notice that he is facing a charge of contempt of court: *R. v. Pinx* (1979), 50 C.C.C. (2d) 65, 105 D.L.R. (3d) 143 (Man. C.A.).

While the deliberate failure of counsel who has undertaken to represent an accused to appear when the case is called, or even failure to attend in circumstances showing indifference, may constitute contempt of court, failure to attend due to mere inadvertence even if due to negligence, but falling short of indifference, does not necessarily constitute contempt of court: *R. v. Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.).

**Counsel withdrawing from case** – In contempt proceedings against a lawyer a distinction must be drawn between the lawyer who deliberately frustrates the due carrying on of court proceedings by the wilful act of non-attendance, an act which may constitute contempt of court, and the act of a lawyer who impulsively reacts to an adverse ruling by the court by attempting to withdraw, which is at worst an error of judgment: *R. v. Swartz* (1977), 34 C.C.C. (2d) 477, [1977] 2 W.W.R. 751 (Man. C.A.).

A trial judge has no right in law to order counsel to continue in the defence of an accused after counsel has advised that he has decided that he will no longer represent the accused. While the judge may urge counsel to reconsider and to try to reconcile any differences with his client, should counsel stand firm then he cannot properly be cited for contempt for refusing to comply with an order by the trial judge that he continue to act: *Re Leask and Cronin* (1985), 18 C.C.C. (3d) 315, [1985] 3 W.W.R. 152 (B.C.S.C.).

**Conduct of counsel in court** – Language by a lawyer attributing dishonourable or disgraceful conduct to the judge trying a case and suggesting that the judge acted dishonestly, is capable of constituting contempt of court: *R. v. Doz* (1985), 19 C.C.C. (3d) 434 (Alta. C.A.), rev'd on other grounds 38 C.C.C. (3d) 479, 55 Alta. L.R. (2d) 289 (S.C.C.).

There is a distinction between conduct by a barrister which though open to censure is merely discourteous and conduct which constitutes contempt of Court: *R. v. Fox* (1976), 30 C.C.C. (2d) 330, 70 D.L.R. (3d) 577 (Ont. C.A.).

Mere discourtesy or use of uncomplimentary remarks to the court is not always to be taken as contempt. On the other hand where there has been a proper question put to counsel by the presiding judge the repeated refusal by counsel to answer the question will normally constitute contempt: *R. v. Barker* (1980), 53 C.C.C. (2d) 322, [1980] 4 W.W.R. 202 (Alta. C.A.).



A charge of contempt of court, arising out of a lawyer's submissions in the course of a trial, requires proof of a serious, real imminent risk of obstruction of the administration of justice. It must be shown that he had a dishonest intention or acted in bad faith in that he intentionally discredited or attempted to discredit the administration of justice: *R. v. Bertrand* (1989), 49 C.C.C. (3d) 397, 70 C.R. (3d) 362 (Que. S.C.).

**Conduct of other persons in court** – Words or actions directed at other persons besides the judge such as jurors, counsel or other officers of the court may also be regarded as contempt where such words or acts interfere or tend to interfere with the administration of justice. Thus, in *R. v. Paul* (1978), 44 C.C.C. (2d) 257, 6 C.R. (3d) 272 (Ont. C.A.), it was held (2:1) that the deliberately false allegation in open court by an unrepresented accused that the charges laid against him were the work of a “corrupt” Crown Attorney, constituted contempt of court. The decision of the Court of Appeal was affirmed 52 C.C.C. (2d) 331, [1980] 2 S.C.R. 169, 15 C.R. (3d) 219 (5:0) where it was held that the trial judge did not err in dealing with the contempt summarily rather than requiring the Crown Attorney to take the matter to the Attorney-General.

An accused's voluntary act in consuming a large quantity of alcohol shortly before his trial well-knowing the effect this would have on him and which would result in the court being unable to proceed with the trial constitutes contempt of court notwithstanding the accused did not intend to obstruct the course of justice: *R. v. Perkins* (1980), 51 C.C.C. (2d) 369, [1980] 4 W.W.R. 763 (B.C.C.A.).

It was held by the majority in *R. v. Flamand* (1980), 57 C.C.C. (2d) 366 (Que. C.A.) that remarks by an accused to the trial judge that he was not fit to try the case because the judge's son was a police officer and that he (the accused) no longer had confidence in the judge constituted contempt of court being deliberately calculated to bring the trial judge into contempt, lower his authority, cast discredit on the administration of justice and impede its normal course. Mayrand J.A. dissenting would have quashed the conviction on the basis that an expressed lack of confidence in a judge, if a genuinely held belief, even if not justified on a rational basis, does not constitute contempt of court. His Lordship also considered the summary manner in which the proceedings were conducted by the trial judge deprived the accused of an opportunity to present a full and complete defence. On further appeal (1982), 65 C.C.C. (2d) 192n (S.C.C.) (7:0), the dissenting judgment of Mayrand J.A. was approved and the conviction quashed.

Abusive language by an accused attributing gross insensitivity to the trial judge could be viewed as calculated to lower his authority and thus capable of constituting contempt of court: *R. v. Martin* (1985), 19 C.C.C. (3d) 248 (Ont. C.A.).

**Conduct outside of court** – Notwithstanding the accused's conduct may also have constituted the offence of attempting to obstruct justice contrary to s. 139 [R.S.C. 1985], the Crown may proceed by way of contempt of court: *R. v. Vermette* (1987), 32 C.C.C. (3d) 519, 57 C.R. (3d) 340, [1987] 1 S.C.R. 577 (4:0).

**Refusal of witness to be sworn or answer questions** – On an appeal from conviction for contempt of court in the face of the court based on a refusal to answer a question in a criminal case if it is not shown that the question was relevant then the conviction cannot stand. However, at the trial itself it is the judge not the witness who must decide whether or not the question is relevant and a witness who disagrees with the judge's ruling on relevancy nevertheless must abide by it or risk being cited for contempt. On the other hand where the witness objects to the question the trial judge ought to inquire into and determine its relevancy: *R. v. Fields* (1986), 28 C.C.C. (3d) 353, 53 C.R. (3d) 260, 56 O.R. (2d) 213 (C.A.).

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**APPEAL / Idem / Part XXI applies.**

**10. (1) Where a court, judge, justice or provincial court judge summarily convicts a**



person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal

- (a) from the conviction; or
  - (b) against the punishment imposed.
- (2) Where a court or judge summarily convicts a person for a contempt of court not committed in the face of the court and punishment is imposed in respect thereof, that person may appeal
- (a) from the conviction; or
  - (b) against the punishment imposed.
- (3) An appeal under this section lies to the court of appeal of the province in which the proceedings take place, and, for the purposes of this section, the provisions of Part XXI apply, with such modifications as the circumstances require. R.S., c. C-34, s. 9; 1972, c. 13, s. 4.

#### CROSS-REFERENCES

Section 9 preserves the common law power to punish for contempt and the notes under that section relate to the grounds of contempt of court. The notes under this section relate to procedural issues, including rights of appeal. Procedure on appeal and powers of the Court of Appeal, in appeals from summary contempt proceedings, is governed by Part XXI: procedure on appeal by indictment [notwithstanding the contempt finding was made in the course of a summary conviction proceeding]. This section would not apply to an accused convicted in summary conviction proceedings of a summary conviction offence such as the offence in s. 648 of publishing proceedings in the absence of the jury.

#### SYNOPSIS

This section creates the right to have an appeal from a conviction for contempt of court heard in accordance with the procedure for appeals in cases which have proceeded by indictment, even if the conviction for contempt of court was summary. The appeal is to be heard by the provincial court of appeal, with such modifications to the procedure on appeals from convictions on indictable offences as may be necessary.

The forms of contempt of court are discussed in a comment under s. 9, *supra*. This comment is meant to draw attention to certain procedural problems. It is first necessary to distinguish between contempt in the face of the court [*in facie*], for example, disruption of the proceedings in the courtroom, failure of counsel to attend court as required, or refusal of a witness to be sworn or to answer questions; and contempt out of the face of the court [*ex facie*], such as interference with a witness, or publication of material calculated to interfere with the fair trial of an accused. The distinction is important because, while a superior court can punish both types of contempt, an inferior court can only punish contempts committed in the face of the court. The line between the two types of contempt can be exceedingly fine. Consider the failure of counsel to appear at a criminal trial as required. While the act of non-appearance is committed in the face of the court, the reasons why counsel failed to attend court may be, and usually would be, completely outside the personal knowledge of the presiding judge. Nevertheless, since the decision in *McKeown v. The Queen*, [1971] S.C.R. 446 there can be little doubt that this conduct constitutes contempt *in facie* and is punishable by the presiding judge.

A second problem concerns the procedure by which the contempt is initiated. For contempt *in facie*, it would seem that no particular form of notice is required and even verbal notice to a person disrupting the proceedings would be sufficient, provided the alleged contemnor is sufficiently advised of the act said to constitute contempt. On the other hand, the presiding judge can leave it to some other party such as the Attorney General to initiate proceedings through some more formal process. Where the contempt is out of the face of the court and thus triable only by the superior court, some form of written notice would ordinarily be required to secure the person's attendance. The usual

notice is by way of originating notice of motion served upon the alleged contemnor and returnable in the superior court and is referred to as the summary procedure. However, it would also seem that a more formal process is available by preferring a direct indictment in the superior court. This latter form of process has fallen almost entirely into disuse, but the Supreme Court of Canada in *R. v. Vermette*, *infra* recognized that it was still available.

It seems clear that the Charter of Rights and Freedoms applies to the trial of the contempt charge whether *ex facie* or *in facie* and that, unless very unusual circumstances arise, the person must be given a reasonable opportunity to prepare a defence and to consult counsel. Further, it would seem that proof of contempt must be made out on the criminal standard and the accused would have the right to call witnesses, be represented by counsel if he wished and the right not to be compelled to be a witness. Authority is unanimous that the constitutional right to jury trial does not apply. On the other hand, it may be that, where the unusual direct indictment procedure were resorted to, the trial would have to be by jury, which was the manner of trying such contempts before use of the summary process was widely resorted to. A particular concern relates to the constitutional guarantee to trial by an independent and impartial tribunal. Some forms of contempt *in facie* involve insulting or abusive behaviour towards the presiding judge. Once the judge has restored order, which may include removal of the person from the court and citing the person for contempt, it is probably best that the actual contempt be tried by some other judge in order to preserve the appearance of fairness. It should be noted, however, that, in light of *R. v. Doz* (1987), 38 C.C.C. (3d) 479 (S.C.C.), one judge of an inferior court has no jurisdiction to try a contempt committed in the face of the court of another inferior court judge. Accordingly, if fairness requires that the inferior court judge not deal with the contempt himself then the proceedings for contempt of court would have to be taken in the superior court.

## ANNOTATIONS

**Contempt of court: Procedure / Jurisdiction of courts to try contempt of court** – At common law, superior courts have an inherent and exclusive jurisdiction to punish for contempt not committed in the face of the court while inferior courts have only a limited inherent jurisdiction to punish for contempt in the face of court. Inferior courts which are not courts of record have no power to punish for contempt unless such power is conferred by statute. Violation of an order of the Quebec Police Commission prohibiting publication of the photograph of a witness is contempt out of the face of the court and therefore punishable only by the superior court: *Canadian Broadcasting Corp. et al. v. Cordeau et al.* (1979), 48 C.C.C. (2d) 289, [1979] 2 S.C.R. 618 (9:0).

A judge presiding at a preliminary hearing has no power to punish summarily for contempt of court a witness who refuses to answer relevant questions without reasonable excuse. The power of the judge is limited to the procedure under s. 545: *R. v. Bublely* (1976), 32 C.C.C. (2d) 79, [1976] 6 W.W.R. 179 (Alta. S.C. App. Div.).

Section 484 of this Act, however, gives the judge power to commit for contempt in the face of court in order to preserve order in his court-room: *R. v. Barker* (1980), 53 C.C.C. (2d) 322, [1980] 4 W.W.R. 202 (Alta. C.A.).

A provincial court judge exercising the jurisdiction to try an indictable offence under Part XIX does have an inherent jurisdiction to punish for contempt committed in the face of the court, such as the wilful refusal of a witness to testify: *R. v. Dunning* (1979), 50 C.C.C. (2d) 296 (Ont. C.A.); *Re Layne and The Queen* (1984), 14 C.C.C. (3d) 149, [1984] 6 W.W.R. 108 (B.C.S.C.). *Contra*: *R. v. Heer* (1982), 68 C.C.C. (2d) 333, 38 B.C.L.R. 176 (S.C.).

Similarly a provincial court judge presiding at a trial of an accused for a summary conviction offence under Part XXVII constitutes a court of record and has power to punish for contempt of court committed in the face of the court, such as the refusal of a witness

to answer relevant questions: *R. v. Fields* (1986), 28 C.C.C. (3d) 353, 53 C.R. (3d) 260, 56 O.R. (2d) 213 (C.A.).

It was held in *Vaillancourt v. The Queen* (1981), 58 C.C.C. (2d) 31, 19 C.R. (3d) 178, [1981] 1 S.C.R. 69 (5:0), that a judge presiding in the criminal courts has power to punish summarily as a contempt in the face of the court the refusal of a juvenile witness to testify. It was held that such a contempt is not a delinquency which could only be tried under the former Juvenile Delinquents Act but rather was the exercise of the court's inherent power which is preserved by this section. It would seem that in light of s. 47(3) of the Young Offenders Act this jurisdiction in the ordinary courts is retained but the Youth Court also has jurisdiction to try the contempt. In either case the penalty is determined by the provisions of the Young Offenders Act (see s. 47(4) of that Act).

**Initiation of contempt proceedings** – Although rarely employed, procedure by indictment for punishment of contempt *ex facie* is preserved by this section. However, the offence is triable only by the superior court and the provisions of Part IX do not apply to the trial of such offence so as to permit the accused to elect trial by provincial court judge. Finally, it would seem that where an indictment for criminal contempt is employed it would have to be by direct indictment to the superior court: *R. v. Vermette* (1987), 32 C.C.C. (3d) 519, 57 C.R. (3d) 340, [1987] 1 S.C.R. 577 (4:0).

Even where the court initiates summary procedure for contempt out of the face of the court, in a matter of interference with the administration of justice the Attorney-General has the responsibility to present the evidence and if he chooses not to adduce any evidence on the show cause hearing then the charge should be dismissed: *Hamel and Lesage v. The Queen* (1978), 9 C.R. (3d) 214 (Que. C.A.).

Criminal contempt proceedings may be brought at the instance of an individual: *Re Letourneau-Belanger and Société de Publication Merlin Ltée*, [1969] 4 C.C.C. 313, 6 C.R.N.S. 308 (Que. Q.B., App. Side) or any interested party: *R. v. Froese and B.C. Television Broadcasting System Ltd. (No. 1)* (1979), 50 C.C.C. (2d) 105, [1980] 1 W.W.R. 667 (B.C.S.C.).

The initiation of the summary process by way of an originating notice of motion for a contempt *ex facie curiae* is appropriate where the accused has broadcast inflammatory and prejudicial material at the opening of a criminal trial. Further, the hearing of the contempt motion may then be properly adjourned until the conclusion of the criminal trial so as not to further prejudice that trial. In the interim should there be any repetition of the contempt the currency of the notice of motion ensures that the accused can be immediately controlled: *R. v. Froese and British Columbia Television Broadcasting System Ltd. (No. 3)* (1980), 54 C.C.C. (2d) 315, 18 C.R. (3d) 75 *sub nom.* *R. v. Bengert et al.*; *R. v. Froese and British Columbia Television Broadcasting System Ltd. (No. 3)* (B.C.C.A.).

A citation requiring a person to show cause is not objectionable as it is a formal offer giving him an opportunity to explain and perhaps justify an apparent contempt: *Re Hill and The Queen* (1974), 18 C.C.C. (2d) 458, 27 C.R.N.S. 200 (B.C.S.C.). Appeal dismissed without reasons, 22 C.C.C. (2d) 64n, 31 C.R.N.S. 225n (B.C.C.A.).

In *Covroni v. Quebec Police Commission and Brunet et al.* (1977), 38 C.C.C. (2d) 56, 80 D.L.R. (3d) 490 (5:4) (S.C.C.), a conviction for contempt of the Commissioners was quashed because of the vagueness of the charge. It was held that where testimony is false in its entirety, a charge of perjury, and consequently of contempt, is specific enough if it simply states that. However, where as in this case the objection is not to the testimony as a whole, the charge must specify which part of the testimony is complained of. Where the complaint is the evasiveness of some of the witnesses' answers it was necessary to specify what was considered evasive.

**Procedure on trial of contempt** – As developed at common law, the summary procedure for dealing with the contempt of a witness refusing to testify at a criminal trial, does not offend the principles guaranteed by s. 7 or 11. Those principles include the right to be presumed innocent until proven guilty beyond a reasonable doubt, to be informed with-



out unreasonable delay of the specific offence with which he is charged, to have counsel, to have a reasonable time to prepare a defence, to call witnesses and not to be compelled to give evidence. He also has the right to be tried by an independent and impartial tribunal and where the contempt alleged consists of insolent or contemptuous behaviour or other disorderly conduct or behaviour which reflects adversely upon the character, integrity or reputation of the initiating judge, the charge should be tried by another judge. However, there may be very exceptional cases where the circumstances are so compelling and the need for action on the part of the presiding judge so urgent to preserve the order and protect the authority of the court that some limitation on such rights, particularly with respect to time, may be justified: *R. v. Cohn* (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused March 14, 1984.

However, the fact that the witness was the last witness for the Crown was not such a compelling circumstance as required infringement of the accused's rights, particularly an opportunity to consult counsel and prepare the defence to a charge of contempt for refusing to testify. The major inducement to a recalcitrant witness to give evidence is the knowledge that his actions may constitute contempt of court, and if found in contempt he may be sentenced to a substantial term of imprisonment. In those cases where a witness refuses to be sworn or to testify, the trial judge is always in a position to threaten that he will cite the proposed witness for contempt and to warn him that if he is found in contempt he may be sentenced to imprisonment. If, however, after repeated appearances and repeated warnings, the witness still refuses to testify it is most unlikely that a finding of contempt by the trial judge would induce such witness to testify. Once he has been sentenced, there is no longer any effective inducement as the court cannot vary a sentence once it is imposed: *R. v. Ayres* (1984), 15 C.C.C. (3d) 208, 42 C.R. (3d) 33 (Ont. C.A.).

While *instant* summary contempt procedures may be justified in some exceptional cases, in most circumstances, natural justice requires the usual steps of putting the witness on notice that he or she must show cause why they should not be found in contempt of court, followed by an adjournment which need be no longer than that required to offer the witness an opportunity to be advised by counsel and, if he or she chooses, to be represented by counsel. In addition, upon a finding of contempt, there should be an opportunity to have representations made as to the appropriate sentence: *R. v. K.(B.)*, [1995] 4 S.C.R. 186, 102 C.C.C. (3d) 18, 43 C.R. (4th) 123 (S.C.C.).

A person cited for civil contempt who is liable to be imprisoned for up to one year cannot be compelled to testify at the contempt proceedings: *Vidéotron Ltée v. Industries Microlec Produits Electroniques Inc.* (1992), 76 C.C.C. (3d) 289, [1992] 2 S.C.R. 1065, 96 D.L.R. (4th) 376.

Proceedings for contempt of court arising out of abusive remarks by the accused to the trial judge after he convicted her, having made adverse findings of credibility, ought not to have been tried by that same judge. In the circumstances, the accused could have a reasonable apprehension of bias and her rights under s. 11(d) of the Charter of Rights were infringed: *R. v. Martin* (1985), 19 C.C.C. (3d) 248 (Ont. C.A.).

Where there are contradicted facts relating to matters essential to a decision as to whether or not a party is in contempt of court, those facts cannot be found by an assessment of the credibility of deponents of affidavits who have not been seen or heard by the trier of fact: *R. v. Jetco Manufacturing Ltd. and Alexander* (1987), 31 C.C.C. (3d) 171, 57 O.R. (2d) 776 (C.A.).

A trial judge needs nothing more than cognizance of a person's statement or conduct before his court to convict summarily: *R. v. Vallieres (No. 2)* (1973), 17 C.C.C. (2d) 361, 47 D.L.R. (3d) 363 (Que. C.A.).

An accused cited for contempt of court has the right to make full answer and defence and where he is, by reason of intoxication, not in a fit state to defend himself, then the judge cannot proceed with the hearing: *R. v. Jolly* (1990), 57 C.C.C. (3d) 389 (B.C.C.A.).



**Right to jury trial** – A witness cited for contempt of court is “charged with an offence” within the meaning of s. 11 of the Charter of Rights and Freedoms and therefore is entitled to the rights guaranteed by that section as well as to fundamental justice under s. 7. However, the summary procedure is not an unconstitutional derogation from the right to a jury trial as guaranteed by s. 11(f) since the offender is subject only to a punishment of less than five years’ imprisonment: *R. v. Cohn* (1984), 15 C.C.C. (3d) 150, 42 C.R. (3d) 1 (Ont. C.A.); *R. v. Robinson-Blackmore Printing & Publishing Co. Ltd.* (1989), 47 C.C.C. (3d) 366, 73 Nfld. & P.E.I.R. 46 (Nfld. S.C.). Similarly: *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217, 113 D.L.R. (4th) 368, 90 B.C.L.R. (2d) 24 (C.A.).

A person before the superior court on a summary motion to have him cited for contempt is not “charged with an offence” within the meaning of s. 11(f) of the Canadian Charter of Rights and Freedoms so as to have the benefit of a jury trial as guaranteed by that provision: *A.-G. Que. v. Laurendeau* (1982), 3 C.C.C. (3d) 250, 33 C.R. (3d) 40 (Que. S.C.); *A.-G. Man. v. Groupe Quebecor Inc.* (1987), 37 C.C.C. (3d) 421, 59 C.R. (3d) 1, [1987] 5 W.W.R. 270, 47 Man. R. (2d) 187 (C.A.).

The summary procedure for trying contempt of court is a reasonable limitation on the right to a jury trial as provided for in s. 11(f) of the Charter of Rights and Freedoms: *Re Layne and The Queen*, *supra*.

**Appeal** – Where the trial judge made an order for costs against defence counsel personally, there was a right of appeal. The jurisdiction to impose such a penalty could only be consequent upon a finding of contempt and therefore, the trial judge was effectively exercising contempt powers: *R. v. McCullough* (1995), 24 O.R. (3d) 239, 82 O.A.C. 63 (C.A.).

## CIVIL REMEDY NOT SUSPENDED.

**11. No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence. R.S., c. C-34, s. 10.**

## SYNOPSIS

This section states that parties may pursue civil remedies notwithstanding the fact that the same act or omission giving rise to the civil proceeding is also a criminal offence. Courts retain their inherent jurisdiction to protect their process and may, in an exceptional case, stay the civil proceedings until the conclusion of the criminal trial, to protect the accused’s right to a fair trial.

## ANNOTATIONS

In *British Acceptance Corporation Ltd. v. Belzberg et al.* (1962), 36 D.L.R. (2d) 587, 39 C.R. 72 (Alta. S.C.), it was held that there was no general principle in Canada preventing the simultaneous trial of criminal and civil proceedings. A stay may be granted for either of the proceedings if simultaneous action would be vexatious but that is entirely discretionary.

Concurrent criminal and civil proceedings against a person is not in itself an exceptional cause for staying the latter proceedings: *Stickney v. Trusz* (1973), 16 C.C.C. (2d) 25, 25 C.R.N.S. 257 (Ont. H.C.J.). Affd 17 C.C.C. (2d) 478n, 28 C.R.N.S. 125 (Div. Ct.), affd 17 C.C.C. (2d) 480n, 46 D.L.R. (3d) 82n (C.A.).

## OFFENCE PUNISHABLE UNDER MORE THAN ONE ACT.

**12. Where an act or omission is an offence under more than one Act of Parliament, whether punishable by indictment or on summary conviction, a person who does the act or makes the omission is, unless a contrary intention appears, subject to proceedings under any of those Acts, but is not liable to be punished more than once for the same offence. R.S., c. C-34, s. 11.**

## CROSS-REFERENCES

As to an *autrefois* plea, see ss. 7(6), 607 to 610 of the Code and s. 11(h) of the Charter of Rights and Freedoms. As to the abuse of process generally, see notes following s. 579. As to the common law rule precluding multiple convictions for same *delict*, the “*Kienapple*” rule and common law principles of *res judicata* and issue estoppel, see notes following s. 613.

## ANNOTATIONS

This section does not modify the scope of *res judicata* which precludes multiple convictions for the same *delict*, although the matter is the basis of two separate offences: *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 26 C.R.N.S. 1 (5:4) (S.C.C.) Folld: *Dore v. A.-G. Can. (No. 2)* (1974), 17 C.C.C. (2d) 359, 27 C.R.N.S. at p. 258 (S.C.C.) (8:1).

Also see notes under s. 613, *infra*.

## CHILD UNDER TWELVE.

**13. No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years. R.S., c. C-34, s. 12; 1980-81-82-83, c. 110, s. 72.**

## CROSS-REFERENCES

Note that s. 23.1 provides that an accused may be convicted as a party, or accessory after the fact under ss. 21 to 23, notwithstanding that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists, cannot be convicted of the offence.

Trial of offences committed by young persons aged 12 to 17 years is governed by the Young Offenders Act [unless the case is transferred to the ordinary courts pursuant to s. 16 of the Young Offenders Act].

A person's age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

## SYNOPSIS

No child under 12 years of age may be held criminally accountable. The age of 12 represents a relatively recent increase from the common law rule which established age seven as the start of accountability. Below this age, provincial child welfare legislation may apply to children who are involved in criminal activity.

## ANNOTATIONS

The reference to age in this section is to chronological age not “mental age”. Thus, this section does not bar the trial of a mentally retarded adult, nor do such proceedings violate s. 15 of the Charter: *R. v. Sawchuk* (1991), 66 C.C.C. (3d) 255, [1991] 5 W.W.R. 381, 6 W.A.C. 311 (Man. C.A.), leave to appeal to S.C.C. refused 67 C.C.C. (3d) vi, 137 N.R. 385n.

## CONSENT TO DEATH.

**14. No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given. R.S., c. C-34, s. 14.**

## CROSS-REFERENCES

For the offences of murder and manslaughter see ss. 222 to 240. The offence of counselling or aiding suicide is set out in s. 241.

## SYNOPSIS

This section states that *no* one has the *right to consent* to have death inflicted on him. In

addition, if a person causes the death of another, the consent of the deceased does not provide the person who caused the death a defence to criminal responsibility.

### ANNOTATIONS

Notwithstanding this section, in the case of a genuine suicide pact, the surviving party should have a defence to murder. This defence will only be available when the parties are in such a mental state that they have formed a common and irrevocable intent to commit suicide together simultaneously and by the same act where the risk of death is identical and equal for both. The survivor may, however, be liable to be convicted of the offence contrary to s. 241: *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143, 24 C.R. (4th) 369, [1993] R.J.Q. 1716 (C.A.).

### OBEDIENCE TO *DE FACTO* LAW.

**15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs. R.S., c. C-34, s. 15.**

### CROSS-REFERENCES

This provision does not apply to trials of war crimes and crimes against humanity: s. 7(3.74). Note also the provisions of s. 269.1(3) which limit the availability of the defence of obedience to superior orders, etc., to the offence of torture. This provision is of quite limited application and provisions similar to it were originally enacted in England to protect persons serving the King *de facto* who might turn out to be on the wrong side of a civil war, and to make it clear that it was not treason to the successful claimant to the throne to have faithfully served the then reigning monarch.

In present times, a more relevant defence may be the emerging defence of officially induced error noted under s. 19, *infra*.

### SYNOPSIS

This provision states that obedience to the laws, for the time being, made and enforced by those who are *de facto* in possession of the sovereign power in and over the place where the acts or omissions occur will prevent a conviction – unless a specific exception is made in the provision creating the offence.

### ANNOTATIONS

This section does not afford a defence to a movie theatre, that, in compliance with provincial legislation, received approval for public showing of a film later alleged by the Crown to be obscene: *R. v. Daylight Theatre Company Ltd.* (1973), 13 C.C.C. (2d) 524, 41 D.L.R. (3d) 236 (Sask. C.A.). Folld: *R. v. McFall et al.* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.), although evidence of the provincial censor as to why he approved the film is relevant to the issue of whether in fact the film was obscene. Similarly, on a charge of distributing obscene publications, this section has no application notwithstanding the offending publications were first cleared through customs: *R. v. 294555 Ontario Ltd.* (1978), 39 C.C.C. (2d) 352 (Ont. C.A.), 61 D.L.R. (4th) 85, 69 O.R. (2d) 557.

The discretion to remove the defence provided by this section in the case of war crimes and crimes against humanity by s. 7(3.74) does not infringe ss. 7 and 15 of the Charter of Rights: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.C.R. (4th) 265.

### DEFENCE OF MENTAL DISORDER / Presumption / Burden of Proof.

**16. (1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of**



appreciating the nature and quality of the act or omission or of knowing that it was wrong.

(2) Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.

(3) The burden of proof that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party that raises the issue. R.S. c. C-34, s. 16; 1991, c. 43, s. 2.

#### CROSS-REFERENCES

This section deals with the defence of mental disorder. Where that defence is made out, the trier of fact is required to deliver a verdict of not criminally responsible on account of mental disorder: s. 672.34. As to the disposition hearing subsequent to a verdict of not criminally responsible on account of mental disorder or unfit to stand trial, see ss. 672.45 to 672.52. As to dispositions by a court or review board, see ss. 672.54 to 672.63. As to review of dispositions, see ss. 672.81 to 672.85. As to remand for assessment, see ss. 672.11 to 672.2. As to trial of issue of fitness to stand trial, see ss. 672.22 to 672.33. As to review boards, see 672.38 to 672.44. As to dual status offender, see ss. 672.67 to 672.71. As to appeals, see ss. 672.72 to 672.8. As to interprovincial transfers, see ss. 672.86 to 672.89. As to application of Part XX.1 to young offenders, see s. 13.2 of the Young Offenders Act. Mental disorder is defined in s. 2.

#### SYNOPSIS

The newly enacted provisions are effectively identical to the previous s. 16 except for terminology which replaces the concept of insanity with the phraseology “mental disorder”. The new terminology, however, still codifies the common law test of insanity, now termed mental disorder. Subsection (1) sets out the long-standing principle of criminal law that no person who committed an offence while suffering a mental disorder may be convicted. Subsection (1) also restates, with one significant modification, the common law rule developed in nineteenth century England in the *McNaughten* case. This is a legal and not a medical test although expert psychiatric and psychological evidence is almost invariably used to assist in making the determination. Subsection (2) sets out the presumption of sanity until the contrary is proven on the balance of probabilities and subsection (3) requires the party raising the issue of mental disorder to bear the burden of proof.

The first arm of the test is that the accused is proved to be suffering from a mental disorder which replaces the concepts of “natural imbecility” and “disease of the mind” contained in the prior definition of insanity. These principles, however, are incorporated by virtue of the generic term “mental disorder”. To be found to be suffering from a mental disorder, the accused must meet one of two tests: the mental disorder must have rendered them incapable (1) of appreciating the nature and quality of the act or omission or (2) of knowing that an act or omission is wrong.

Subsection (3) of the previous legislation which stated that a person “who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person” is now subsumed under the definition of “mental disorder” contained in subsection (1). Consequently, a person who suffers from a delusion to the point where it renders them incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong will be characterized as suffering from a “mental disorder”.

Subsections (2) and (3) of the new provisions speak to the presumption of sanity and the burden of proof on the balance of probability which must be borne by the party raising the issue.



## ANNOTATIONS

**Note:** Most of the cases below were decided under the predecessor legislation. The two significant changes to the legislation are to replace the term "insane" with the term "not criminally responsible" and to replace the term "state of natural imbecility or has disease of the mind" with the term "mental disorder". However, "mental disorder" is defined in s. 2 as meaning a **disease of the mind** and so it is believed that much of the case-law decided under the predecessor legislation is applicable to the new provision.

**Meaning of "disease of the mind"** – The term "disease of the mind" is a legal concept and it is therefore a question of law for the trial Judge what mental conditions are included within the term as is the question whether there is any evidence that the accused suffered from an abnormal mental condition comprehended by that term. Any malfunctioning of the mind, or mental disturbance having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a disease of the mind if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept. In particular, the ordinary stresses and disappointments of life, though they may bring about malfunctioning of the mind such as a dissociative state, do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a disease of the mind and could not form the basis of a defence of non-insane automatism: *R. v. Rabey* (1977), 37 C.C.C. (2d) 461, 79 D.L.R. (3d) 414 (Ont. C.A.), affd 54 C.C.C. (2d) 1, [1980] 2 S.C.R. 513, 15 C.R. (3d) 225 (4:3).

The term "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion. Thus personality disorders may constitute disease of the mind. The word "appreciates" imports a requirement beyond mere knowledge of the physical quality of the act and requires a capacity to apprehend the nature of the act and its consequences: *Cooper v. The Queen* (1980), 51 C.C.C. (2d) 129, [1980] 1 S.C.R. 1149, 13 C.R. (3d) 97 and 18 C.R. (3d) 138 (5:2) where the decisions of the Ontario Court of Appeal in *R. v. Rabey*, *supra*, and *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507 were referred to with approval.

A mental disorder may still constitute a disease of the mind even if it is not prone to recur. "Disease of the mind" includes any medically recognized mental disorder or mental illness that could render a person incapable of appreciating the nature and quality of his act, or of knowing that it is wrong, save for transient mental disturbances caused by external factors such as violence or drugs: *R. v. Oakley* (1986), 24 C.C.C. (3d) 351 (Ont. C.A.).

Where the accused is in a state of automatism to which a disease of the mind is a contributing factor then his defence is insanity, not non-insane automatism, even if there were other factors such as consumption of alcohol and a physical illness which were contributing factors: *R. v. Revell* (1979), 48 C.C.C. (2d) 267 (Ont. C.A.), affd 61 C.C.C. (2d) 575, 21 C.R. (2d) 162, [1981] 1 S.C.R. 576 (9:0).

The term "automatism" as comprehended by the defence of non-insane automatism means an unconscious, involuntary act where the mind does not go with what is being done. It does not include the case of an accused who by reason of delusions did not have the capacity to form a rational judgment or who under the dominance of delusions which distorted his perception of reality considered that he had no choice other than to what he did: *R. v. Oakley*, *supra*.

In *R. v. Parks* (1992), 75 C.C.C. (3d) 287, [1992] 2 S.C.R. 871, 15 C.R. (4th) 289 (8:0) the court held that, on the evidence in this case, the trial judge properly held that the accused's sleepwalking or somnambulism was not a disease of the mind and, therefore, only the defence on non-insane automatism should be left to the jury. Whether or not a particular mental condition is a disease of the mind is a legal term not a medical

term of art since it contains a substantial legal or policy component. This policy component relates in part to whether the condition makes the accused a continuing danger and whether the condition is a result of some internal cause. The evidence in this case was to the effect that there was no likelihood of recurrent violent somnambulism making a finding of insanity less likely. As well, the internal cause theory was not readily applicable. Other policy considerations such as the possibility that the condition is easily feigned or that recognition of somnambulism as non-insane automatism will open the floodgates to a cascade of sleepwalking defence claims were not persuasive. In another case, the medical evidence might show that the accused's condition did amount to a disease of the mind.

The syndrome known as delirium tremens, brought about by prolonged and chronic, albeit voluntary, consumption of alcohol, is a "disease of the mind" within the meaning of this section of the Criminal Code. While "disease of the mind" does not include the ordinary effects of drunkenness, there is a distinction between drunkenness and a disease of the mind such as delirium tremens. The latter is not self-induced in the way of drunkenness, but is the supervening result of abuse of alcohol over an extended period of time: *R. v. Malcolm* (1989), 50 C.C.C. (3d) 172, 71 C.R. (3d) 238, [1989] 6 W.W.R. 23 (Man. C.A.).

**Meaning of "appreciating" and "knowing"** – In using the two words "appreciating" and "knowing", Parliament clearly intended that different tests be used. The verb "know" has a positive connotation requiring a base awareness while "appreciate" involves a further step of analysis of knowledge or experience: *R. v. Barnier* (1980), 51 C.C.C. (2d) 193, [1980] 1 S.C.R. 1124, 13 C.R. (3d) 129 (7:0), affg 37 C.C.C. (2d) 508, [1978] 1 W.W.R. 137 (B.C.C.A.). And see: *R. v. Baltzer* (1979), 27 C.C.C. (2d) 118, 10 N.S.R. (2d) 561 (S.C. App. Div.) and *R. v. Simpson, infra*.

Appreciation of the nature and quality of the act refers to an incapacity by reason of disease of the mind to appreciate the physical consequences of the act. Thus, an accused could not rely on this branch of the insanity defence where he was aware that he was killing the victim and knew that killing was a crime, although he believed that the victim was "Satan" and that in killing the deceased he was acting on divine orders. On the other hand, an accused, who by reason of disease of the mind was acting under such a delusion, would be entitled to a finding of insanity on the basis that he did not know the act was wrong in view of the expanded definition given the term "wrong" in *R. v. Chaulk, infra*: *R. v. Landry* (1991), 62 C.C.C. (3d) 117, 2 C.R. (4th) 268, [1991] 1 S.C.R. 99 (7:0).

Although personality disorders or psychopathic personalities are capable of constituting a disease of the mind the defence of insanity is not made out where the accused has the necessary understanding of the nature, character and consequences of the act, but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feeling stems from disease of the mind: *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507 (Ont. C.A.).

This part of the judgment in *R. v. Simpson, supra*, was approved in *Kjeldsen v. The Queen* (1981), 64 C.C.C. (2d) 161, 24 C.R. (3d) 289 (S.C.C.) (9:0).

A delusion which renders the accused incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not render him incapable of appreciating the nature and quality of the act within the meaning of this section so as to give rise to the insanity defence. While the concept of appreciating the nature and quality of an act requires an understanding of the consequences of the act, this refers to the physical consequences of the act: *R. v. Abbey* (1982), 68 C.C.C. (2d) 394, 29 C.R. (3d) 193, [1982] 2 S.C.R. 24 (9:0).

In *R. v. Wolfson*, [1965] 3 C.C.C. 304, 46 C.R. 8, (Alta. S.C. App. Div.), it was held that evidence of an irresistible impulse is not, by itself, enough to support a finding of insanity under this section.

**Meaning of "wrong"** – The term "wrong" in subsec. (2) means "morally wrong" and

not simply "legally wrong". The court must determine whether the accused, because of a disease of the mind, was rendered incapable of knowing that the act committed was something that he ought not to have done. Thus, the inquiry cannot terminate with the discovery that the accused knew that the act was contrary to the formal law. A person may know that the act was contrary to law and yet, by reason of a disease of the mind, be incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society: *R. v. Chaulk* (1990), 62 C.C.C. (3d) 193, 2 C.R. (4th) 1, [1991] 2 W.W.R. 385 (S.C.C.).

The inquiry under this section focuses not on a general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances. The accused must not only possess the intellectual ability to know right from wrong in an abstract sense but must possess the ability to apply that knowledge in a rational way to the alleged criminal act. The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice of whether to do it or not. The accused would not be criminally responsible where, by reason of delusions, he perceives an act which is wrong as right or justifiable, and the disordered condition of his mind deprives the accused of the ability to rationally evaluate what he is doing. It is not necessary to show that, if the delusions were true, a specific defence such as self-defence would also apply: *R. v. Oommen*, [1994] 2 S.C.R. 507, 91 C.C.C. (3d) 8, 30 C.R. (4th) 195.

**Mental illness short of insanity** – Our Criminal Code does not recognize the defence of diminished responsibility and even though the accused may have been ill at the time of the offence he is technically sane if he was able to distinguish between right and wrong: *Chartrand v. The Queen* (1975), 26 C.C.C. (2d) 417, 64 D.L.R. (3d) 145 (S.C.C.) (8:0).

Nevertheless where the accused is charged with an offence which requires proof of a specific intent, evidence that the accused was suffering from mental illness or mental disorder, though falling short of proof of insanity, may negative the requisite specific intent, as in the case of murder reduce the charge to manslaughter: *R. v. Baltzer*, *supra*. And to the same effect: *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *R. v. Meloche* (1975), 34 C.C.C. (2d) 184 (Que. C.A.); *R. v. Lechasseur* (1977), 38 C.C.C. (2d) 319 (Que. C.A.); *R. v. Browning* (1976), 34 C.C.C. (2d) 200 (Ont. C.A.); *R. v. Leblanc* (1991), 4 C.R. (4th) 98, [1991] R.J.Q. 686 (C.A.); *R. v. Wright* (1979), 48 C.C.C. (2d) 334, 11 C.R. (3d) 257 (Alta. S.C. App. Div.), leave to appeal to S.C.C. refused October 22, 1979.

Where evidence is adduced in support of a defence of insanity to a charge of first degree murder, the jury is to be directed to first consider that defence. If that defence fails, then the jury should consider all the evidence in the case, including relevant evidence which was adduced in support of the insanity defence to determine whether the accused had the relevant intent for murder and, if so, whether the killing was planned and deliberate: *R. v. Allard* (1990), 57 C.C.C. (3d) 397, 78 C.R. (3d) 228, [1990] R.J.Q. 1847 (C.A.).

**Procedure** – Where the accused seeks to introduce evidence to support a defence of automatism, whether insane or non-insane automatism, a *voir dire* should not be resorted to where the evidence is relevant and not subject to rejection on any recognized legal ground. The evidence should be led before the jury and at the end of the case it will be for the trial Judge to instruct the jury whether there is any evidence which will support the particular defence: *R. v. Sproule* (1975), 26 C.C.C. (2d) 92, 30 C.R.N.S. 56 (Ont. C.A.).

The accused may raise the defence of insanity at any time during the trial and in fact may raise the defence after the trier of fact has found the accused guilty but prior to conviction. If, during the course of the trial, prior to the finding of guilt, evidence is led which does not satisfy the trier of fact of insanity under this section, such evidence may nevertheless be considered on the issue of whether the accused had the requisite *mens*



*rea: R. v. Swain* (1991), 63 C.C.C. (3d) 481, 5 C.R. (4th) 253, 3 C.R.R. (2d) 1 (S.C.C.) (6:1).

Section 650(3) which gives the accused the right “after the close of the case for the prosecution” to make full answer and defence must apply to evidence given by way of rebuttal as well as to that given during the Crown’s case in chief. Accordingly, it was held in *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 (B.C.C.A.), that the rules regarding the permissible scope of surrebuttal must be applied liberally in favour of the accused, where the accused relied on the defence of insanity and evidence to rebut that defence was first given by the Crown in rebuttal.

Where the trial judge is of the view that there is no evidence to support the defence of insanity, he should so inform counsel prior to their making their jury addresses: *R. v. Charest* (1990), 57 C.C.C. (3d) 312, 76 C.R. (3d) 63, 28 Q.A.W. 258 (C.A.).

Even where the Crown has notice that the accused intends to rely on the insanity defence as provided in this section, the Crown need not adduce evidence in chief to challenge that defence. The Crown was therefore properly permitted to adduce its evidence with respect to sanity in rebuttal. The accused suffered no prejudice as he was given the opportunity for surrebuttal: *R. v. Chaulk, supra*.

**Expert evidence** – The placing of the crucial question of the accused’s state of mind to the expert witness, while ordinarily framed as a hypothetical question may, if the facts are uncontradicted be put in direct form. This discretion of the trial judge was confirmed in *Bleta v. The Queen*, [1965] 1 C.C.C. 1, 44 C.R. 193 (S.C.C.) (5:0), *per* Ritchie J., at p. 6 C.C.C., p. 198 C.R.: “Provided that the questions are so phrased as to make clear what the evidence is on which an expert is being asked to found his conclusion, the failure of counsel to put such questions in hypothetical form does not of itself make the answers inadmissible. It is within the competence of the trial Judge in any case to insist upon the foundation for the expert opinion being laid by way of hypothetical question if he feels this to be the best way in which he can be assured of the matter being fully understood by the jury, but this does not, in my opinion, mean that the Judge is necessarily precluded in the exercise of his discretion in the conduct of the trial from permitting the expert’s answer to go before the jury if the nature and foundation of his opinion has been clearly indicated by other means.”

While an expert opinion based on second-hand evidence is admissible, if relevant, the facts asserted in this second-hand evidence are not admissible for their truth. Thus, while medical experts are entitled to take into consideration all possible information in forming their opinions, “this in no way removes from the party tendering such evidence the obligation of establishing, through properly admissible evidence, the factual basis on which such opinions are based.” *R. v. Abbey, supra*.

Provided there is some admissible evidence to establish the foundation for the expert opinion, a trial judge cannot subsequently instruct the jury to completely ignore the testimony. Where the factual basis of an expert opinion is a mixture of admissible and second-hand (hearsay) evidence the duty of the trial judge is to caution the jury that the weight attributable to the expert testimony is directly related to the amount and quality of admissible evidence on which the opinion depends: *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97, [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1 (7:0). See also *R. v. Skrzydlewski* (1995), 103 C.C.C. (3d) 467, 87 O.A.C. 174 (C.A.).

On the other hand, not all “second-hand” evidence is hearsay and thus, statements of a preposterous nature by an accused may be relevant to the issue of insanity and may be original evidence on that issue. For example, utterances by the accused manifesting a delusion or hallucination are not used to prove any fact asserted in them, but as circumstantial evidence to support an inference that the accused suffers from delusions or hallucinations. While such statements may be feigned, whether they indicate an actual mental state must be determined by the court, usually with the assistance of experts: *R. v. Kirkby, supra*.

An expert may be cross-examined to determine what the expert considered relevant,



whether there are matters relevant that were not considered and whether the expert might have arrived at his conclusion as a result of considerations irrelevant to his particular expertise. Since an expert cannot take into account facts that are not subject to his professional expert assessment, he cannot be cross-examined and asked to take such facts into account. Further, it is not open to the cross-examiner or examiner to put as a fact or even a hypothetical fact, that which is not and will not become part of the case as admissible evidence: *R. v. Howard* (1989), 48 C.C.C. (3d) 38, [1989] 1 S.C.R. 1337, 69 C.R. (3d) 193 (3:1).

Where counsel requires the services of an expert in order to assist him in preparing the defence, communications between the accused and the expert are covered by solicitor-client privilege. There is no requirement that counsel be present during the examination. Where defence counsel, however, subsequently calls the expert, he may be required to disclose his communications with the accused. This is because the accused, by calling as a witness in his defence a psychiatrist, whose opinion was based at least in part on what the accused has confided in him, thereby waived privilege: *R. v. Perron* (1990), 54 C.C.C. (3d) 108, 75 C.R. (3d) 382, [1990] R.J.Q. 752 (C.A.).

Where statements by the accused are adduced through cross-examination of defence experts or through examination of experts retained by the Crown solely for their bearing on the expert opinion and not as evidence of their truth on which the jury could act independently, then no issue of voluntariness arises: *R. v. Stevenson* (1990), 58 C.C.C. (3d) 464 (Ont. C.A.).

**Confession of "insane" accused** – While the correct test for admissibility of the confession of an insane accused may be framed *per R. v. Ward* (1979), 44 C.C.C. (2d) 498, [1979] 2 S.C.R. 30, 7 C.R. (3d) 153, as to whether it represents the "operating mind" of the accused, this is not the only word formula for testing the admissibility of an insane accused's statements to the police. Thus in *R. v. Nagotcha* (1980), 51 C.C.C. (2d) 353 (S.C.C.) (9:0), the trial Judge's ruling admitting the statements was upheld where he found that the accused, who at the time of the making of the statements was a paranoid schizophrenic and unfit to stand trial, was not "so devoid of rationality and understanding, or so replete with psychotic delusions that his uttered words could not be fairly be said to be his statements at all". Also see: *R. v. Whittle* (1994), 92 C.C.C. (3d) 11, 32 C.R. (4th) 1, 116 D.L.R. (4th) 416 (S.C.C.) noted under s. 10 of the Charter, *infra*.

**Subsec. (3)** – It was held in *R. v. Chaulk*, *supra*, that the former s. 16(4) which also placed the burden on the accused to prove the defence on a balance of probabilities while infringing the presumption of innocence guarantee in s. 11(d) of the Charter was a reasonable limit and therefore valid.

**Adverse influence from failure to submit to examination** – Where the accused relies on the defence of insanity, although he is not required to submit to psychiatric examination by a psychiatrist retained by the Crown, evidence of such refusal is admissible and an inference adverse to the accused may be drawn from such refusal: *R. v. Sweeney* (No. 2) (1977), 35 C.C.C. (2d) 245, 76 D.L.R. (3d) 211 (Ont. C.A.).

Further, the drawing of the adverse inference does not infringe the accused's right to fundamental justice under s. 7 of the Charter: *R. v. Worth* (1995), 98 C.C.C. (3d) 133, 40 C.R. (4th) 123, 23 O.R. (3d) 211 (C.A.).

The defence decision to permit access to the accused by a Crown psychiatrist is imbued with a use limitation restricted by the character of the disclosure impelled by the principle that an accused, who raises an issue of diminished intent or mental disorder and refuses to see a Crown psychiatrist, may suffer an adverse inference. The Crown may not lead evidence from its psychiatrist in-chief to prove the identity of the accused by virtue of statements made by the accused during the interview: *R. v. Brunczlik* (1995), 103 C.C.C. (3d) 131 (Ont. Ct. (Gen. Div.)).

Where the accused, who relied on a defence of lack of specific intent, relied upon the evidence of psychiatrists retained by the defence, it was open to the Crown to adduce

evidence that the accused refused to discuss details of the offence with a psychiatrist who examined the accused on behalf of the Crown. This evidence was admissible to explain why the Crown's expert's evidence may not have been as complete as that of the defence experts. The trial judge ought however to have instructed the jury that, in not discussing the circumstances of the offence, the accused was exercising his right to remain silent and that no inference of guilt could be drawn against him on this account: *R. v. Stevenson*, *supra*.

**Right of Crown to adduce evidence of insanity** – The Crown may lead evidence of insanity only in two circumstances: (1) where the accused's own defence, in the opinion of the trial judge, has somehow put the accused's mental capacity for criminal intent in issue, in which case the trial judge will be entitled to charge on the insanity defence; and (2) after the trier of fact had concluded that the accused was otherwise guilty of the offence charged. Where the Crown is required to adduce its evidence only after the accused has been found guilty, then the jury should be instructed that the Crown does so only because this is what the law requires, not because the Crown has chosen to conduct its case in this manner: *R. v. Swain*, *supra*.

## COMPULSION BY THREATS.

17. A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280 to 283 (abduction and detention of young persons). R.S., c. C-34, s. 17; 1974-75-76, c. 105, s. 29; 1980-81-82-83, c. 125, s. 4; R.S.C. 1985, c. 27 (1st Supp.), s. 40(2).

## CROSS-REFERENCES

The offences excepted from the defence created by this section are defined in the following sections: ss. 46, 47, high treason or treason; ss. 229, 230, murder; s. 74, piracy; s. 239, attempted murder; ss. 271 to 273, sexual assault; s. 279(2), forcible abduction; s. 279.1, hostage taking; s. 343, robbery; s. 267(a), assault with weapon; s. 267(b), assault causing bodily harm; s. 268, aggravated assault; s. 269, unlawfully causing bodily harm; s. 433, arson.

## SYNOPSIS

This section exhaustively defines the scope of the defence of *duress* as it affects those who personally commit an offence. For duress to act as an excuse, the following requirements must be satisfied: (a) the threat must be of *immediate* death or bodily harm; (b) the person making the *threat* must be *present* when the offence is committed; (c) the threatened accused must *believe* that the *threats* will be carried out; and (d) the threatened accused must not be a party to a conspiracy or association whereby he is subject to compulsion. For reasons of public policy many *serious offences involving personal violence* (e.g., murder, sexual assault) or threats to public safety (e.g., arson, high treason) are exempted from the operation of this section and therefore duress will afford *no defence* to a *principal* charged with the listed offences. Cases have held that a *party may rely* on the defence of duress, notwithstanding that they were a party to one of the exempted offences listed in s. 17.

## ANNOTATIONS

**Elements of statutory defence** – There was no evidence to support a defence of duress to a charge of perjury where the accused could have informed the police of the threats he received prior to testifying and thus obtained police protection. A threat of death, from which the accused could have easily escaped and that he could have rendered unenforceable when he gave his evidence, does not give rise to the defence under this section: *R. v. Hebert* (1989), 49 C.C.C. (3d) 59, [1989] 1 S.C.R. 233, 22 Q.A.C. 101, affg 3 Q.A.C. 251, C.C.C. *loc. cit.* (C.A.).

The defence of duress to a charge of perjury was rejected where although the persons who threatened the accused were present in Court at the time the false testimony was given the accused had the opportunity to seek official protection: *R. v. Falkenberg* (1973), 13 C.C.C. (2d) 562 (Ont. Co. Ct.), revd on other grounds 16 C.C.C. (2d) 525, 25 C.R.N.S. 374 (C.A.). Cf. *R. v. Hudson and Taylor* (1971), 56 Cr. App. R. 1 (C.A.).

The offence of “forcible abduction” is not the equivalent of kidnapping. The latter offence is defined by s. 279 and therefore this section does offer a defence to a person charged with kidnapping. However, a threat that the accused’s own children would be kidnapped and taken to another country is not a threat of death or grievous bodily harm so as to give the accused a defence under this section: *R. v. Robins* (1982), 66 C.C.C. (2d) 550 (Que. C.A.).

**Availability of common law defence** – The common law defence of duress is available to a party to an offence such as murder or robbery. While that defence, if made out, excuses the commission of the offence, the existence of threats does not negate the *mens rea* of the party: *R. v. Hibbert*, [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193, 40 C.R. (4th) 141; *R. v. Paquette*, [1977] 2 S.C.R. 189, 30 C.C.C. (2d) 417, 70 D.L.R. (3d) 129.

The common law defence of duress is similar to the defence of necessity and, like necessity, can only be invoked where there is no legal way out of the situation of duress the accused faces. Accordingly, the defence is unavailable if a safe avenue of escape was available to the accused. The question of whether or not a safe avenue of escape existed is to be determined according to an objective standard. When considering the perceptions of a reasonable person, however, the personal circumstances of the accused are relevant and important and should be taken into account: *R. v. Hibbert*, *supra*.

The common law defence of duress is available to an accused who is merely a party to the offence of robbery pursuant to s. 21(1)(b) of the Criminal Code. However, more than one person may commit an offence and two persons may be guilty as joint perpetrators although one person performs one part of the crime while the other perpetrator performs the other. In either of those circumstances both accused have actually committed the offence and in the case of robbery the defence of duress would be unavailable. However, an intention to act in concert with the other person is an integral part of the doctrine that when one person commits one element of the offence and another person commits another element of the offence both are co-perpetrators of the offence. As to the elements of the common law defence, while threat of death or serious physical injury is necessary that threat may be express or implied, provided that where an implied threat is relied upon to constitute duress there must be evidence from the acts, conduct or words of the person alleged to have made the threat which could reasonably be construed as a threat of the required kind. *R. v. Mena* (1987), 34 C.C.C. (3d) 304, 57 C.R. (3d) 172 (Ont. C.A.).

The proviso in this section that the defence is unavailable where the accused was party to a conspiracy whereby he was subject to compulsion also exists at common law and therefore participation in such a conspiracy would similarly prevent an accused from relying on the common law duress defence: *R. v. Logan* (1988), 46 C.C.C. (3d) 354, 67 O.R. (2d) 87 (C.A.), affd on other grounds 58 C.C.C. (3d) 391, 73 D.L.R. (4th) 40 (S.C.C.).

**Constitutional considerations** – The requirements imposed upon an accused who actu-



ally commits one of the listed offences to successfully make out a defence of compulsion by threats under this section are so restrictive, especially the requirements that the accused must be acting under compulsion by threats of “immediate” death or bodily harm and by a person who is “present when the offence is committed”, that there is a real risk of conviction of a person who is morally blameless. The section therefore violates the fundamental justice guarantee in s. 7 of the Charter and is of no force and effect. In the result the accused may rely upon the common law defence of duress: *R. v. Langlois* (1993) 80 C.C.C. (3d) 28, 19 C.R. (4th) 87, [1993] R.J.Q. 675 (C.A.).

### COMPULSION OF SPOUSE.

**18. No presumption arises that a married person who commits an offence does so under compulsion by reason only that the offence is committed in the presence of the spouse of that married person. R.S., c. C-34, s. 18; 1980-81-82-83, c. 125, s. 4.**

### CROSS-REFERENCES

The defence of compulsion by threats is found in s. 17.

### SYNOPSIS

At common law there was an outdated presumption that a woman who committed an offence in the presence of her husband was presumed to have been coerced by him. This section abolishes this presumption.

### ANNOTATIONS

This section has abolished the antiquated common law defence of marital coercion: *R. v. Robins* (1982), 66 C.C.C. (2d) 550 (Que. C.A.).

### IGNORANCE OF THE LAW.

**19. Ignorance of the law by a person who commits an offence is not an excuse for committing that offence. R.S., c. C-34, s. 19.**

### CROSS-REFERENCES

Notwithstanding the apparent breadth of this section, certain offences by their definition allow for a colour of right defence which would include at least mistake as to the civil law, for example: s. 322, theft; s. 429, mischief and arson; s. 72, forcible entry.

### SYNOPSIS

This provision codifies the common law rule that *ignorance of the law is no excuse* for the commission of a criminal offence. This section does not affect the common law defence of mistake of fact which is preserved by s. 8. In addition, there may be a defence of officially induced error if an accused relies upon incorrect legal advice from governmental officials but the scope of this defence remains uncertain.

### ANNOTATIONS

**Ignorance of the law** – By virtue of this section, ignorance, whether of the existence of the law or of its meaning, scope or application, is no defence. Thus an accused’s ignorance that a certain drug had been added to Sch. H to the Food and Drugs Act, R.S.C. 1985, c. F-27 by Regulation which was published in the *Canada Gazette* is no defence to a charge of trafficking in that drug contrary to s. 48(1) of that Act: *R. v. Molis* (1980), 55 C.C.C. (2d) 558, [1980] 2 S.C.R. 351 (7:0). The court did however point out that the rigours of s. 19 have been relaxed where commission of the offence is dependent upon a Regulation, by s. 11(2) of the Statutory Instruments Act, 1970-71-72 (Can.), c. 38 which in effect provides that where the Regulation has not been published in the *Canada Gazette* no person shall be convicted of an offence consisting of a contravention of the



Regulation unless, *inter alia*, reasonable steps have been taken to bring the purport of the Regulation to the notice of those persons likely to be affected by it.

Where, on the trial for a provincial offence, the only possible defence an accused can put forward is his ignorance of the fact that his licence had been suspended by the provisions of the provincial statute, which constitutes a mistake of law and is therefore not available as a defence, the accused is effectively denied the defence of due diligence. In those circumstances, the offence must be characterized as absolute liability: *R. v. Pontes*, [1995] 3 S.C.R. 44, 100 C.C.C. (3d) 353, 41 C.R. (4th) 201.

**Breach of probation** – On a charge of breach of probation contrary to s. 740, where the alleged breach is commission of a criminal offence, an honest belief by the accused that he was not committing the underlying criminal offence is a defence notwithstanding this section. An accused cannot have wilfully breached his probation order through the commission of a criminal offence unless he knew that what he did constituted a criminal offence: *R. v. Docherty* (1989), 51 C.C.C. (3d) 1, 72 C.R. (3d) 1, 101 N.R. 161 (S.C.C.) (7:0).

**Officially induced error** – By virtue of this section an accused's honest belief based on reasonable inquiries of customs authorities that certain gambling devices were legal in Canada is no defence to a charge contrary to s. 202(1)(b) of the Criminal Code: *R. v. Potter* (1978), 39 C.C.C. (2d) 538 (P.E.I.S.C.).

However, in *R. v. MacDougall* (1982), 1 C.C.C. (3d) 65, 31 C.R. (3d) 1, [1982] 2 S.C.R. 605 (7:0) the Court in dealing with a provincial offence referred to this section as “no more than a codification of the common law rule” and applicable to the provincial prosecution. Ritchie, J., for the Court then continued: “It is not difficult to envisage a situation in which an offence could be committed under mistake of law arising because of, and therefore induced by, ‘officially induced error’ and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying the reasoning adopted by Mr. Justice Macdonald”. Macdonald, J.A. had held at 60 C.C.C. (2d) 137, 46 N.S.R. (2d) 47, 10 M.V.R. 236 (C.A.) that officially induced error was a defence to the charge, in this case driving while suspended contrary to the Motor Vehicle Act, R.S.N.S. 1967, c. 191.

In *R. v. Cancoil Thermal Corp. and Parkinson* (1986), 27 C.C.C. (3d) 295, 52 C.R. (3d) 188 (Ont. C.A.), the court considered officially induced error as a defence to a provincial offence. It was held that the defence is available as a defence to a “regulatory” offence where the accused reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law.

**Mistake of fact** – Unless the statute otherwise provides, as in s. 150.1, a mistake of fact is made out if the belief is honestly, *i.e.*, genuinely held. The reasonableness or unreasonableness of the belief is merely evidence from which the trier of fact may determine whether the mistake was genuine: *R. v. Pappajohn* (1980), 52 C.C.C. (2d) 481 (S.C.C.); *R. v. Rees* (1950), 115 C.C.C. 1 (S.C.C.).

Closely related to the defence of mistake of fact is the concept of wilful blindness. The doctrine of wilful blindness is “justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry” and the defence of mistake will not be available if the accused’s mistake or ignorance falls within this doctrine: *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223, [1985] 1 S.C.R. 570, 45 C.R. (3d) 193.

Where, on the facts as he believed them to be, the accused was in fact committing a more serious offence than the offence with which he is charged then he is properly convicted of the offence, the *actus reus*, of which he committed: *R. v. Ladue*, [1965] 4 C.C.C. 264 (Y.T.C.A.).

A mistaken belief as to the type of narcotic being imported would not be a defence, but a mere belief by the accused that he was importing something illegal would not be sufficient *mens rea*: *R. v. Blondin* (1970), 2 C.C.C. (2d) 118 (B.C.C.A.).

On the other hand, the accused’s mistake as to the nature of the drug in his possession

is no defence provided that the drug is proscribed either by the Food and Drugs Act or the Narcotic Control Act: *R. v. Couture* (1976), 33 C.C.C. (2d) 74 (Ont. C.A.); *R. v. Futa* (1976), 31 C.C.C. (2d) 568 (B.C.C.A.).

It has been held that a provision of the Code [former s. 146, now repealed], which removed the defence of mistake of fact, was to that extent inconsistent with s. 7 of the Charter of Rights and Freedoms and that part of the provision was struck out: *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 6 W.W.R. 289 (S.C.C.) (5:2) [noted under the Charter, s. 7].

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#### CERTAIN ACTS ON HOLIDAYS VALID.

**20. A warrant or summons that is authorized by this Act or an appearance notice, promise to appear, undertaking or recognizance issued, given or entered into in accordance with Part XVI, XXI or XXVII may be issued, executed, given or entered into, as the case may be, on a holiday. R.S., c. C-34, s. 20; c. 2 (2nd Supp.), s. 2.**

#### CROSS-REFERENCES

Definition of “holiday”, see s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Where the time limited for doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday . . . s. 26 of the Interpretation Act. The jury’s verdict may be taken on Sunday or on a holiday, see s. 654.

#### SYNOPSIS

Warrants, summons and other forms of process created by the Criminal Code (*e.g.*, a promise to appear) may be validly issued, given or entered into on holidays. This section reverses a common law rule that prohibited the issuance and execution of process on holidays.

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### *Parties to Offences*

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#### PARTIES TO OFFENCE / Common intention.

**21. (1) Every one is a party to an offence who**

- (a) actually commits it;**
- (b) does or omits to do anything for the purpose of aiding any person to commit it;**  
**or**
- (c) abets any person in committing it.**

**(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence. R.S., c. C-34, s. 21.**

#### CROSS-REFERENCES

This section defines the liability of a person for the offence actually committed by the principal. Pursuant to s. 22, an accused is also rendered liable for offences committed by a person whom he counselled to commit an offence. A series of related provisions concern other forms of liability as follows: ss. 23, 463, accessory after the fact; ss. 24, 463, attempt; s. 465, conspiracy; s. 464, counselling offence not committed; s. 23.1, as to liability of party notwithstanding person who actually commits offence cannot be convicted.

Certain provisions deal specifically with the liability of a secondary party. For example: s. 46, treason; s. 50, failing to report treason or high treason; s. 54, assisting Canada Forces deserters; s. 56, assisting RCMP deserters; s. 129(b), failing to assist peace officer; s. 146, assisting escape;

s. 147, permitting rescue of prisoner; s. 148, assisting prisoner of war; s. 160(2), compelling person to commit bestiality; s. 167, assisting in immoral performance; ss. 170, 171, procuring or permitting sexual activity of minors; s. 201, gaming house offences; s. 210, bawdy house offences; s. 212, procuring; s. 240, accessory after the fact to murder; s. 241, counselling or aiding suicide; s. 272, party to sexual assault.

## SYNOPSIS

Section 21 sets out the *liability of principals and parties* to an offence.

Section 21(1)(a) holds an accused liable for the role as principal (or perpetrator) if the accused personally committed that offence.

Section 21(1)(b) makes an accused liable as a party for acts or omissions which are done *for the purpose* of aiding a principal to commit an offence. It is not sufficient that the acts had the effect of aiding in the commission of the offence – the purpose must be proven.

Section 21(1)(c) makes an accused liable as a party to the offence if that accused *abetted* the principal. Abetting simply means encouraging. Merely being present is not enough, unless presence is accompanied by such additional factors as the prior knowledge that the principal was going to commit the offence.

Section 21(2) extends the liability of the principal and parties beyond the wrongful act originally intended. It encompasses other offences which are committed while carrying out the original intention if the additional offence is a *probable consequence* of carrying out the original *unlawful purpose*. The key to establishing liability for the party is proving that the accused foresaw that the resulting offence was a probable consequence of carrying out the unlawful purpose agreed to. The phrase, referring to the liability of a party, “or ought to have known” has been the subject of attack under the Canadian Charter of Rights and Freedoms. See the notes below under heading “Application of Charter of Rights”.

## ANNOTATIONS

**Subsec. (1) / Liability of party generally** – Mere presence at the scene of an offence is not sufficient to ground liability under this subsection. There must be more: encouragement of the principal; an act which facilitates the commission of the offence; or an act which tends to prevent or hinder interference with accomplishment of the criminal act. Passive acquiescence is not sufficient. Presence at the scene of an offence can be evidence of aiding and abetting only if accompanied by other factors such as prior knowledge of the principal's intention to commit the offence or attendance for the purpose of encouragement: *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93, [1979] 2 S.C.R. 881, 8 C.R. (3d) 349 (4:3). And see the earlier appellate Court decisions in *R. v. Salajko*, [1970] 1 C.C.C. 352, 9 C.R.N.S. 145 (Ont. C.A.); *R. v. Clow* (1975), 25 C.C.C. (2d) 97, 8 Nfld. & P.E.I.R. 96 (P.E.I.S.C.) and *R. v. Black and six others*, [1970] 4 C.C.C. 251, 10 C.R.N.S. 17 *sub nom.* *R. v. Black et al.* (B.C.C.A.).

Where there is evidence that the offence was committed by one or more persons then it is appropriate to direct the jury as to the application of this section even on the trial of a single accused and although the identity of the other person is unknown as is the precise part played by each person. However, where there is no evidence to support the proposition that more than one person was involved then it is misdirection to charge the jury on this section: *R. v. Sparrow* (1979), 51 C.C.C. (2d) 443, 12 C.R. (3d) 158 (Ont. C.A.); *R. v. Isaac* (1984), 9 C.C.C. (3d) 289, [1984] 1 S.C.R. 74 (7:0); *Thatcher v. The Queen* (1987), 32 C.C.C. (3d) 481, 57 C.R. (3d) 97, [1987] 1 S.C.R. 652 (7:0).

The words “actually commits it” in subsec. (1)(a) include the case of an accused who commits an offence by means of an innocent agent: *R. v. Berryman* (1990), 57 C.C.C. (3d) 375, 78 C.R. (3d) 376, 48 B.C.L.R. (2d) 105 (C.A.).

To render a person liable as a party to attempted murder under this subsection, it is not sufficient that it be shown merely that the accused knew the principal offender



intended to commit some act of violence. While the party need not necessarily have knowledge of the details of the specific crime committed by the principal, he must have some knowledge of the essential nature of the offence committed by the principal. Thus, on a charge of attempted murder, the accused must know of the principal's intention to kill: *R. v. Adams* (1989), 49 C.C.C. (3d) 100, 33 O.A.C. 148 (C.A.).

The accused's liability as a party to a killing cannot be determined simply by application of a principle that the accused was party to some single ongoing transaction. In the case of an accused who aids or abets in the killing of another, the requisite intent that the aider or abettor must have in order to warrant a conviction for murder must be the same as that required of the person who actually does the killing. The person aiding or abetting the crime must intend that death ensue or intend that he or the perpetrator cause bodily harm of a kind likely to result in death and be reckless whether death ensues or not. If the intent of the aiding party is insufficient to support a conviction for murder, then the party may still be convicted of manslaughter if the unlawful act which was aided or abetted is one he knows is likely to cause some harm short of death: *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97, 1 C.R. (4th) 91, 116 N.R. 81 (S.C.C.) (5:2).

A person may be convicted of manslaughter who aids and abets another in the offence of murder, where a reasonable person in all the circumstances would have appreciated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken; *R. v. Jackson*, [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385, 26 C.R. (4th) 178.

The term "for the purpose of" is essentially synonymous with "intention" and does not require proof that the accused also desired the commission of the offence: *R. v. Hibbert*, [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193, 40 C.R. (4th) 141.

The charge "or omitted to do anything which assisted the rape" is incorrect, it should be "or omitted to do anything for the purpose of aiding such person to commit the rape": *R. v. Cosgrove* (1975), 29 C.C.C. (2d) 169 (Ont. C.A.).

Self-induced intoxication is a defence to a charge of a general intent offence where the accused's liability depends on his being a party under para. (b) or (c): *R. v. Fraser* (1984), 13 C.C.C. (3d) 292 (B.C.C.A.).

**Abetting** – "Abets" means to encourage and while it is common to speak of "aiding and abetting", the two concepts are not the same and either activity constitutes a sufficient basis of liability: *R. v. Meston* (1975), 28 C.C.C. (2d) 497, 34 C.R.N.S. 323 (Ont. C.A.).

Although subsec. (1)(c) does not provide that the words or actions must be for the purpose of abetting the person nevertheless the Crown must prove that the accused intended that the words or acts would encourage the principal: *R. v. Curran* (1977), 38 C.C.C. (2d) 151, [1978] 1 W.W.R. 255 (Alta. S.C. App. Div.), motion for leave to appeal to S.C.C. dismissed 20 N.R. 180n.

An accused who is present at the scene of the offence and who carries out no act to aid or encourage the commission of the offence may, nevertheless, be convicted as a party, if his purpose in failing to act was to aid in the commission of the offence and the accused was under a duty to act. Thus, a police officer who was the officer in charge of the lock-up could be convicted as a party to an assault committed by another officer on a prisoner. The accused was under a statutory and common law duty to protect the prisoner and his failure to act to prevent the assault may be found to have encouraged the commission of the offence: *R. v. Nixon* (1990), 57 C.C.C. (3d) 97, [1990] 6 W.W.R. 253, 78 C.R. (3d) 349 (B.C.C.A.).

**Involvement of party undetermined** – This section precludes a requirement of jury unanimity as to the particular nature of the accused's participation in the offence, whether he personally committed the offence or aided or abetted someone else to commit the offence: *Thatcher v. The Queen* (1987), 32 C.C.C. (3d) 481, 57 C.R. (3d) 97, [1987] 1 S.C.R. 652.

Where, on a charge of murder, evidence shows that the accused acted in concert pursuant to a common motive, there is no requirement that the jury be instructed that if it



could not decide which of the accused had administered the fatal beating to the deceased then all must be acquitted. In such circumstances, it is open to the jury to convict all accused as aiders or abettors although the extent of individual participation in the violence is unclear: *R. v. Wood* (1989), 51 C.C.C. (3d) 201, 33 O.A.C. 260 (C.A.).

**Conspiracy** – A person may become a party to the offence of conspiracy (as opposed to a participant in the conspiracy) by virtue of this section if for example the accused having learned of the conspiracy at any time prior to the attainment of its object encouraged the conspirators to pursue its object: *R. v. McNamara et al. (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 452-4.

**Relationship to corporate liability** – The fact that the acts of an individual accused were at law those of his corporation, which was also charged, for the purpose of imposing liability on the corporation, does not prevent the conviction of the individual accused either as a principal or as a party under this subsection: *R. v. Fell* (1981), 64 C.C.C. (2d) 456, 131 D.L.R. (3d) 105 (Ont. C.A.).

**Subsec. (2) / Application of Charter of Rights** – If the offence with which the accused is charged is one of the few for which s. 7 of the Charter requires a minimum degree of *mens rea*, then Parliament is precluded from providing for the conviction of a party to that offence on the basis of a degree of *mens rea* below the constitutionally required minimum. Thus, since it has been determined that as a constitutional requirement no one can be convicted of murder unless the Crown proves that the person had subjective foresight of the death of the victim, then a party cannot be convicted on the basis of any lesser *mens rea*. Similarly, the constitutionally required minimum for attempted murder is subjective foresight of the consequences and so the party to a charge of attempted murder cannot be convicted on any lesser *mens rea*. To the extent that subsec. (2) would allow for the conviction of a party to the offence of attempted murder or murder on the basis of objective foresight, it is of no force and effect. Accordingly, the words “or ought to have known” in subsec. (2) must be declared inoperative in such a case: *R. v. Logan* (1990), 58 C.C.C. (3d) 391, 73 D.L.R. (4th) 40, [1990] 2 S.C.R. 731; *R. v. Rodney* (1990), 58 C.C.C. (3d) 408, [1990] 2 S.C.R. 687, 79 C.R. (3d) 187.

Since there is no constitutional requirement of foresight of death for the offence of manslaughter, liability for that offence may be based on objective liability and the words “or ought to have known” are operative: *R. v. Jackson* (1991), 68 C.C.C. (3d) 385, 9 C.R. (4th) 57, 51 O.A.C. 92 (Ont. C.A.), affd [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385, 26 C.R. (4th) 178.

**Application of subsection generally** – This subsection has no application where the unlawful purpose is the same as the offence charged. This subsection covers the case where, in the absence of aiding and abetting, a person may become a party to an offence committed by another which he knew or ought to have known was a probable consequence of carrying out the unlawful purpose: *R. v. Simpson and Ochs* (1988), 38 C.C.C. (3d) 481, 62 C.R. (3d) 137, [1988] 1 S.C.R. 3, [1988] 2 W.W.R. 385 (5:0).

This subsection may be resorted to on a possession charge. The liability of the accused is not confined to s. 4(3): *R. v. Zanini*, [1968] 2 C.C.C. 1, [1967] S.C.R. 715, 2 C.R.N.S. 219 (5:0) where it was also held that an accused may be convicted as a party to the offence committed by his companions notwithstanding the charge against them had been withdrawn.

In a “gang rape” situation it was held that the trial Judge erred in leaving this subsection to the jury where there was no evidence that the accused, although present at the scene, were part of a plan to lure the victim there as part of the motorcycle gang’s initiation rites: *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93, [1979] 2 S.C.R. 881, 8 C.R. (3d) 349 (4:3).

The expression “intention in common” means only that the party and principal must

have in mind the same unlawful purpose and does not require proof of a mutuality of motives and desires between them: *R. v. Hibbert*, [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193, 40 C.R. (4th) 141.

**Liability of party for offence committed by principal** – In *R. v. Jackson*, [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385, 26 C.R. (4th) 178 the court held that the wording of this subsection did not preclude the conviction of the party of manslaughter although the principal offender was convicted of murder. If the accused party did not foresee the probability of murder by the principal offender, but a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention, the party could be found guilty of manslaughter. Liability of manslaughter under this subsection does not depend upon proof that a reasonable person would have foreseen the risk of death. [Note: The holding that the party could be convicted of a different offence than the principal appears to have been based, in part, on the theory that the words “the offence” and “that offence” in subsec. (2) refer not only to the actual offence committed by the principal offender but encompass all included offences. The court had no occasion to consider the reverse situation where it is sought to render the party liable for a more serious offence than the principal. On this latter issue, see the earlier decision in *R. v. Hebert* (1986), 51 C.R. (3d) 264, 68 N.B.R. (2d) 379 (C.A.), leave to appeal to S.C.C. refused 76 N.B.R. (2d) 360n, 72 N.R. 79n holding that where the principal was convicted of manslaughter the party could not be convicted of murder under this subsection.]

**Abandonment** – For the defence of abandonment there must be evidence of timely and reasonable unequivocal notice by the accused to his co-accused of his intention to abandon the common criminal purposes before the crime was committed: *R. v. Miller and Cockriell* (1976), 31 C.C.C. (2d) 177, 70 D.L.R. (3d) 324 (S.C.C.) (9:0).

The accused was charged with another with murder. The evidence indicated that the co-accused sexually assaulted the victim after he and the accused broke into her house, and then the co-accused strangled and suffocated the victim. In the course of the strangulation the accused told the co-accused to stop as he would kill her. This statement to the co-accused constituted timely notice that the co-accused was from that point on acting on his own and that the accused was not a party to the strangulation and suffocation. Thus even if the accused could be considered a party to the earlier sexual assault by the time of the attempted strangulation he had clearly resiled from any agreement or arrangement with the co-accused and was not party to the suffocation of the victim: *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97, 1 C.R. (4th) 91 (S.C.C.) (5:2).

**Evidence** – In *Vetrovec v. The Queen*; *Gaja v. The Queen* (1982), 67 C.C.C. (2d), 27 C.R. 304, [1982] 1 S.C.R. 811 (9:0) (affirming *R. v. Vetrovec* (1980), 58 C.C.C. (2d) 537 (B.C.C.A.)) the Supreme Court of Canada had occasion to re-examine the question of the mandatory accomplice warning. The Court held that it is no longer a rule of law that a trial Judge must direct the jury that it is dangerous to act on the uncorroborated evidence of an accomplice. An accomplice is to be treated like any other witness testifying at a criminal trial and the Judge's conduct if he chooses to give his opinion, is governed by the general rules. Thus a Judge may properly consider that he should instruct the jury that in the circumstances the jury should, as a matter of prudence, look for evidence which confirms the story of such a witness. A clear and sharp warning to attract the attention of the juror to the risks of adopting, without more, the evidence of the witness, may be appropriate. The Judge may, as well, properly illustrate from the evidence the kind of evidence which might be drawn upon by the juror in confirmation of the witness' testimony or some important part thereof. This common sense approach applies to other kinds of witnesses such as a disreputable witness of demonstrated moral lack or other situations where corroboration was required at common law. It does not of course apply where corroboration is required by statute as in s. 133.

The trial judge has a discretion to determine whether the evidence of any witness is for

some reason untrustworthy to such an extent that a warning to the jury is necessary. However, if a warning is given regarding a particular witness it is not the case that the trial judge must always go on to point out in detail evidence which is capable of corroborating that witness's testimony. While an instruction of that nature may be given in tandem with the clear sharp warning, it is not a requirement in all cases. The extent to which the trial judge should refer to potentially corroborative evidence depends upon the circumstances of the case, although it is not required, nor would it be appropriate, that the potentially corroborative evidence be reviewed exhaustively: *R. v. Bevan*, [1993] 2 S.C.R. 599, 82 C.C.C. (3d) 310, 21 C.R. (4th) 277.

The so-called co-conspirators exception to the hearsay rule that acts or declarations done in furtherance of a common criminal design are admissible against all the parties thereto applies in all situations where one person is talking or acting on behalf of another and not just when the charge is one of conspiracy: *R. v. Koufis*, [1941] S.C.R. 481, 76 C.C.C. 161.

#### PERSON COUNSELLING OFFENCE / *Idem* / Definition of "counsel".

**22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.**

**(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.**

**(3) For the purposes of this Act, "counsel" includes procure, solicit or incite. R.S., c. C-34, s. 22; R.S.C. 1985, c. 27 (1st Supp.), s. 7(1).**

#### CROSS-REFERENCES

Section 464, where the offence counselled is not committed; s. 23.1, as to liability of accused notwithstanding, person counselled cannot be convicted of the offence; s. 53(b), inciting mutiny; s. 56(a), counselling R.C.M.P. member to desert or go absent without leave; s. 62(1)(c), counselling disloyalty, mutiny, etc., of member of military forces.

#### SYNOPSIS

This section, like s. 21, defines when a person is party to an offence as a result of counselling commission of an offence.

Subsection (3) provides a non-exhaustive definition of *counsel* stating that it includes procure, solicit or incite.

Subsection (1) requires proof that the person who was *counselled* by the accused *actually was a party* to the offence counselled. If that is established, the accused is a *party* to that offence, even if it is committed in a different way than that suggested by the accused.

Subsection (2) applies when the person counselled commits an additional offence as a consequence of committing the offence originally counselled by the accused. It must be shown that the accused (counsellor) *knew or ought to have known* that the additional offence was the consequence of counselling the original offence. If the liability of the counselled accused for the additional offence is based on proof of a subjective mental element, it is doubtful that the phrase "or ought to have known" can be relied upon as a basis of liability, as it would impose liability for an objective intent upon the counsellor, which would likely be a violation of the accused's rights under ss. 7 and 11(d) of the Charter.



**ACCESSORY AFTER THE FACT / Husband or wife, when not accessory.**

**23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.**

**(2) No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting or assisting the spouse for the purpose of enabling the spouse to escape. R.S., c. C-34, s. 23; 1974-75-76, c. 66, s. 7.**

**CROSS-REFERENCES**

The punishment and classification of the offence of accessory after the fact is found in s. 463, except for accessory after the fact to murder, see s. 240. The effect of s. 463 is that the accessory's liability depends on the nature of the offence to which he or she is an accessory. For example, an accessory after the fact to the indictable offence of robbery which has a maximum punishment of life imprisonment is by virtue of s. 463(a) guilty of an indictable offence and liable to imprisonment for 14 years. The mode of trial will be determined by the nature of the offence. For example, an accessory after the fact to robbery will have an election under s. 536(2). Certain offences are, however, within the absolute jurisdiction of a provincial court judge pursuant to s. 553(b). For example, accessory after the fact to theft of goods of a value not exceeding one thousand dollars where the prosecution elects to proceed by way of indictment is pursuant to s. 553(b) within the absolute jurisdiction of a provincial court judge. Note as well that, by virtue of s. 469(b), the offences of accessory after the fact to high treason, treason or murder may be tried only by the superior court of criminal jurisdiction (defined in s. 2).

Section 23.1, liability of accessory after the fact although person assisted cannot be convicted.

Section 592, indictment of accessory after the fact, whether or not the principal has been indicted, convicted or is amenable to justice.

Section 54, specific offence for assisting, harbouring, etc., deserter or absentee without leave from Canadian Forces and s. 56(b), deserter or absentee without leave of member of R.C.M.P.

**SYNOPSIS**

It is an offence under this section to be an *accessory* after the commission of a crime.

The *actus reus* of the offence is described as *receiving, comforting or assisting* another after that person has committed an offence. The mental element requires that the accused *knew that the person assisted* has been a party to an offence and that the acts were done *for the purpose* of assisting that person to escape. Proof that the acts had the effect of assisting the party to the prior offence to escape is not sufficient.

No one can be convicted as an accessory after the fact if the *principal has been acquitted* but even if the principal has not been convicted (*i.e.*, has not been found not guilty, but has not been successfully prosecuted either), the accused may be convicted as an accessory after the fact if the prosecution can prove the guilt of the principal.

Section 23(2) exempts a *married person* who would otherwise be liable as an accessory after the fact to their spouse's offence.

**ANNOTATIONS**

**Elements of offence** – Mere failure to disclose the fact that an offence has been committed in his presence does not make the accused an accessory after the fact: *R. v. Dumont* (1921), 37 C.C.C. 166, 64 D.L.R. 128 (Ont. C.A.); nor does the mere failure to aid in the apprehension of the principal: *Young v. The Queen* (1950), 98 C.C.C. 195, 10 C.R. 142 (Que. C.A.).

**Proof of offence** – Evidence by the principal that he pleaded guilty to the offence and was sentenced is admissible against the accessory to prove the principal crime: *R. v. Vinette*, *infra*.

The guilty verdict against the principal offender, who did not testify at the accessory's



trial and who was appealing his conviction, was not admissible at the accessory's trial: *R. v. Hamel* (1993), 20 C.R. (4th) 68, [1993] R.J.Q. 999, 55 Q.A.C. 146 (C.A.).

**Trial of accessory prior to conviction of principal** – An accessory after the fact may not be tried or tender a valid plea of guilty until the principal is convicted, so that if the latter is acquitted the accessory must of necessity be discharged: *R. v. Vinette* (1974), 19 C.C.C. (2d) 1, [1975] 2 S.C.R. 222 (5:0).

In *R. v. Anderson* (1980), 57 C.C.C. (2d) 255, 26 A.R. 172 (C.A.) the Court held that the Supreme Court of Canada in *R. v. Vinette*, *supra*, was not laying down a rule that an accessory after the fact can never be convicted unless the principal has been convicted but only that if the principal was acquitted, the accessory must be acquitted and that a plea of guilty by an accessory is improper if the principal has not been convicted. Accordingly, an accessory after the fact can be convicted, notwithstanding there is no evidence the principal was convicted, if the Crown proves that the principal committed the offence. Further, in tendering such proof, any evidence that is admissible against the principal is admissible against the accessory.

A similar conclusion was reached in *R. v. McAvoy* (1981), 60 C.C.C. (2d) 95, 21 C.R. (3d) 305 (Ont. C.A.) where the Court noted that in *R. v. Vinette*, *supra*, there had been no mention of the provisions of s. 592.

Similarly in *R. v. Camponi* (1993), 82 C.C.C. (3d) 506, 22 C.R. (4th) 348, 48 W.A.C. 71 (B.C.C.A.). It was held that, especially in light of s. 23.1, the accessory could be convicted although the charge against the principal offender has been stayed.

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#### WHERE ONE PARTY CANNOT BE CONVICTED.

**23.1** For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence. R.S.C. 1985, c. 24 (2nd Supp.), s. 45

#### CROSS-REFERENCES

Section 592, indictment of accessory after the fact, whether or not the principal has been indicted, convicted or is amenable to justice.

#### SYNOPSIS

This section has been recently added to the Criminal Code to clarify that an accused may be convicted under ss. 21 to 23 even if the principal whom the accused aids, abets, counsels or in relation to whose offence the accused is an accessory after the fact cannot be convicted. Examples of circumstances under which the other accused may not be convicted would be if the person is under 12 years or is not guilty by reason of insanity.

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#### ATTEMPTS / Question of law.

**24. (1)** Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

**(2)** The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law. R.S. c. C-34, s. 24.

#### CROSS-REFERENCES

The punishment and classification of the offence of attempt is found in s. 463, except for certain offences such as attempted murder, see s. 239. Certain other substantive offences resemble attempts such as treason and high treason, s. 46, 47; mutiny, s. 53; attempt to influence municipal official,

s. 123; bribery of judicial officers, members of Parliament or the legislature, s. 119; bribery of other officers, s. 120; obstruct justice, s. 139. These provisions set out the classification and punishment for the offence. The effect of s. 463 for other attempt offences is that the accused's liability depends on the nature of the offence which he attempted to commit. For example, robbery has a maximum punishment of life imprisonment and, thus, by virtue of s. 463(a), a person convicted of attempted robbery is guilty of an indictable offence and liable to imprisonment for 14 years. The mode of trial will be determined by the nature of the offence. For example, an accused charged with attempted robbery will have an election under s. 536(2). Certain offences are, however, within the absolute jurisdiction of a provincial court judge pursuant to s. 553(b). For example, attempted theft of goods of a value not exceeding one thousand dollars where the prosecution elects to proceed by way of indictment is pursuant to s. 553(b) within the absolute jurisdiction of a provincial court judge. Note as well that, by virtue of s. 469(d), an attempt to commit the offences in ss. 47, 49, 51, 53, 61, 74, and 75 may be tried only by the superior court of criminal jurisdiction (defined in s. 2). Thus, attempted murder is not within the exclusive jurisdiction of the superior court of criminal jurisdiction and the accused has his election as to mode of trial pursuant to s. 536(2). The offence described by s. 119 which includes attempt to obtain a bribe (subsec. (1)(a)(iii)) where the accused is the holder of a judicial office, can only be tried by the superior court of criminal jurisdiction by virtue of s. 469(c).

Sections 660 and 661 make provision for conviction of an accused for attempt where the full offence is charged, and conviction of the accused for the attempt charged although the full offence is proved.

## SYNOPSIS

This section creates liability for attempting to commit an offence regardless of whether it was factually possible to commit.

Subsection (1) sets out that it must be proven that the accused intended to commit an offence and did or attempted to do anything for the purpose of committing that offence. The *mens rea* for the offence of attempt will vary with the mental element required to commit the full offence attempted.

A vexing aspect of this section is determining whether the acts of the accused have progressed beyond mere preparation to commit the offence to an attempt to commit it. It is not necessary to show that the accused's acts were unlawful. Subsection (2) states that whether the acts done by an accused proven to have the requisite *mens rea*, constitutes an attempt or mere preparation is a question of law and is therefore to be determined by a judge. However, it is no defence, if the acts were done with intention, that the offence could not be committed only because the would-be victim of the offence (for example in a case of fraud or public mischief) was not deceived by the acts.

## ANNOTATIONS

**Distinction between preparation and attempt** – In *R. v. Cline* (1956), 115 C.C.C. 18, 24 C.R. 58 (Ont. C.A.), the Court substituted a conviction of an attempt to commit the offence charged. The Court said that there can be no general test to distinguish attempt from preparation, but laid down the following propositions:

1. There must be both *mens rea* and an *actus reus* to constitute a criminal attempt, but the criminality of misconduct lay mainly in the intention of the accused.
2. Evidence of similar acts done by the accused before the offence with which he is charged, and also afterwards, if not too remote in time, was admissible to establish a pattern of conduct from which the Court might properly find *mens rea*.
3. Such evidence might be advanced in the case for the prosecution without waiting for the defence to raise a specific issue.
4. It was not essential that the *actus reus* be a crime or a tort or even a moral wrong or social mischief.
5. The *actus reus* must be more than mere preparation to commit a crime.
6. But when the preparation was fully complete and ended, the next step done by the

accused for the purpose and with the intention of committing a specific crime constituted an *actus reus* sufficient in law to establish a criminal attempt to commit that crime.

Where the accused's intention is otherwise proved, acts which on the face are equivocal may none the less be sufficiently proximate to constitute an attempt. However, where there is no such extrinsic evidence as to the accused's intent acts which on the face are equivocal may be insufficient to show the acts were done with intent to commit the crime charged: *R. v. Sorrell and Bondett* (1978), 41 C.C.C. (2d) 9 (Ont. C.A.).

No satisfactory general criterion can be formulated for drawing a line between preparation and attempt. The application of the distinction to the facts of a particular case must be left to common-sense judgment. The distinction is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. While relative proximity may give an act which might otherwise appear to be mere preparation the quality of an attempt, an act which on its face is an act of commission, does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have to elapse before the completion of the offence: *Deutsch v. The Queen* (1986), 27 C.C.C. (3d) 385, 52 C.R. (3d) 305, [1986] 2 S.C.R. 2 (5:0).

**"Impossible" attempt** – To sustain an attempt theft charge the Crown is not required to prove what the accused intended to steal or that it would have been possible to complete the theft: *R. v. Gagnon*, (1975), 24 C.C.C. (2d) 339 (Que. C.A.).

It is no bar to a conviction for an attempt that the acts went beyond mere preparation and were fully carried out although in circumstances which did not amount to the full offence, as on a charge of fraud where proof of the full offence failed because the "victim" was not in fact deceived by the accused's act: *Detering v. The Queen* (1982), 70 C.C.C. (2d) 321, 31 C.R. (3d) 354, [1982] 2 S.C.R. 583 (7:0).

## Protection of Persons Administering and Enforcing the Law

PROTECTION OF PERSONS ACTING UNDER AUTHORITY / *Idem* / When not protected / When protected / Power in case of escape from penitentiary.

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,
- (b) as a peace officer or public officer,
- (c) in aid of a peace officer or public officer, or
- (d) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for



the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer, and every person lawfully assisting the peace officer, is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

- (a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested;
- (b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant;
- (c) the person to be arrested takes flight to avoid arrest;
- (d) the peace officer or other person using the force believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm; and
- (e) the flight cannot be prevented by reasonable means in a less violent manner.

(5) A peace officer is justified in using force that is intended or is likely to cause death or grievous bodily harm against an inmate who is escaping from a penitentiary within the meaning of subsection 2(1) of the Corrections and Conditional Release Act, if

- (a) the peace officer believes on reasonable grounds that any of the inmates of the penitentiary poses a threat of death or grievous bodily harm to the peace officer or any other person; and
  - (b) the escape cannot be prevented by reasonable means in a less violent manner.
- R.S., c. C-34, s. 25; 1994, c. 12, s. 1.

## CROSS-REFERENCES

Definition of “peace officer” and “public officer”, s. 2.

As to power of arrest of private citizen, see s. 494, and peace officer, s. 495.

The following provisions also define circumstances where a person is required or authorized to use force: s. 27, use of force to prevent commission of certain offences; s. 30, use of force to prevent breach of peace; s. 31, arrest by peace officer of person in breach of peace; s. 32, 33, use of force to suppress riot; ss. 34, 35, 37, self-defence; s. 37, defence of persons under protection; ss. 38 to 42, defence of property; s. 43, use of force by way of correction; s. 44, use of force by master of ship.

Also see the following: s. 26, liability of person for excessive force; s. 28, protection of persons executing and assisting in execution of warrant; s. 29, also note requirement that person have possession of the warrant or other process; s. 45, protection from liability for surgical operations.

Section 31 of the Interpretation Act, R.S.C. 1985, c. I-21, gives persons, authorized to exercise a power to do or enforce the doing of any act or thing, ancillary powers necessary to do the act or thing. Section 31 has, however, been strictly construed where the statutory power would encroach on the common law rights of the property owner. Thus, a former provision of the Criminal Code, which authorized police officers to seize firearms in certain circumstances, did not imply the right to enter and search private property: *Colet v. The Queen* (1981), 57 C.C.C. (2d) 105 (S.C.C.). However, compare *R. v. Lyons* (1984), 15 C.C.C. (3d) 417, [1984] 2 S.C.R. 633, where reference was made to s. 31 as confirmation that the authority to intercept private communications included the power to enter private premises to install the electronic device where such entry was necessary to implement the authorization granted under Part VI. Section 24 of the Interpretation Act provides for the exercise of powers by a successor in office.

## SYNOPSIS

This section establishes protection from liability for certain persons acting under authority.

Subsection (1) provides justification for the actions of any of the persons listed in paras. (a) to (d), if the additional requirements of the subsection are met. The person must be either *required or authorized by law* to do anything in relation to the *administration*



or enforcement of the law. The requirement or authorization may be found in either statute or common law. In addition, it must be shown that the specified person acted on *reasonable grounds* and used *only as much force as was necessary* to achieve that purpose. If the actions of the person exceed the scope of activities authorized or required by law or the force used was more than that which was necessary to achieve that protected purpose, this subsection will not apply to exclude liability. However, to understand the scope of the provision as it applies to peace officers, it must be read together with subsecs. (3) and (4).

Subsection (2) protects a person acting in *good faith* who was executing process or carrying out a sentence, if authorized or required to do so. This protection will apply, even if the sentence or the process is determined to have been defective or without effect for any of the reasons noted in the subsection. The protection also extends to those who assist the authorized person in carrying out these functions.

Subsection (3) both provides an exception to the scope of protection conferred by the section and is itself subject to an exception in subsec. (4) and (5). It limits the type of harm which may be inflicted under the protection of the section, by excluding the use of force *intended to or likely to cause death or grievous bodily harm unless the person believes, on reasonable grounds*, that such force must be used to protect himself or a person under his protection from death or grievous bodily harm. The application of the subsection is to take account of the circumstances in which the force is used and it is not required that a person in such a situation weigh the force used with precision. The phrase "grievous bodily harm" has been held to mean serious hurt or pain.

Subsection (4) permits a peace officer and persons lawfully assisting the officer to use force, that is intended or likely to cause death or grievous bodily harm, to prevent flight from a lawful arrest provided that the conditions in the subsection are met. Those conditions include that the arrest is lawful, the offence is one for which the person can be arrested without a warrant, the flight cannot be prevented by reasonable means in a less violent manner and the peace officer or person assisting believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person assisting the officer or any other person from "imminent or future death or grievous bodily harm".

Subsection (5) is a special provision permitting use of force that is intended or likely to cause death or grievous bodily harm to prevent an escape from a penitentiary. However, the officer must believe on reasonable grounds that any of the inmates poses a threat of death or grievous bodily harm to the officer or any other person and the escape cannot be prevented by reasonable means in a less violent manner.

## ANNOTATIONS

**Use of force in enforcement or administration of law** – An analysis of the justification of a peace officer's apprehension of a citizen who he has been informed was going to commit a crime is found in *Kennedy v. Tomlinson et al.* (1959), 126 C.C.C. 175, 20 D.L.R. (2d) 273 (Ont. C.A.).

In *Eccles v. Bourque et al.* (1974), 19 C.C.C. (2d) 129, 27 C.R.N.S. 325 (S.C.C.), four members of the Court (the other five members specifically declining to express any view) held that this section does not authorize a forcible trespass on private property to effect a lawful arrest under s. 495 of the Criminal Code, since that subsection authorizes a peace officer to make an arrest, not to commit a trespass. The full Court held, however, that such a forcible trespass is lawful at common law provided that there are reasonable and probable grounds for the belief that the person sought is within the premises and that proper announcement is made prior to entry.

This section does not permit a police officer to use as much force as necessary to generally carry out the lawful execution of his duty. Thus, while an officer has a duty to investigate crimes and question citizens, this section does not give him the right to detain the person or to use force for that purpose short of arrest: *R. v. O'Donnell*; *R. v. Cluett*

(1982), 3 C.C.C. (3d) 333, 55 N.S.R. (2d) 6 (S.C. App. Div.), reversed, with respect to *Cluett*, on other grounds (1985), 21 C.C.C. (3d) 318, 21 D.L.R. (4th) 306 (S.C.C.) (7:0).

The words “grievous bodily harm” in subsec. (3) mean serious hurt or pain. Moreover, in determining the availability of the defence under this section the jury must be directed to have regard to the circumstances as they existed at the time the force was used, keeping in mind that the officer could not be expected to measure the force used with exactitude: *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211, 22 C.R. (3d) 371 (B.C.C.A.).

In the absence of a specific statutory exemption, a police officer, pursuing a person suspected of committing a criminal offence, is not insulated from liability for the offence of failing to stop at a stop sign contrary to the Highway Traffic Act (Ont.). Assuming that this section could apply, the issue is not whether the officer was required or authorized by law to apprehend the suspect but, rather, whether he was required or authorized by law to drive through the stop sign without stopping. There is no common law authority in a constable which would give him immunity wider than that provided by this section: *R. v. Brennan* (1989), 52 C.C.C. (3d) 366, 75 C.R. (3d) 38, 18 M.V.R. (2d) 161 (Ont. C.A.).

**Subsec. (2)**—The defence under this subsection is distinct from the defence of obedience to or in conformity with the law in force at the time and in the place of commission of the offence and was therefore available to a person charged with war crimes or crimes against humanity, notwithstanding the provisions of s. 7(3.74). Unless the law was manifestly illegal, the police officer must obey and implement that law and, if it turns out that the officer has followed an illegal order, he may plead the defence under this subsection just as a military officer may properly put forth the defence of obedience to superior orders under certain limited conditions. However, an officer acting pursuant to a manifestly unlawful order or law would not be able to defend his actions on the grounds they were justified under this subsection: *R. v. Finta*, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265 (S.C.C.).

**Use of force where person takes flight / Subsec. (4) – Note:** the cases noted below were decided under the predecessor to this section which allowed the use of as much force as necessary to prevent the escape, unless the escape could not be prevented by reasonable means in a less violent manner.

In deciding in a particular case whether a police officer had used more force than is authorized by subsec. (4), general statements as to the duty to take care to avoid injury to others made in civil negligence cases cannot be accepted as applicable without reservation. The performance of the duty imposed upon police officers to arrest may, at times and of necessity, involve risk or injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is, *damnum sine injuria*: *Priestman v. Colangelo and Smythson* (1959), 124 C.C.C. 1, [1959] S.C.R. 615 (3:2).

A peace officer who had lawful authority to arrest a person in one province under s. 495 and is in fresh pursuit of that person retains for the purposes of subsec. (4) his status of a peace officer even where the pursuit takes him into an adjoining province: *Roberge v. The Queen* (1983), 4 C.C.C. (3d) 304, 33 C.R. (3d) 289, [1983] 1 S.C.R. 312 (7:0).

## EXCESSIVE FORCE.

**26. Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess. R.S., c. C-34, s. 26.**

## CROSS-REFERENCES

A number of provisions authorize the use of force in carrying out duties under the law, to prevent commission of offences or in defence of oneself or others, such as the following: s. 25, use of force

by person required or authorized by law to do anything in the administration or enforcement of the law [e.g., to effect an arrest under s. 494 or 495]; s. 27, use of force to prevent commission of certain offences; s. 30, use of force to prevent breach of peace; s. 31, arrest by peace officer of person in breach of peace; ss. 32, 33, use of force to suppress riot; ss. 34, 35, 37, self-defence; s. 37, defence of persons under protection; ss. 38 to 42, defence of property; s. 43, use of force by way of correction; s. 44, use of force by master of ship.

## SYNOPSIS

This section imposes criminal liability for the use of force in excess of that authorized by law. Thus, it has been held that if one exceeds the force permitted by s. 27 or the force permitted as self-defence under s. 34, the excess force which results in death will be murder and not considered reduced to manslaughter.

## ANNOTATIONS

It now seems clear as a result of a series of cases in the Supreme Court of Canada: *R. v. Gee* (1982), 68 C.C.C. (2d) 516, 29 C.R. (3d) 347, [1982] 2 S.C.R. 286; *R. v. Faid* (1983), 2 C.C.C. (3d) 513, 33 C.R. (3d) 1, [1983] 1 S.C.R. 265; *Brisson v. The Queen* (1982), 69 C.C.C. (2d) 97, 29 C.R. (3d) 289, [1982] 2 S.C.R. 227 and *Reilly v. The Queen* (1984), 15 C.C.C. (3d) 1, 42 C.R. (3d) 154 (S.C.C.) (6:0), that there does not exist in Canada a qualified defence of excessive force in self-defence or in preventing the commission of an offence which would have the effect of reducing murder to manslaughter. If the accused has used excessive force so that the defence provided by s. 34 or s. 27 is not available, then absent any other defence, the accused is liable to be convicted of murder. The evidence led in self-defence may however support a defence of provocation or negative the specific intent for murder in which case the proper verdict would be manslaughter.

In *R. v. Bayard* (1988), 29 B.C.L.R. (2d) 366, 92 N.R. 376 (C.A.) the majority of the court ordered a new trial on a Crown appeal from the accused's acquittal on murder and conviction for manslaughter on the basis, *inter alia*, that the trial judge had misdirected the jury as to the effect of excessive force in self defence. Lambert J.A., dissenting, was of the view that the impugned instructions related solely to s. 34(1) which could not apply if the accused had the intent for murder. If, however, he did not have the intent to kill and used no more force than necessary, then, pursuant to that subsection, the accused would be acquitted. If, however, he did use more force than was necessary then, in fact, the verdict should be manslaughter. On appeal by the accused to the Supreme Court of Canada, [1989] 1 S.C.R. 425, 70 C.R. (3d) 95, [1989] 5 W.W.R. 121, 37 B.C.L.R. (2d) 1, 92 N.R. 376, the appeal was allowed and the accused's conviction for manslaughter restored substantially for the dissenting reasons of Lambert J.A.

## USE OF FORCE TO PREVENT COMMISSION OF OFFENCE.

### 27. Every one is justified in using as much force as is reasonably necessary

#### (a) to prevent the commission of an offence

(i) for which, if it were committed, the person who committed it might be arrested without warrant, and

(ii) that would be likely to cause immediate and serious injury to the person or property of anyone; or

(b) to prevent anything being done that, on reasonable grounds, he believes would, if it were done, be an offence mentioned in paragraph (a). R.S., c. C-34, s. 27.

## CROSS-REFERENCES

In most cases, the determination of whether or not the person, "might be arrested without warrant", will be determined by reference to ss. 494 and 495 which authorizes warrantless arrest by anyone and by a peace officer, respectively. The most important power is that provided by s. 494(1)(a) which authorizes the arrest of a person found committing an indictable offence. Virtu-



ally all offences which would be likely to cause immediate and serious injury to person or property will constitute indictable offences, bearing in mind that even Crown-option offences are deemed to be indictable offences by s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21.

In many circumstances, the use of force will be authorized not only by this section but the self-defence and defence of property provisions set out in ss. 34 to 42.

Section 26 renders the person liable for any excessive use of force.

## SYNOPSIS

This section provides authorization for the use of force to prevent the commission of specified types of offences or to prevent anything that might lead to the commission of such offences.

Section 27(a) permits the use of such *force* by *any one* as is *reasonably necessary* to *prevent the commission of certain types of offences* under the circumstances outlined in section 27(a)(i) and (ii). This paragraph may be applied to any person, as contrasted with provisions such as s. 28 which can be relied upon only by a person authorized to execute process. In addition, it should be noted that the amount of force used will be judged by an objective standard as denoted by the term “reasonably necessary”. Section 27(a)(i) limits the type of offence to those for which a person may be arrested without warrant. The criteria in s. 27(a)(ii) must also be met, namely that the offence, if committed, would be *likely* to cause *immediate and serious* injury to either a person or property. Again, it should be noted that the likelihood of the result is to be judged on an objective basis and the harm feared must be immediate and serious.

Section 27(b) permits an element of the accused’s subjective beliefs to be incorporated but only if those beliefs are *reasonable* on an objective basis.

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## ARREST OF WRONG PERSON / Person assisting.

**28. (1)** Where a person who is authorized to execute a warrant to arrest believes, in good faith and on reasonable and probable grounds, that the person who he arrests is the person named in the warrant, he is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant.

**(2)** Where a person is authorized to execute a warrant to arrest,

(a) every one who, being called on to assist him, believes that the person in whose arrest he is called on to assist is the person named in the warrant, and

(b) every keeper of a prison who is required to receive and detain a person who he believes has been arrested under the warrant,

is protected from criminal responsibility in respect thereof to the same extent as if that person were the person named in the warrant. R.S., c. C-34, s. 28.

## CROSS-REFERENCES

This provision, in and of itself, does not authorize the use of force but merely deals with the case of mistake in execution of the warrant. The use of force to arrest is dealt with primarily under s. 25 and see notes under that section. Section 29 requires the person executing a warrant to have it with him where feasible and prescribes other duties. In addition, s. 10 of the Charter of Rights and Freedoms requires a police officer to inform the arrestee of the reason for the arrest and of his right to counsel. See notes under s. 10 of the Charter of Rights, *infra*. As to where an arrest warrant may be exercised, see ss. 514, 703 and 528. An accused who was illegally arrested and in the course of the arrest killed the person attempting to effect the arrest, may, in some circumstances, have a defence of provocation under s. 232(4) or self-defence under s. 34. The offence of resisting or obstructing a peace officer, public officer, or person in the lawful execution of process is found in s. 129. The offences of assault with intent to resist arrest and assault of an officer in the execution of duty are in s. 270. The offence of misconduct by officers executing process is found in s. 128.



## SYNOPSIS

Section 28 creates a limited exemption from criminal liability for persons who are *authorized* to execute arrest warrants and mistakenly arrest the wrong person or keep such wrongfully arrested person in custody.

It must be shown that the mistake of identity was made *in good faith and on reasonable grounds*.

Section 28(2) provides protection for those who *assist the person making the mistaken arrest or detain* such wrongfully arrested person on the same basis as if the person arrested was the person sought. As with s. 28(1), the person making the arrest must have been authorized to execute an arrest warrant. Section 28(2)(a) deals with the person who assists in the arrest after being *called upon to do so*. The assistant must believe that the person whom he is asked to help arrest is the person sought. This is a much lower standard of belief than that applied in s. 28(1); it need not be based on reasonable and probable grounds. Section 28(2)(b) protects the keeper of a prison, if the keeper has a subjective belief that the person he is asked to detain has been arrested under a warrant.

## DUTY OF PERSON ARRESTING / Notice / Failure to comply.

29. (1) It is the duty of every one who executes a process or warrant to have it with him, where it is feasible to do so, and to produce it when requested to do so.

(2) It is the duty of every one who arrests a person, whether with or without a warrant, to give notice to that person, where it is feasible to do so, of

- (a) the process or warrant under which he makes the arrest; or
- (b) the reason for the arrest.

(3) Failure to comply with subsection (1) or (2) does not of itself deprive a person who executes a process or warrant, or a person who makes an arrest, or those who assist them, of protection from criminal responsibility. R.S., c. C-34, s. 29.

## CROSS-REFERENCES

**Subsec. (1)** – This provision, in and of itself, does not authorize the use of force. The use of force to arrest is dealt with primarily under s. 25 and see notes under that section. Section 28 deals with the case of mistake in execution of an arrest warrant. As to where an arrest warrant may be exercised, see ss. 514, 703 and 528. As to execution of a search warrant, see s. 487, search warrant; s. 487.1, tele-warrants; s. 488, time of execution; s. 488.1, execution of warrant at lawyer's office; s. 489, seizure of other items; s. 462.32, proceeds of crime. As to search warrants for weapons etc., see s. 103. An accused who was illegally arrested and, in the course of the arrest, killed the person attempting to effect the arrest may, in some circumstances, have a defence of provocation under s. 232(4) or self-defence under s. 34. The offence of misconduct by officers executing process is found in s. 128.

**Subsec. (2)** – In addition to the duties prescribed by this subsection, s. 10 of the Charter of Rights and Freedoms requires a police officer to inform the arrestee of the reason for the arrest and of his right to counsel. See notes under s. 10 of the Charter of Rights, *infra*. The power of arrest is also circumscribed by other provisions of the Charter, see especially notes under s. 9 of the Charter of Rights. Arrest without warrant is authorized by a number of sections: s. 31, breach of the peace; s. 33, arrest of rioters; s. 101, arrest for weapons offences; s. 199(2), arrest of inmates of disorderly house; s. 494, arrest by any person for certain criminal offences; s. 495, arrest by peace officer for criminal offences; s. 524(2), arrest by peace officer of accused on interim release. The offence of resisting or obstructing a peace officer, public officer, or person in the lawful execution of process is found in s. 129. The offences of assault with intent to resist arrest and assault of an officer in the execution of duty are in s. 270.

## SYNOPSIS

This section outlines the duties imposed upon those who execute process or make an arrest, and states the effect of non-compliance with the section.

Section 29(1) states that it is the duty of a person *executing a process or warrant* to have a

copy of such document with him. In addition, such document must be shown if a request is made to see it. Both requirements apply only if it is *feasible* to comply with them.

Section 29(2) sets out the *duty of a person making an arrest* with or without warrant. The requirements are that the person being arrested is to be told of the process or warrant permitting the arrest or the reason for the arrest. As with s. 29(1), the duties apply only *when feasible*. These duties are supplemented by the requirements in s. 10 of the Charter.

Section 29(3) spells out that *non-compliance* with either of the foregoing subsections does not *by itself* deprive the person making the arrest, executing process, or those who assist such persons, of the protection from criminal responsibility conferred elsewhere under the Criminal Code (see, for example, s. 28).

## ANNOTATIONS

**Subsec. (1)** – An officer executing a search warrant is required to have the warrant with her. Where, however, the officer forgot to bring the warrant through inadvertence and the accused consented to the search commencing while the warrant was being brought to his home, then it was not shown that the search was unlawful: *R. v. B.(J.E.)* (1989), 52 C.C.C. (3d) 224 (N.S.C.A.).

**Subsec. (2)** – The provisions of this subsection are to be read disjunctively, so that when an arrest is being made without possession of a warrant, but pursuant thereto, the duty of the arresting officer is fully discharged by telling the arrested person that the reason for his arrest is the existence of an outstanding warrant. The arresting officer is under no duty to obtain the warrant or ascertain its contents to tell the accused: *Gamracy v. The Queen* (1973), 12 C.C.C. (2d) 209, [1974] S.C.R. 640 (3:2) where Ritchie, J., writing the major decision also held that the leading British case in this area, *Christie et al. v. Leachinsky*, [1947] 1 All E.R. 567 (H.L.) was of no assistance in interpreting s. 29.

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## PREVENTING BREACH OF PEACE.

**30.** Every one who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof and may detain any person who commits or is about to join in or to renew the breach of the peace, for the purpose of giving him into the custody of a peace officer, if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace. R.S., c. C-34, s. 30.

## CROSS-REFERENCES

Section 31 authorizes a peace officer to receive into custody a person detained under this section. This section does not itself create an offence, however, a provincial court judge would appear to still have a common law power to bind a person over to keep the peace. See notes under s. 810, *infra*. There are also other provisions of the Criminal Code which may apply to conduct amounting to breach of the peace. See s. 49, breach of the peace in presence of Her Majesty; s. 175, causing a disturbance. A breach of the peace may escalate into an unlawful assembly or a riot, in which case see ss. 32, 33 and 63 to 69.

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## ARREST FOR BREACH OF PEACE / Giving person in charge.

**31. (1)** Every peace officer who witnesses a breach of the peace and every one who lawfully assists the peace officer is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable grounds, he believes is about to join in or renew the breach of the peace.

**(2)** Every peace officer is justified in receiving into custody any person who is given into his charge as having been a party to a breach of the peace by one who has, or

who on reasonable grounds the peace officer believes has, witnessed the breach of the peace. R.S., c. C-34, s. 31.

#### CROSS-REFERENCES

"Peace officer" is defined in s. 2. Section 30 authorizes a citizen to detain a person for breach of the peace. Neither this section nor s. 30 create an offence, however, a provincial court judge would appear to still have a common law power to bind a person over to keep the peace. See notes under s. 810, *infra*. There are also other provisions of the Criminal Code which may apply to conduct amounting to breach of the peace. See s. 49, breach of the peace in presence of Her Majesty; s. 175, causing a disturbance. A breach of the peace may escalate into an unlawful assembly or a riot, in which case see ss. 32, 33 and 63 to 69. As to use of force in effecting an arrest, see s. 25 and notes thereunder. As to duty of peace officer when effecting an arrest, see s. 29. The offence of resisting or obstructing a peace officer is found in s. 129. The offences of assault with intent to resist arrest and assault of an officer in the execution of duty are in s. 270.

#### ANNOTATIONS

**Subsec. (1)** – In *Blanchard v. Galbraith* (1966), 10 Crim. L.Q. 122 (Man. Q.B.), the plaintiff claimed damages for false imprisonment when in a belligerent and defiant manner he accepted gaol on being given the alternative of returning to his hotel room by an R.C.M.P. constable who was endeavouring to disperse a group of loiterers outside a location that was a known town trouble spot. Hall, J., dismissed the action with costs for the defendant R.C.M.P. officers, holding that it was the plain duty of peace officers to act in anticipation of, and thereby prevent breaches of the peace, and the plaintiff's refusal by inviting arrest amounted to obstruction in the discharge of the arresting officer's duty.

Although there is no offence in Canada of breach of the peace, this section does give the police officer a power to arrest anyone for breach of the peace and resisting such an arrest may be the basis for a charge under s. 129. This section is a form of preventive remedy either through arrest for not more than 24 hours or a peace bond at common law: *R. v. Lefebvre* (1982), 1 C.C.C. (3d) 241 (B.C. Co. Ct.), affirmed 15 C.C.C. (3d) 503 (B.C.C.A.).

Although this subsection is confined to breaches of the peace that have actually taken place, there is a common law power for a peace officer to arrest without a warrant where the officer honestly and reasonably believes that such a breach will be committed in the immediate future: *Hayes v. Thompson et al.* (1985), 18 C.C.C. (3d) 254, 44 C.R. (3d) 316, [1985] 3 W.W.R. 366 (B.C.C.A.).

**Subsec. (2)** – The word "justified" in subsec. (2) gives lawful sanction to the actions of an officer who receives into his custody any person who is given into his charge as having been a party to a breach of the peace by a person who he reasonably believes has witnessed a breach of the peace. The officer is then in the execution of his duty and an accused may be convicted of the offence under s. 129(a) if he resists this officer notwithstanding his acquittal on the charge for which he was originally arrested: *R. v. Biron* (1975), 23 C.C.C. (2d) 513, [1976] S.C.R. 56 (5:3).

## Suppression of Riots

USE OF FORCE TO SUPPRESS RIOT / Person bound by military law / Obeying order of peace officer / Apprehension of serious mischief / Question of law.

32. (1) Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,

(a) is necessary to suppress a riot; and



- (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- (2) Every one who is bound by military law to obey the command of his superior officer is justified in obeying any command given by his superior officer for the suppression of a riot unless the order is manifestly unlawful.
- (3) Every one is justified in obeying an order of a peace officer to use force to suppress a riot if
- (a) he acts in good faith; and
  - (b) the order is not manifestly unlawful.
- (4) Every one who, in good faith and on reasonable grounds, believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer is justified in using as much force as he believes in good faith and on reasonable grounds,
- (a) is necessary to suppress the riot; and
  - (b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.
- (5) For the purposes of this section, the question whether an order is manifestly unlawful or not is a question of law. R.S., c. C-34, s. 32.

#### CROSS-REFERENCES

“Peace officer” and “military law” are defined by s. 2. Section 33 sets out the duties of peace officers and others, where rioters do not disperse after a proclamation has been read under s. 67 or an offence committed under s. 68. The offence of resisting or obstructing a peace officer is found in s. 129. The offences of assault with intent to resist arrest and assault of an officer in the execution of duty are in s. 270. Section 26 makes a person liable for excessive force. Also see s. 25 as to use of force generally in acting to enforce the law.

#### SYNOPSIS

This section and s. 33 have the combined effect of protecting specified categories of persons who seek to suppress a riot.

Section 32(1) applies only to peace officers. It justifies the use of force, or ordering others to use it to suppress a riot. The officer will be protected if he had both *good faith* and *reasonable grounds* for believing that the other requirements of the subsection were met. They are that the force used was necessary to suppress a riot *and* that it was *not excessive* considering the *danger* perceived if the riot continued.

Section 32(2) applies to those who are bound by *military law* to obey the orders of a superior officer. It justifies obeying an order by such superior to suppress a riot. However, the protection is removed if the order was *manifestly unlawful*.

Section 32(3) justifies the actions of *anyone obeying the orders of a peace officer* to suppress a riot, if the other conditions of the section are met. It must be shown that the person obeying the order acts in good faith. In addition, the subsection limits protection to those circumstances in which the order of the peace officer is not manifestly unlawful.

Section 32(5) states that the determination of whether an order was manifestly unlawful is a question of law.

Section 32(4) permits a person to act to suppress a riot under certain stringent conditions. It must be shown that the person believes in *good faith and on reasonable grounds* that a peace officer cannot be brought to the scene in time to prevent *serious mischief* from a riot. The remaining requirements of this subsection are the same as those imposed upon peace officers under s. 32(1).

#### ANNOTATIONS

It was held in *Hebert v. Martin* (1930), 54 C.C.C. 257, [1931] S.C.R. 145, [1931] 2



D.L.R. 484 that the taking of life can only be justified by the necessity to disperse a riotous crowd which is dangerous unless dispersed and a police officer was not liable civilly for the death of a person when he had good reason to fear danger to his own life.

In *Martin's 1955 Criminal Code*, the 1911 opinion of the Attorney General of England is quoted as to the use of force by the military when called upon to aid civil authorities. In particular, it was the opinion of the law officer that the military may not use lethal weapons to prevent or suppress minor disorders or offences of a less serious character, and in no case should they do so if less extreme measures will suffice. Should it be necessary for the military to use extreme measures, they should, whenever possible, give sufficient warning of their intention.

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**DUTY OF OFFICERS IF RIOTERS DO NOT DISPERSE / Protection of officers /**  
**Section not restrictive.**

**33. (1) Where the proclamation referred to in section 67 has been made or an offence against paragraph 68(a) or (b) has been committed, it is the duty of a peace officer and of a person who is lawfully required by him to assist, to disperse or to arrest persons who do not comply with the proclamation.**

**(2) No civil or criminal proceedings lie against a peace officer or a person who is lawfully required by a peace officer to assist him in respect of any death or injury that by reason of resistance is caused as a result of the performance by the peace officer or that person of a duty that is imposed by subsection (1).**

**(3) Nothing in this section limits or affects any powers, duties or functions that are conferred or imposed by this Act with respect to the suppression of riots. R.S., c. C-34, s. 33.**

**CROSS-REFERENCES**

"Peace officer" is defined in s. 2. This section is complementary to ss. 67 to 69 which deal with providing for the reading of a proclamation to disperse a riotous assembly. The unlawful assembly offences and riot offences are found in ss. 63 to 66. Section 32 authorizes the use of force to suppress a riot. The offence of resisting or obstructing a peace officer is found in s. 129. The offences of assault with intent to resist arrest and assault of an officer in the execution of duty are in s. 270. Section 26 makes a person liable for excessive force. Also see s. 25 as to use of force generally in acting to enforce the law.

**SYNOPSIS**

Section 33 states the duties of peace officers and those lawfully required to assist them if a crowd fails to disperse following the reading of the proclamation under s. 67 of the Criminal Code (the "riot act") or if an offence under s. 68 is committed (which relates to the prevention of or interference with the reading of the "riot act" or the failure to disperse after it is read). In addition, subsec. (3) explicitly provides that this section does not limit any powers conferred elsewhere in the Criminal Code in relation to the suppression of riots.

Section 33(1) imposes a duty upon peace officers or those lawfully required to assist them to disperse or arrest those who fail to disperse after the proclamation is read or an offence under s. 68 is committed.

Section 33(2) protects persons carrying out the duties imposed by subsec. (1) from civil or criminal liability if death or injury results from the resistance to the carrying out of those duties.

## *Self-induced Intoxication*

### **WHEN DEFENCE NOT AVAILABLE / Criminal fault by reason of intoxication / Application.**

33.1. (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person. 1995, c. 32, s. 1.

## *Defence of Person*

### **SELF-DEFENCE AGAINST UNPROVOKED ASSAULT / Extent of justification.**

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

- (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and
- (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm. R.S., c. C-34, s. 34.

### **CROSS-REFERENCES**

Provocation, for the purpose of this section, is defined in s. 36. Also see ss. 38(2) and 41(2) concerning provocation by trespassers. Assault is defined in s. 265. Grievous bodily harm is not defined, but a definition of “bodily harm” is contained in s. 2 and “grievous bodily harm” was defined for the purposes of s. 25(3) as serious hurt or pain: *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.).

The use of force in self-defence is dealt with in a number of provisions of the Criminal Code and these provisions will often overlap. See generally the following: s. 27, use of force to prevent commission of certain serious offences; s. 35, self-defence in case of aggression; s. 37, use of force in self-defence and defence of persons under one’s protection; ss. 38 to 42, concerning defence of property. In homicide cases the accused may also seek to defend the case on the basis of provocation, in which case see s. 232. As to excessive force in self-defence, see s. 26.

### **ANNOTATIONS**

**Use of force where no intent to cause death or grievous bodily harm** – If the force is justified under subsec. (1) in that all of the conditions have been met then the defence is

made out, even if death or grievous bodily harm results. The person cannot weigh to a nicety the exact measure of the defensive action nor be expected to stop and reflect upon the risk of deadly consequences which might result from taking justifiable defensive action: *R. v. Kandola* (1993), 80 C.C.C. (3d) 481, 45 W.A.C. 226 (B.C.C.A.).

Where physical resistance is offered to an illegal search by peace officers this defence will lie: *R. v. Larlham*, [1971] 4 W.W.R. 304 (B.C.C.A.).

To avail himself of this defence the accused is not necessarily required to retreat and certainly when he is in his own home is not required to retreat and give up his home to his adversary: *R. v. Deegan* (1979), 49 C.C.C. (2d) 417, [1979] 6 W.W.R. 97 (Alta. C.A.).

A person need not be reduced to a state of frenzy in resisting the attack before self defence is available to him as a defence to a charge of assault: *R. v. Antley*, [1964] 2 C.C.C. 142, 42 C.R. 384, [1964] 1 O.R. 545 (C.A.).

To constitute provocation so as to deprive the accused of the defence under subsec. (1), the conduct of the accused must have been intended by the accused to provoke an assault: *R. v. Nelson* (1992), 71 C.C.C. (3d) 449, 13 C.R. (4th) 359, 8 O.R. (3d) 364 (C.A.).

**Relationship between subsecs. (1) and (2)** – Subsections (1) and (2) are not mutually exclusive and accordingly where the issue is whether or not the accused intended to cause death or grievous bodily harm the trial Judge should instruct the jury as to the provisions of subsec. (1) and then tell the jury that if they are then satisfied that the accused intended to cause death or grievous bodily harm they must then consider the provisions of subsec. (2). Both subsections import a subjective element and the doctrine of mistake of fact is applicable to both. Furthermore, the jury must consider under either subsection that a defending person cannot be expected to weigh to a nicety the exact measure of necessary defensive action: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A.). Similarly, *R. v. Martin* (1985), 47 C.R. (3d) 342 (Que. C.A.).

Where there is no evidence that the accused is under reasonable apprehension of death or grievous bodily harm subsec. (2) should not be left to the jury but subsec. (1) may still apply if the accused did not intend death or grievous bodily harm and used no more force than was necessary, notwithstanding the victim died as a result of the accused's assault on him: *R. v. Setrum* (1976), 32 C.C.C. (2d) 109 (Sask. C.A.).

Unlike subsec. (1), there is no requirement under subsec. (2) that the assault upon the accused which led to the defensive action be unprovoked. Thus subsec. (2) is available to the initial aggressor: *R. v. McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171 (5:4).

The issue is not whether the accused was in fact unlawfully assaulted but rather whether she reasonably believed in the circumstances that she was being unlawfully assaulted. Further, there is no requirement that the danger be imminent. The imminence of apprehended danger is only one factor which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker: *R. v. Pétel*, [1994] 1 S.C.R. 3, 87 C.C.C. (3d) 97, 26 C.R. (4th) 145. Also see *R. v. Nelson*, *supra*.

**Use of force under subsec. (2)** – The issue as to whether or not the force used by the accused was disproportionate to the original force used by the deceased is only a matter of evidence for the jury to consider in determining whether the accused had a reasonable apprehension of death and whether the accused had reasonable and probable grounds to believe that she could not otherwise preserve herself from death or grievous bodily harm: *R. v. Bogue* (1976), 30 C.C.C. (2d) 403, 70 D.L.R. (3d) 603 (Ont. C.A.).

While this subsection contemplates that the defence may be available where the accused acted under a mistaken perception, nevertheless his apprehension of death or grievous bodily harm must be reasonable and his belief that he could not otherwise pre-



serve himself must be based on reasonable and probable grounds. His mistake must therefore be one which an ordinary man using ordinary care could have made in the same circumstances. It is, therefore, unnecessary to relate evidence of intoxication to the defence under this section, since intoxication cannot induce a mistake which must be founded upon reasonable and probable grounds: *Reilly v. The Queen* (1984), 15 C.C.C. (3d) 1, 42 C.R. (3d) 154 (S.C.C.) (6:0).

The issue under this subsection is what the accused reasonably apprehended and believed, and, in addressing this question, evidence relating to the accused's intellectual impairment is relevant. Where the accused has an intellectual impairment, not within his control, which relates to his ability to perceive and react to events – an impairment that clearly takes him out of the broad and normal adult intellectual capacity – then this deficit should be taken into account: *R. v. Nelson, supra*.

It is misleading to direct the jury in terms that the accused is entitled to the benefit of this subsection “as long as the force he used was no more than necessary in the circumstances”. These portions of the charge to the jury may have been construed as an invitation to first consider whether the conduct of the accused fell within the protection of this subsection and, secondly, to consider whether an additional, unstated prohibition against excessive force disqualified the accused from the benefit of that defence. To invite the jury to make such an inquiry would contravene the well-known principle that a person defending himself against an upraised knife cannot be expected to weigh with nicety the exact measure of force he may use to preserve himself. If the requirements of s. 34(2) are satisfied, then no further inquiry or consideration of the nature of the force used by the accused is necessary or permissible. A process which invites the jury to consider the question of excessive force, separate from and in addition to the ingredients of this subsection, presents a special danger for an accused because some jurors, even though satisfied that the circumstances met the requirements of those sections, may have believed that some weapons, particularly guns, are so dangerous that their use is always excessive: *R. v. Siu* (1992), 71 C.C.C. (3d) 197, 12 C.R. (4th) 356 (B.C.C.A.).

**Evidence to support self-defence** – Expert psychiatric evidence as to the “battered wife syndrome” was admissible where the accused relied upon the defence under subsec. (2). Such evidence, relating to the ability of the accused to perceive danger from the deceased, went to the issue of whether she reasonably apprehended death or grievous bodily harm, on the occasion in question, from a threat by the deceased to kill the accused at some later time. While subsec. (2) does not actually stipulate that the accused apprehend imminent danger before acting in self-defence, there is an assumption that it is inherently unreasonable to apprehend death or grievous bodily harm unless and until the physical assault is actually in progress at which point the victim can reasonably gauge the requisite amount of force needed to repel the attack and act accordingly. Expert testimony can cast doubt on these assumptions as they applied in the context of the battered wife's efforts to repel an assault. Such evidence can explain the heightened sensitivity of a battered woman to her partner's acts. The issue is not what an outsider would have reasonably perceived but what the accused reasonably perceived given her situation and experience. The expert evidence would also be of assistance to the jury on the issue of whether the accused believed on reasonable grounds that it was not otherwise possible to preserve herself from death or grievous bodily harm. The question the jury must ask itself is whether, given the history, circumstances and perception of the accused, her belief that she could not preserve herself from being killed by the deceased later that night except by killing the spouse first was reasonable. This evidence would explain, for example, why the accused could not flee: *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97, [1990] 1 S.C.R. 852, [1990] 4 W.W.R. 1, 76 C.R. (3d) 329, 108 N.R. 321 (7:0).

On the trial of a charge of murder where the accused relies on self-defence, evidence of the deceased's character or disposition for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased. This disposition may be evidenced by proof of specific



acts of violence unknown to the accused at the time of the incident, by evidence of reputation and by psychiatric evidence, if the question falls within the proper sphere of expert evidence. However, to be admissible the specific acts of violence unknown to the accused must have sufficient probative value that they will legitimately and reasonably assist the jury and there must exist some other appreciable evidence of the deceased's aggression on the occasion in question. This latter evidence may emanate from the accused himself: *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481, 34 O.R. (2d) 524 (C.A.).

In assessing the admissibility of prior acts of violence by the deceased, its prejudicial impact in arousing feelings of hostility towards the deceased must be weighed against its probative value within the context of affording a fair trial to the accused. On the other hand, where the evidence was of acts of violence against the accused and her relatives, it was no objection to admission that some of these acts had taken place some time in the past. Even prior acts of destruction of property can be admitted in proper circumstances where, as here, in light of the deceased's history of violence, it would not be unreasonable for the accused to fear that anger directed for the moment towards property would be expanded to assaults upon the person. Further, in light of defence counsel's statement that the evidence was essential for the defence of self-defence to which the accused would be testifying, it may be elicited by counsel through cross-examination of Crown witnesses: *R. v. Ryan* (1989), 49 C.C.C. (3d) 490, 76 Nfld. & P.E.I.R. 26 (Nfld. C.A.).

The evidence of the prior acts of violence unknown to the accused must have sufficient probative value for the purpose for which it is tendered to justify its admission. Evidence which is logically relevant may still be excluded because of the costs or risks associated with its admission: *R. v. Yaeck* (1991), 68 C.C.C. (3d) 545 (Ont. C.A.).

#### SELF-DEFENCE IN CASE OF AGGRESSION.

**35. Every one who has without justification assaulted another but did not commence the assault with intent to cause death or grievous bodily harm, or has without justification provoked an assault on himself by another, may justify the use of force subsequent to the assault if**

- (a) **he uses the force**
  - (i) **under reasonable apprehension of death or grievous bodily harm from the violence of the person whom he has assaulted or provoked, and**
  - (ii) **in the belief, on reasonable grounds, that it is necessary in order to preserve himself from death or grievous bodily harm;**
- (b) **he did not, at any time before the necessity of preserving himself from death or grievous bodily harm arose, endeavour to cause death or grievous bodily harm; and**
- (c) **he declined further conflict and quitted or retreated from it as far as it was feasible to do so before the necessity of preserving himself from death or grievous bodily harm arose. R.S.C. 1970, c. C-34, s. 35.**

#### CROSS-REFERENCES

Provocation for the purpose of this section is defined in s. 36. Also see ss. 38(2) and 41(2) concerning provocation by trespassers. Assault is defined in s. 265. Grievous bodily harm is not defined, but a definition of "bodily harm" is contained in s. 2 and "grievous bodily harm" was defined for the purposes of s. 25(3) as serious hurt or pain: *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.).

The use of force in self-defence is dealt with in a number of provisions of the Criminal Code and these provisions will often overlap. See generally the following: s. 27, use of force to prevent commission of certain serious offences; s. 34, self-defence in case of unprovoked assault; s. 37, use of force in self-defence and defence of persons under one's protection; ss. 38 to 42, concerning defence of property. In homicide cases, the accused may also seek to defend the case on the basis of provocation, in which case see s. 232. As to excessive force in self-defence, see s. 26.

## SYNOPSIS

Section 35 outlines the application of self-defence to cases in which the person seeking to rely on *self-defence initiated or provoked the assault*.

All parts of this section commence with one of two premises: the accused performed the initial assault without justification though without the intention of causing death or grievous bodily harm or that the accused provoked an assault on himself, without being provoked to do so.

There are three strict criteria which must be met for the actions in self-defence following the defender's initial aggression to be justified. Firstly, similar criteria as that found in s. 34(2) apply, namely that the force is used under the person's *reasonable* apprehension of *death or grievous bodily harm* from the person whom the defender originally assaulted or provoked and the defender must *believe on reasonable grounds* that the force is necessary to prevent his own death or grievous bodily harm being inflicted upon him.

Secondly, the defender did not, at any time before the need arose to protect himself from death or grievous bodily harm, try to cause grievous bodily harm or death.

Thirdly, there is an obligation upon the defender to decline further conflict and leave or *retreat* as far as is feasible before the need to defend from death or grievous bodily harm arises.

In cases in which it is unclear whether the accused was the aggressor, both this section and s. 34 should be left to the jury.

## ANNOTATIONS

A new trial was ordered, *inter alia*, on the basis that the trial Judge should have charged the jury as to the application of this section in case the jury was of the view that the accused had provoked an assault (either actual or believed) by the victim: *R. v. Bolyantu* (1975), 29 C.C.C. (2d) 174 (Ont. C.A.).

The "further conflict" in para. (c) merely refers to the conflict generated by the initial assault or provocation offered by the accused. It is at that point, not earlier, that the requirement of declining further conflict and retreating, if feasible, arises: *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C.C.A.).

## PROVOCATION.

**36. Provocation includes, for the purposes of sections 34 and 35, provocation by blows, words or gestures. R.S., c. C-34, s. 36.**

## CROSS-REFERENCES

As to provocation defence in murder cases, see s. 232.

## SYNOPSIS

This section provides a statement of what is included in the term *provocation* as it is used in ss. 34 and 35. It includes blows, words or gestures.

## PREVENTING ASSAULT / Extent of justification.

**37. (1) Every one is justified in using force to defend himself or any one under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.**

**(2) Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent. R.S., c. C-34, s. 37.**

## CROSS-REFERENCES

Assault is defined in s. 265. There is no definition of the term, "anyone under his protection", but it would likely include persons in the accused's immediate family and others with whom he had a

close relationship and certainly include persons to whom is owed a legal duty to provide necessities under s. 215. As to whether the section would include other persons who had sought the accused's protection remains to be seen, but the use of force could often be justified in such cases under s. 27. The policy behind limiting the use of force to persons under the accused's protection appears to lie in an attempt to minimize mistakes as to the use of force in the circumstances.

The use of force in self-defence is dealt with in a number of provisions of the Criminal Code and these provisions will often overlap. See generally the following: s. 27, use of force to prevent commission of certain serious offences; s. 34, self-defence in case of unprovoked assault; s. 35, use of force in case of aggression; ss. 38 to 42, concerning defence of property. In homicide cases, the accused may also seek to defend the case on the basis of provocation, in which case see s. 232. In addition to subsec. (2) concerning excessive force, see s. 36.

## SYNOPSIS

This section sets out the extent of the justification which is available when a person uses *force to prevent an assault or its repetition*. It imports an element of *proportionality* into the justification.

Section 37(1) justifies the use of force by a person in his own defence or in the defence of a *person under his protection*. The force used must be no more than is necessary to prevent the assault or its repetition. Unlike that referred to in s. 34(2), the justification is not limited in its application to an assault of any particular severity.

Section 37(2) states that the section *will not justify the wilful infliction of a hurt or mischief* which is *excessive* in relation to the nature of the assault which the defender was trying to prevent.

## ANNOTATIONS

This section was held to have application in the trial of a charge of murder: *Lowther v. The Queen* (1957), 26 C.R. 150 (Que. C.A.) and *per* Hyde, J., at p. 163 must be read as an extension of s. 34.

This section introduces the concept of "proportionate force" and if it is to be left to the jury along with s. 34(2) it is incumbent on the trial Judge to distinguish its wording from that of s. 34(2) to avoid "watering down" the defence afforded by s. 34(2): *R. v. Mulder* (1978), 40 C.C.C. (2d) 1 (Ont. C.A.).

## Defence of Property

### DEFENCE OF PERSONAL PROPERTY / Assault by trespasser.

**38. (1)** Every one who is in peaceable possession of personal property, and every one lawfully assisting him, is justified

(a) in preventing a trespasser from taking it, or

(b) in taking it from a trespasser who has taken it,

if he does not strike or cause bodily harm to the trespasser.

(2) Where a person who is in peaceable possession of personal property lays hands on it, a trespasser who persists in attempting to keep it or take it from him or from any one lawfully assisting him shall be deemed to commit an assault without justification or provocation. R.S., c. C-34, s. 38.

## CROSS-REFERENCES

Section 39(1) provides for a defence where the person is in peaceable possession of personal property under a claim of right. Section 39(2) limits the use of force by a person who, although in possession, does not claim possession under a claim of right against a person lawfully entitled to possession. Sections 40 to 42 deal with use of force in defence of real property. Use of force may also be



justified under s. 27 to prevent commission of a serious offence involving property. Also note ss. 34 to 37 concerning use of force in defence of the person. As to liability for excessive force, see s. 26. The term “bodily harm” is defined for the purposes of the assault provisions in s. 2 and may be of assistance for the purpose of this section. Neither the terms “personal property” nor “trespasser” are defined and resort must be had to the civil and provincial law. As to the scope of subsec. (2) see notes under s. 41(2).

## SYNOPSIS

This section sets out when *force* may be used in *defence of personal property*.

Subsection (1) sets out the limit on the use of force; it cannot include striking or causing bodily harm to the trespasser. The justification applies to the person in *peaceable possession of personal property* and extends to anyone assisting him. The permitted actions are *preventing the trespasser from taking the property, or in taking property back from a trespasser*. The standard to be applied is a *subjective* one and if the accused believes that the person is a trespasser and does not exceed the limits in the subsection, the actions will be justified. The *force* used must *not be excessive*, but the section has been interpreted to permit the pointing of a gun by a physically weak person to prevent the taking of the property.

Subsection (2) deems the actions of the trespasser to be an assault without justification or provocation under the circumstances outlined in the subsection. This deeming provision will have the effect of permitting a person to rely on s. 34 rather than s. 35, if an assault is committed upon the trespasser.

## ANNOTATIONS

This section can apply where the Court finds the accused had reasonable grounds to believe the person was a trespasser: *R. v. Weare* (1983), 4 C.C.C. (3d) 494, 56 N.S.R. (2d) 411 (S.C. App. Div.).

The test under this section is a subjective one, whether the accused used more force than he, on reasonable grounds, believed was necessary. While the firing at a person to prevent him from taking movable property may not be justified under this section, the mere pointing of the firearm to scare the person off may, depending on the circumstances, be justified. Therefore, this section could constitute a defence to a charge of pointing a firearm contrary to s. 86: *R. v. Weare, supra*.

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## DEFENCE WITH CLAIM OF RIGHT / Defence without claim of right.

**39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.**

**(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it. R.S., c. C-34, s. 39.**

## CROSS-REFERENCES

Section 38 provides for a defence where the person is in peaceable possession of personal property. The term “claim of right” is not defined, but likely embraces an honest, although mistaken, belief in entitlement to the property, although the mistake is based on a mistake of law or fact. [See discussion of claim of right in relation to theft in *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.).] Sections 40 to 42 deal with use of force in defence of real property. Use of force may also be justified under s. 27 to prevent commission of a serious offence involving property. Also note ss. 34 to 37 concerning use of force in defence of the person. As to liability for excessive force, see s. 26.



## SYNOPSIS

This section provides a defence to a person who uses force to defend personal property from removal by another person lawfully entitled to it.

The protection in s. 39(1) is limited to cases in which the defender is in *peaceable possession* of personal property and does have a *claim of right to it*. It extends the protection from the possessor of the right to those who act under the authority of such person. There will be no criminal responsibility if *no more force than is necessary* is used to defend that possession, even as against a person who is entitled by law to have it.

Subsection (2) may be seen as the converse of subsec. (1) and acts to deny similar relief from criminal responsibility to a person defending personal property if that person (or someone acting under the authority of such person) does *not have a claim of right to it*, and acts to defend the property from a person lawfully entitled to it.

## ANNOTATIONS

A private licensed bailiff may re-acquire possession of movable property for his principal peacefully, but he cannot oppose resistance by another person entitled by law to its possession: *R. v. Doucette et al.* (1960), 129 C.C.C. 102, 33 C.R. 174 (Ont. C.A.).

This section was applicable and entitled the accused to resist the attempt by the victim to obtain the suitcases of a third person, which the accused was legally holding under the provisions of the Hotel Keepers Act, R.S.M. 1940, c. 98, provided or so long as he did not use more force than was necessary: *Nykolyn v. The King* (1949), 94 C.C.C. 145, 8 C.R. 7, [1949] S.C.R. 392 (5:0).

## DEFENCE OF DWELLING.

**40. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting under his authority, is justified in using as much force as is necessary to prevent any person from forcibly breaking into or forcibly entering the dwelling-house without lawful authority. R.S., c. C-34, s. 40.**

## CROSS-REFERENCES

"Dwelling house" is defined in s. 2. Forcible entry is defined in s. 72. Section 350 contains an extended definition of break and enter for the purposes of ss. 348 and 349. It is unclear whether that definition could apply in circumstances covered by this section. Defence of real property is also dealt with under ss. 41 to 42. Defence of personal property is dealt with in ss. 38 and 39. Defence of the person is dealt with in ss. 34 to 37. Use of force may also be justified under s. 27 to prevent commission of a serious offence involving property. As to liability for excessive force, see s. 26.

## SYNOPSIS

Section 40 provides a *justification for an assault* committed by a person in lawful possession of a dwelling house while *preventing or attempting to prevent a break-in of that house*.

The section justifies the use of *as much force as is necessary* to prevent any person from *forcibly* breaking in or entering a dwelling house if the other conditions of the section are met. The force must be necessary for that purpose, i.e., to prevent the break-in and not for any additional reason. The person seeking entry into the house must be *without lawful authority*. The defender using the force must be in *peaceable possession* of the home and the section extends to anyone acting under his authority.

## ANNOTATIONS

On a prosecution for obstructing a peace officer in the execution of his duty arising out of an attempt by the accused to prevent the warrantless entry of the officer into the accused's home the onus of establishing justification is a severe one. Where the Crown failed to establish either a statutory or common law right of entry, the accused was entitled to resist the entry by force and invoke this section as a defence to the charge: *R. v. Kephart* (1988), 44 C.C.C. (3d) 97, [1989] 1 W.W.R. 529, 91 A.R. 321 (C.A.).

**DEFENCE OF HOUSE OR REAL PROPERTY / Assault by trespasser.**

**41. (1)** Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.

**(2)** A trespasser who resists an attempt by a person who is in peaceable possession of a dwelling-house or real property, or a person lawfully assisting him or acting under his authority to prevent his entry or to remove him, shall be deemed to commit an assault without justification or provocation. R.S., c. C-34, s. 41.

**CROSS-REFERENCES**

“Dwelling house” is defined in s. 2. The term “trespasser” is not defined and resort must be had to the civil and provincial law. Defence of real property is also dealt with under ss. 40 and 42. Defence of personal property is dealt with in ss. 38 and 39. Defence of the person is dealt with in ss. 34 to 37. Use of force may also be justified under s. 27 to prevent commission of a serious offence involving property. As to liability for excessive force, see s. 26.

**SYNOPSIS**

Section 41 establishes the amount of defensive force that is justifiable in dealing with trespassers on real property or in a dwelling house.

Section 41(1) contains a number of conditions: (1) the person using the force be in peaceable possession of the dwelling house or real property; (2) the force exercised be no more than is necessary (which would seem to invite a subjective test); and (3) the force may only be used to prevent any person from trespassing on the dwelling house or real property or to remove any person from the property. There does not need to be a dwelling house located on the real property for the section to apply, and it applies equally to anyone lawfully assisting the possessor of the house or property.

Section 41(2) deems the trespasser to be committing an assault without justification or provocation if the trespasser resists attempts at preventing the trespass or removing the trespasser under the circumstances described in the subsection. This will permit the person removing the trespasser to rely upon s. 34 rather than s. 35 if an assault is committed.

**ANNOTATIONS**

**Subsec. (1)** – This subsection will not justify shooting at a mere trespasser: *R. v. Baxter* (1975), 27 C.C.C. (2d) 96, 33 C.R.N.S. 22 (Ont. C.A.); nor the infliction of a serious injury with a knife: *R. v. Figueira* (1981), 63 C.C.C. (2d) 409 (Ont. C.A.).

The defence of property which would justify killing can only arise where the person in possession of the property was able to bring himself within s. 34: *R. v. Clark* (1983), 5 C.C.C. (3d) 264, [1983] 4 W.W.R. 313 (Alta. C.A.).

This subsection is not limited to the real property upon which a dwelling-house is situated and may apply to commercial premises such as a store: *R. v. Scopelliti* (1981), 63 C.C.C. (2d) 481, 34 O.R. (2d) 524 (C.A.).

The defence under this subsection has four elements. The accused must be in possession of land, his possession must be peaceable, the victim of the assault must be a trespasser, and the force used to eject the trespasser must be reasonable in the circumstances. For the accused to be in possession of the land, he must have control although not necessarily exclusive control over the property in question. Peaceable possession is not synonymous with peaceful possession and means a possession not seriously challenged by others. The key to peaceable possession is whether the possession is such, and the challenge to it is such, that the situation is unlikely to lead to violence. As to the requirement that the victim must be a trespasser, if that person has a right to be on the

land, even if the accused also has a right to be on the land, the defence is not available. It is unclear whether the accused has the right to treat the victim as a trespasser if the victim has a right to go on the land for one purpose but goes in fact for another unlawful purpose, before that unlawful purpose has been manifested. As regards to the first two elements, the defence of mistake is available. The defence of mistake is also available to the factual content of the third element as to whether the victim is a trespasser. Thus, an accused might honestly but mistakenly believe that he has a measure of control over the lands, or that his supposed control is unchallenged, or he might believe in a set of facts, which, if true, makes the victim a trespasser: *R. v. Born with a Tooth* (1992), 76 C.C.C. (3d) 169, 4 Alta. L.R. (3d) 289 (C.A.).

The fact that the complainant was originally an invitee did not mean that he necessarily remained one until he left the premises if he began to make use of the premises in a manner prohibited by the owner. If the owner had reasonable grounds to believe that the complainant was a trespasser, then the judge must consider whether the use of force by the owner was justified by this section: *R. v. Keating* (1992), 76 C.C.C. (3d) 570, 117 N.S.R. (2d) 39 (C.A.).

**Subsec. (2)** – Passive resistance by a trespasser to his removal is not an assault; there must be proof of an overt act of resistance for a conviction: *R. v. Kellington* (1972), 7 C.C.C. (2d) 564, [1972] 5 W.W.R. 396 (B.C.C.A.).

Similarly, in *R. v. Baxter*, *supra*, Martin J.A., was of the view that the effect of this subsection “is not to convert mere passive resistance into an assault but merely to provide that if force is used by the wrongdoer in resisting an attempt to prevent his entry or to remove him, such force is unlawful, and hence an assault”. See also *R. v. Scopelliti*, *supra*, and *R. v. Richardson* (1983), 8 C.C.C. (3d) 309, 60 N.S.R. (2d) 354 (App. Div.).

This subsection only applies if the attempt to eject the trespasser was lawful and therefore cannot be invoked if the accused used unnecessary force which provoked the trespasser: *R. v. Alkadri* (1986), 29 C.C.C. (3d) 467 (Alta. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

Since in the absence of some statutory authority, a tenant of an apartment building is not in peaceable possession of the common hallways, resistance by a trespasser to a tenant's attempt to remove him is not an assault within this subsection: *R. v. Spencer* (1977), 38 C.C.C. (2d) 303, [1978] 1 W.W.R. 250 (B.C.S.C.).

#### ASSERTION OF RIGHT TO HOUSE OR REAL PROPERTY / Assault in case of lawful entry / Trespasser provoking assault.

**42. (1)** Every one is justified in peaceably entering a dwelling-house or real property by day to take possession of it if he, or a person under whose authority he acts, is lawfully entitled to possession of it.

**(2)** Where a person

(a) not having peaceable possession of a dwelling-house or real property under a claim of right, or  
 (b) not acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,  
 assaults a person who is lawfully entitled to possession of it and who is entering it peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be without justification or provocation.

**(3)** Where a person

(a) having peaceable possession of a dwelling-house or real property under a claim of right, or  
 (b) acting under the authority of a person who has peaceable possession of a dwelling-house or real property under a claim of right,  
 assaults any person who is lawfully entitled to possession of it and who is entering it



peaceably by day to take possession of it, for the purpose of preventing him from entering, the assault shall be deemed to be provoked by the person who is entering. R.S., c. C-34, s. 42.

#### CROSS-REFERENCES

The terms “day” and “dwelling-house” are defined in s. 2. The term “claim of right” is not defined but likely embraces an honest, although mistaken, belief of entitlement to the property although the mistake is based on a mistake of law or fact. [See discussion of claim of right in relation to theft in *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.).] Defence of real property is also dealt with under ss. 40 and 41. Defence of personal property is dealt with in ss. 38 and 39. Defence of the person is dealt with in ss. 34 to 37. Use of force may also be justified under s. 27 to prevent commission of a serious offence involving property. As to liability for excessive force, see s. 26.

#### SYNOPSIS

This section provides justification for those who *enter real property peaceably to take lawful possession* of it, and spells out what *actions will constitute assault upon persons who have lawful entitlement* to the property.

Section 42(1) justifies entering a dwelling house or real property to take possession of it if the person is lawfully entitled to possession of it or is acting under the authority of someone who is so lawfully entitled. The entry is only permitted *by day* and must be done *peaceably*. This subsection should be read together with subsec. (3) to see the effect of an assault upon such a person.

Section 42(2) sets out the legal effect of assaulting a person described in subsec. (1) who is entering to take possession of the dwelling or property. The person who is affected by this deeming provision is a person who is not in peaceable possession of the aforementioned property *under a claim of right* or who is not acting under the authority of a person with such a claim. Under such circumstances, an assault upon the person described in subsec. (1), *for the purpose of preventing that person from taking possession* of the property, will be deemed to be an unprovoked and unjustified assault. This means that the person committing the assault will be limited to using s. 35 rather than s. 34 to support a defence of self-defence.

Section 42(3) provides a corollary to subsec. (2) by deeming an assault upon a person described in subsec. (1) by a person in *peaceable possession of a dwelling house or real property acting either under his own claim of right* or the authority of one who has such a claim to have been *provoked by the person entering to take possession* of the property. The purpose for the assault is limited to preventing the other person from entering the property to take possession. This subsection may be relied upon, even if the person assaulted entered by day and was lawfully entitled to do so.

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### Protection of Persons in Authority

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#### CORRECTION OF CHILD BY FORCE.

43. Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances. R.S., c. C-34, s. 43.

#### CROSS-REFERENCES

The terms “schoolteacher”, “child”, “pupil” and “parent” are not defined, but case-law has provided meaning to those terms. See especially *Ogg-Moss v. The Queen*, and *Nixon v. The Queen*, *infra*. As to liability for excessive force, see s. 26.



## SYNOPSIS

This section justifies the use of *force* by certain persons *to correct a child or pupil*.

The persons who may rely upon this section are *schoolteachers, parents or those standing in the place of a parent*. The child or pupil must be *under the care of the person using the force*, and the force must be applied for the *purpose of correcting the child*. Thus, if the child is too young to learn from the correction or is incapable due to mental disability, the use of force will not be justified by s. 43. The force applied cannot exceed what is *reasonable* in the circumstances. This would appear to be an objective standard, although the reference to "in the circumstances" permits some element of subjectivity to be considered.

## ANNOTATIONS

Even if the school-boy had not committed a breach of discipline, if there were reasonable and probable grounds for the teacher to believe that he had done so, his action of punishing the boy at the next reasonable opportunity after the weekend was excusable under this section: *R. v. Habershtock* (1970), 1 C.C.C. (2d) 433 (Sask. C.A.).

A mentally retarded adult at a residential centre is neither a "child" nor a "pupil" within the meaning of this section. A "pupil" is limited to a child taking instruction. Further, a mental retardation counsellor at such a centre is not a person standing in the place of a parent, having only temporary care of the adult, not being responsible for the adult's pecuniary needs and by express direction not the delegate of the Minister for the purpose of using force for correction. As well, such counsellor having functions related to personal care of the patient rather than teaching was not a "schoolteacher": *Ogg-Moss v. The Queen* (1984), 14 C.C.C. (3d) 116, 41 C.R. (3d) 297, [1984] 2 S.C.R. 173 (5:0); *Nixon v. The Queen* (1984), 14 C.C.C. (3d) 257, [1984] 2 S.C.R. 197, 12 D.L.R. (4th) 762 (5:0).

This section authorizes the use of force only where it is by way of correction, that is, for the benefit of the education of the child. In so far as a mentally retarded child is incapable of appreciating correction, this section does not, as a matter of law, justify the use of force by a person standing in the place of a parent or by a schoolteacher. Where the victim of an assault to the knowledge of the accused was by reason of his mental retardation incapable of remembering the "correction" within minutes of its application, then this section was no defence: *Ogg-Moss v. The Queen* (1984), 14 C.C.C. (3d) 116, 41 C.R. (3d) 297, [1984] 2 S.C.R. 173 (5:0).

In determining whether the force used has exceeded what is reasonable under the circumstances, the court must consider both from an objective and subjective standpoint such matters as the nature of the offence calling for correction, the age and character of the child and the likely effect of the punishment on the particular child, the degree of gravity of the punishment, the circumstances under which it was inflicted and the injuries, if any, suffered: *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453, 43 C.R. (3d) 70, [1985] 2 W.W.R. 369 (Sask. C.A.).

In *R. v. Halcrow* (1993), 80 C.C.C. (3d) 320, 40 W.A.C. 197 (B.C.C.A.), affd [1995] 1 S.C.R. 440, 95 C.C.C. (3d) 94, 90 W.A.C. 72, Southin J.A. in her opinion [dissenting in part] considered that the word "reasonable" in this section means "moderate" or "not excessive" and what is or is not excessive should depend solely upon the age and physical condition of the child. Factors such as the gravity of the offence, the character of the child, and the likely effect on the character of the child are relevant only to the issue of the accused's purpose, whether the force was applied by way of correction.

In determining whether the force used was reasonable under the circumstances the Court must consider the customs of the contemporary Canadian community, not the customs of the accused's former country where corporal punishment may have greater acceptance: *R. v. Baptiste and Baptiste* (1980), 61 C.C.C. (2d) 438 (Ont. Prov. Ct.).

**MASTER OF SHIP MAINTAINING DISCIPLINE.**

**44. The master or officer in command of a vessel on a voyage is justified in using as much force as he believes, on reasonable grounds, is necessary for the purpose of maintaining good order and discipline on the vessel. R.S., c. C-34, s. 44.**

**CROSS-REFERENCES**

“Vessel” is defined for the purposes of Part VIII in s. 214. It is unclear whether that definition would apply to this section, however, see s. 15 of the Interpretation Act, R.S.C. 1985, c. I-21. As to liability for excessive force, see s. 26.

**SURGICAL OPERATIONS.**

**45. Every one is protected from criminal responsibility for performing a surgical operation on any person for the benefit of that person if**

- (a) the operation is performed with reasonable care and skill; and**
- (b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case. R.S., c. C-34, s. 45.**

**CROSS-REFERENCES**

As to duty to use reasonable knowledge, skill and care in administering surgical care, see s. 216. This section is complementary to the criminal negligence provisions in ss. 219 to 221.

**ANNOTATIONS**

The conduct of a physician in stopping the respiratory support treatment of his patient, at the freely given and informed request of the patient so that nature may take its course, is not unreasonable within the meaning of this section and would not attract criminal liability: *Nancy B. v. Hôtel-Dieu de Québec* (1992), 69 C.C.C. (3d) 450, 86 D.L.R. (4th) 385, [1992] R.J.Q. 361 (S.C.).

**Part II / OFFENCES AGAINST PUBLIC ORDER*****Treason and other Offences against the Queen's Authority and Person*****HIGH TREASON / Treason / Canadian citizen / Overt act.**

- 46. (1) Every one commits high treason who, in Canada,**
- (a) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;**
  - (b) levies war against Canada or does any act preparatory thereto; or**
  - (c) assists an enemy at war with Canada, or any armed forces against whom Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the country whose forces they are.**
- (2) Every one commits treason who, in Canada,**
- (a) uses force or violence for the purpose of overthrowing the government of Canada or a province;**
  - (b) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;**

- (c) conspires with any person to commit high treason or to do anything mentioned in paragraph (a);
  - (d) forms an intention to do anything that is high treason or that is mentioned in paragraph (a) and manifests that intention by an overt act; or
  - (e) conspires with any person to do anything mentioned in paragraph (b) or forms an intention to do anything mentioned in paragraph (b) and manifests that intention by an overt act.
- (3) Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,
- (a) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or
  - (b) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).
- (4) Where it is treason to conspire with any person, the act of conspiring is an overt act of treason. R.S., c. C-34, s. 46; 1974-75-76, c. 105, s. 2.

### CROSS-REFERENCES

Punishment for high treason, see ss. 47(1), 742(a). Punishment for treason, see s. 47(2). Limitation period for treason, see s. 48. Limitation as to admission of evidence of overt acts in treason trials, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and by s. 601(9) the indictment may not be amended so as to add to the overt acts. Indictments in case of high treason, see s. 582. Section 604 enacts special provisions for delivery of the indictment, list of witnesses and jury panel to the accused prior to trial of treason or high treason, with some exceptions, as, for example, the offence described by para. (1)(a). Unavailability of defence of compulsion by threats, see s. 17. The offences in this section are triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. This offence may be the basis for constructive murder under s. 230 and the basis for an application for an authorization to intercept private communications by reason of s. 183.

Related offences: s. 49, acts intended to alarm Her Majesty or cause her bodily harm; s. 50(1)(a), assisting enemy alien; s. 51, intimidating Parliament or Legislature; s. 52, sabotage; s. 53, inciting mutiny; s. 54, assisting deserter from Canadian Forces; s. 56, assisting deserter from R.C.M.P. It is also an offence to fail to report the fact that a person is about to commit treason or high treason, s. 50(1)(b). Reference should also be made to the Official Secrets Act, R.S.C. 1985, c. O-5.

### SYNOPSIS

This section creates the offences of treason and high treason. It also prohibits certain activities by persons outside of Canada.

The elements of high treason are set out in s. 46(1). It includes specified violent actions against the Queen, levying war (or preparing to do so) against Canada or assisting an enemy at war with Canada or whose armed forces are engaged in hostilities with our armed forces.

The offence of treason is created by s. 46(2). Section 46(2)(a) states that treason is committed if a person uses force to overthrow the government of Canada or of a province. Section 46(2)(d) provides that if a person forms the intention to commit the acts described in s. 46(1)(a) and shows that intention by doing an overt act, this is also the full offence of treason. It is also treason to conspire to do the acts described in s. 46(1)(a) or to conspire to commit high treason.

An alternative basis for liability is found in s. 46(2)(b), stemming from making available any of a specified class of documents to a foreign agent or state which the accused *knows or ought to know* could be used for a purpose prejudicial to the *safety or defence of Canada*. This paragraph specifies that the accused must have no lawful authority for



communicating or making available such material. A conspiracy to do so or the intention to do so if accompanied by an overt act constitutes treason under s. 46(2)(e).

Section 46(4) provides that conspiring is an overt act of treason in circumstances in which it is treason to conspire with another person.

Section 46(3) imposes liability for either high treason or treason, as the case may be, upon Canadians or those who owe allegiance to Her Majesty in right of Canada for doing the things *inside or outside of Canada* described in s. 46(1) or (2).

#### **PUNISHMENT FOR HIGH TREASON / Punishment for treason / Corroboration / Minimum punishment.**

**47. (1) Every one who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life.**

**(2) Every one who commits treason is guilty of an indictable offence and liable**

- (a) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(a), (c) or (d);**
- (b) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(b) or (e) committed while a state of war exists between Canada and another country; or**
- (c) to be sentenced to imprisonment for a term not exceeding fourteen years if he is guilty of an offence under paragraph 46(2)(b) or (e) committed while no state of war exists between Canada and another country.**

**(3) No person shall be convicted of high treason or treason on the evidence of only one witness, unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.**

**(4) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by subsection (1) is a minimum punishment. R.S., c. C-34, s. 47; 1974-75-76, c. 105, s. 2.**

#### **CROSS-REFERENCES**

Definition of treason and high treason, see s. 46. Punishment for high treason, parole ineligibility, see s. 742(a).

Limitation period in treason, see s. 48; Limitation as to admission of evidence of overt acts in treason trials, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and, by s. 601(9), the indictment may not be amended so as to add to the overt acts. Indictments in case of high treason, see s. 582. Section 604 enacts special provisions for delivery of the indictment, list of witnesses, and jury panel to the accused prior to trial of treason or high treason, with some exceptions, as, for example, the offence described by para. (1)(a). Unavailability of defence of compulsion by threats, see s. 17. Trial of these offences is by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with these offences. This offence may be the basis for constructive murder under s. 230 and the basis for an application for an authorization to intercept private communications by reason of s. 183.

#### **ANNOTATIONS**

In *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 161, [1990] 2 S.C.R. 3, [1990] 4 W.W.R. 577, 77 C.R. (3d) 327 (5:0), the court considered the effect of now repealed s. 586, which provided that no person shall be convicted on the unsworn evidence of a child “unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused”. The wording is thus almost identical to subsec. (3) of this section. It was there held that the requirement that the corroborating evidence implicate the accused requires only that the evidence confirm in some material particular the story of the wit-



ness giving the evidence which required corroboration. The confirming evidence need not also itself implicate the accused.

#### **LIMITATION / Information for treasonable words.**

48. (1) No proceedings for an offence of treason as defined by paragraph 46(2)(a) shall be commenced more than three years after the time when the offence is alleged to have been committed.

(2) No proceedings shall be commenced under section 47 in respect of an overt act of treason expressed or declared by open and considered speech unless

- (a) an information setting out the overt act and the words by which it was expressed or declared is laid under oath before a justice within six days after the time when the words are alleged to have been spoken; and
- (b) a warrant for the arrest of the accused is issued within ten days after the time when the information is laid. R.S., c. C-34, s. 48; 1974-75-76, c. 105, s. 29.

#### **CROSS-REFERENCES**

The term "year" is defined in s. 37 of the Interpretation Act, R.S.C. 1985, c. I-21, and, by reason of that definition, calculation of the three year period would be pursuant to s. 28 of the same Act as a number of months. Calculation of the periods of time set out in subsec. (2) is pursuant to the rules in s. 27 of the Interpretation Act. In particular, subsec. (5) which provides that where anything is to be done "within" a time after a specified day, the time does not include that day. Also see s. 26 for when time limited expires on a holiday (defined in s. 35 of the same Act). For other provisions relating to treason, see notes under ss. 46 and 47.

#### **SYNOPSIS**

This section imposes certain time limits within which prosecutions for particular types of treason may be commenced.

Section 48(1) states that a three-year time-limit applies from the date of the offence if the allegation is based upon the use of force to overthrow the government of Canada or of a province (s. 46(2)(a)).

Section 48(2) requires that in order for a prosecution on an allegation of treason based on words spoken in open speech to proceed, the information must be placed before a justice within six days of the words being said and a warrant for the arrest of the accused issued within 10 days thereafter. The information alleging the offence must specify the words which are said to constitute treason.

### ***Prohibited Acts***

#### **ACTS INTENDED TO ALARM HER MAJESTY OR BREAK PUBLIC PEACE.**

49. Every one who wilfully, in the presence of Her Majesty,

- (a) does an act with intent to alarm Her Majesty or to break the public peace, or
  - (b) does an act that is intended or is likely to cause bodily harm to Her Majesty,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 49.

#### **CROSS-REFERENCES**

Limitation on admission of evidence of overt acts, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and, by s. 601(9), the indictment may not be amended so as to add to the overt acts. This offence is triable only by the superior court of criminal jurisdiction (defined in s. 2) pursuant to ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence.

Related offences: s. 46(1)(a), high treason includes killing, attempting to kill or causing certain forms of bodily harm to, or imprisoning or restraining Her Majesty. Conviction for these offences will, in certain circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

#### ASSISTING ALIEN ENEMY TO LEAVE CANADA, OR OMITTING TO PREVENT TREASON / Punishment.

- 50. (1) Every one commits an offence who**
- (a) incites or wilfully assists a subject of**
    - (i) a state that is at war with Canada, or**
    - (ii) a state against whose forces Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the state whose forces they are,**

**to leave Canada without the consent of the Crown, unless the accused establishes that assistance to the state referred to in subparagraph (i) or the forces of the state referred to in subparagraph (ii), as the case may be, was not intended thereby; or**
  - (b) knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.**
- (2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 50; 1974-75-76, c. 105, s. 29.**

#### CROSS-REFERENCES

The terms “Canadian forces”, “justice” and “peace officer” are defined in s. 2. Treason and high treason are defined in s. 46. Limitation on admission of evidence of overt acts, see s. 55. The accused has an election as to mode of trial pursuant to s. 536(2). Release of the accused pending trial is governed by s. 515. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and, by s. 601(9), the indictment may not be amended so as to add to the overt acts. Section 7(11) provides for admission of a certificate of the Secretary of State for External Affairs stating that, at a certain time, any state was engaged in an armed conflict against Canada. The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *Regina v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

#### SYNOPSIS

This section sets out the indictable offences of assisting an enemy alien to leave Canada or omitting to prevent treason. Both offences are punishable by a maximum sentence of 14 years imprisonment.

The offence created by s. 50(1)(a) is committed by either *inciting or wilfully assisting* a person who is a subject of a country with whom Canada is at war or with whom our armed forces are engaged in hostilities (regardless of whether war has been declared) to leave Canada. It must be shown that the accused did not have the consent of the Crown for the impugned actions or incitement. The accused may rely upon the defence that there was no intention to assist the foreign government or forces but the *onus is upon the accused* to establish that no such intention existed.

Section 50(1)(b) creates one of the few offences in the Criminal Code in which liability is established by an omission to report to the authorities the *knowledge that another is about to commit* an offence. The offence is based on the omission of the accused to advise a justice of the peace or peace officer that another person is about to commit *treason or*

*high treason* or to make other reasonable efforts to prevent the commission of either offence.

## INTIMIDATING PARLIAMENT OR LEGISLATURE.

**51. Every one who does an act of violence in order to intimidate Parliament or the legislature of a province is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 51.**

## CROSS-REFERENCES

Limitation on admission of evidence of overt acts, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and, by s. 601(9), the indictment may not be amended so as to add to the overt acts. This offence is triable only by the superior court of criminal jurisdiction (defined in s. 2) pursuant to ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

## SABOTAGE / Definition of "prohibited act" / Saving / Idem.

**52. (1) Every one who does a prohibited act for a purpose prejudicial to**  
**(a) the safety, security or defence of Canada, or**  
**(b) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada,**  
**is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.**

**(2) In this section, "prohibited act" means an act or omission that**  
**(a) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing; or**  
**(b) causes property, by whomever it may be owned, to be lost, damaged or destroyed.**

**(3) No person does a prohibited act within the meaning of this section by reason only that**  
**(a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment;**  
**(b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or**  
**(c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.**

**(4) No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information. R.S., c. C-34, s. 52.**

## CROSS-REFERENCES

"Dwelling-house" is defined in s. 2.

Limitation on admission of evidence of overt acts, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment. Note, however, that unlike, for example, on the trial of an offence under s. 53, s. 601(9), which provides that the indictment may not be amended so as to add to the overt acts, does not apply to the trial of this offence. The accused has an election as to mode of trial pursuant to s. 536(2). Release of the accused pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5).



## SYNOPSIS

This section creates the indictable offence of sabotage and provides exceptions from liability for certain acts or omissions.

The offence is set out in s. 52(1) and consists of doing one of the *prohibited acts* specified in subsec. (2) *for a purpose prejudicial* to the safety, security or defence of the nation, or to the armed forces of another nation which are lawfully within Canada. The maximum sentence for this offence is 10 years.

Subsections (3) and (4) set out the exceptions to the application of this section. Subsection (3) details a number of reasons why an accused may have stopped work (relating primarily to labour disputes and safety concerns) and provides that *these actions alone* do not constitute a prohibited act (see subsec. (2)). Subsection (4) exempts those who go near a place or house *for the purpose only* of obtaining or communicating information.

## INCITING TO MUTINY.

### 53. Every one who

(a) attempts, for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty, or

(b) attempts to incite or to induce a member of the Canadian Forces to commit a traitorous or mutinous act,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 53.

## CROSS-REFERENCES

“Canadian Forces” is defined in s. 2. Attempt is defined in s. 24.

Limitation on admission of evidence of overt acts, see s. 55. Section 581(4) requires that every overt act that is to be relied on shall be stated in the indictment and, by s. 601(9), the indictment may not be amended so as to add to the overt acts. This offence is triable only by the superior court of criminal jurisdiction (defined in s. 2) pursuant to ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. Other provisions also deal with offences concerning the military, see, for example, s. 54, assisting deserter; s. 62, offences in relation to military forces; ss. 419, 420, offences in relation to military uniforms and certificates and military stores.

Reference should also be made to the National Defence Act, R.S.C. 1985, c. N-5.

## ASSISTING DESERTER.

54. Every one who aids, assists, harbours or conceals a person who he knows is a deserter or absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction, but no proceedings shall be instituted under this section without the consent of the Attorney General of Canada. R.S., c. C-34, s. 54.

## CROSS-REFERENCES

“Canadian Forces” and “Attorney General” are defined in s. 2. As to consent of Attorney General, see s. 583(h). Trial of this offence is by a summary conviction court pursuant to Part XXVII. The punishment for this offence is set out in s. 787. The limitation period is set out in s. 786(2). Release pending trial is governed by s. 515, although the accused is eligible for release by a peace officer or the officer in charge, pursuant to ss. 496, 497 and 498. Other provisions also deal with offences concerning the military, see for example: s. 53, inciting to mutiny; s. 62, offences in relation to military forces; ss. 419, 420, offences in relation to military uniforms and certificates and military stores and s. 120, bribery of public officer [note *officers* of the Canadian Forces are within the definition of public officer in s. 2]; s. 122, breach of trust by official; s. 129(a), obstructing public officer; s. 129(b), refusing to aid public officer; s. 399, false return by public officer.



**EVIDENCE OF OVERT ACTS.**

**55.** In proceedings for an offence against any provision in section 47 or sections 49 to 53, no evidence is admissible of an overt act unless that overt act is set out in the indictment or unless the evidence is otherwise relevant as tending to prove an overt act that is set out therein. **R.S., c. C-34, s. 55.**

**CROSS-REFERENCES**

Section 581(4) also requires that every overt act that is to be relied on shall be stated in the indictment and except in the case of the offence of sabotage under s. 52, by s. 601(9), the indictment may not be amended so as to add to the overt acts.

**SYNOPSIS**

This section sets out a rule of criminal procedure which imposes particular requirements upon the wording of an indictment in prosecutions under ss. 47 and 49 to 53. The indictment (which includes an information pursuant to s. 2) must specify the overt act alleged in order for such evidence to be received against the accused. This section mirrors the contents of s. 581(3), in that the substance of the overt act alleged in prosecutions under the aforementioned sections must be specified in the indictment. However, if the evidence is otherwise relevant as tending to prove an overt act alleged in the indictment it may be admitted.

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**OFFENCES IN RELATION TO MEMBERS OF R.C.M.P.****56. Every one who wilfully**

- (a) persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave,**
- (b) aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police who he knows is a deserter or absentee without leave, or**
- (c) aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,**

**is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 57; R.S.C. 1985, c. 27 (1st Supp.), s. 8.**

**CROSS-REFERENCES**

"Counsel" is defined in s. 22(3). Trial of this offence is by a summary conviction court pursuant to Part XXVII. The punishment for this offence is set out in s. 787. The limitation period is set out in s. 786(2). Release pending trial is governed by s. 515 although the accused is eligible for release by a peace officer or the officer in charge pursuant to ss. 496, 497 and 498. Other provisions also deal with offences concerning the R.C.M.P., see for example: s. 120, bribery of public officer [note officers of the R.C.M.P. are within the definition of public officer in s. 2]; s. 122, breach of trust by official; s. 129(a), obstructing public officer; s. 129(b), refusing to aid public officer; s. 399, false return by public officer.

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**Passports**

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**FORGERY OF OR UTTERING FORGED PASSPORT / False statement in relation to passport / Possession of forged, etc., passport / Special provisions applicable / Definition of "passport" / Jurisdiction / Appearance of accused at trial.**

**57. (1) Every one who, while in or out of Canada,**

- (a) forges a passport, or**
- (b) knowing that a passport is forged**

(i) uses, deals with or acts on it, or  
(ii) causes or attempts to cause any person to use, deal with, or act on it, as if the passport were genuine,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) Every one who, while in or out of Canada, for the purpose of procuring a passport for himself or any other person or for the purpose of procuring any material alteration or addition to any such passport, makes a written or an oral statement that he knows is false or misleading

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(3) Every one who without lawful excuse, the proof of which lies on him, has in his possession a forged passport or a passport in respect of which an offence under subsection (2) has been committed is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(4) For the purposes of proceedings under this section,

(a) the place where a passport was forged is not material; and

(b) the definition “false document” in section 321, and section 366, apply with such modifications as the circumstances require.

(5) In this section, “passport” means a document issued by or under the authority of the Minister of Foreign Affairs for the purpose of identifying the holder thereof.

(6) Where a person is alleged to have committed, while out of Canada, an offence under this section, proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(7) For greater certainty, the provisions of this Act relating to

(a) requirements that an accused appear at and be present during proceedings, and

(b) the exceptions to those requirements,

apply to proceedings commenced in any territorial division pursuant to subsection (6). R.S., c. C-34, s. 58; R.S.C. 1985, c. 27 (1st Supp.), s. 9; 1994, c. 44, s. 4; 1995, c. 5, s. 25.

#### CROSS-REFERENCES

The general offence of forgery is set out in ss. 366 and 367 and of uttering in s. 368. For the offences prescribed by subsec. (1) and (3) the accused has an election as to mode of trial pursuant to s. 536(2). For the offence prescribed by subsec. (2), where the prosecution proceeds by way of summary conviction, then the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the prosecution proceeds by way of indictment, then the accused has an election as to mode of trial pursuant to s. 536(2). In any event, release pending trial is governed by s. 515, except that, for the offence in subsec. (2), the accused is eligible for release by a peace officer or the officer in charge pursuant to ss. 496, 497 and 498 and, in the case of the offence in subsec. (3), by the officer in charge pursuant to s. 498. The reference in subsec. (7) to requirements as to presence of the accused is to s. 650. The term “territorial division” is defined in s. 2. The offences in this section may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

The related offence of fraudulent use of a certificate of citizenship and similar documents is found in s. 58. Reference may also be made to the personation offence in s. 403.

## SYNOPSIS

This section creates offences relating to the creation of forged passports and their subsequent use or possession.

Section 57(5) provides a definition of passport for the purpose of this section. Section 57(4)(b) provides that the definitions of "false document" in ss. 321 and 366 apply to this section with whatever modifications are required. Section 57(6) extends the normal concept of jurisdiction to facilitate prosecution in any territorial division of Canada for an offence under this section which was committed outside the country. Section 57(7) provides that provisions which normally govern when the accused must be present at trial (and when there are exceptions to that rule) apply to any prosecution brought using the special jurisdictional provisions in s. 57(6). The section states that it does not matter where the passport was forged (s. 57(4)(a)).

Section 57(1) creates an indictable offence punishable by a maximum of 14 years if the accused *forges the passport personally* or for specified acts relating to either using, dealing with it or acts on it personally or causes another to do so when the accused *knows* that it is forged. The subsection applies regardless of whether these acts occur in Canada.

Section 57(2) creates an offence which turns on the accused making *false or misleading statements* in connection with passports. It must be shown that these statements were made *for the purpose* of either obtaining a passport initially or getting one altered or added to in some *material* way. This offence states that the accused may be in or out of Canada when the statements are made. This offence may be tried by summary conviction proceeding or by way of indictment. If prosecuted by indictment the maximum sentence is two years.

Section 57(3) makes it an offence to possess a passport resulting from the commission of the offence described in subsec. (2). This is an indictable offence punishable by a maximum sentence of five years. The accused may rely upon a lawful excuse but must prove such excuse. As with all burdens placed upon the accused, this provision is likely to attract scrutiny under the Canadian Charter of Rights and Freedoms.

## ANNOTATIONS

An accused may be convicted of the offence under subsec. (1)(a) where she caused another person to actually make the false passport, although the other person was unaware that the statements provided by the accused were false. While the accused could not be convicted of aiding or abetting the other person, who committed no offence, she could be convicted as a principal by application of the common law doctrine of innocent agent, a doctrine preserved in s. 21(1)(a): *R. v. Berryman* (1990), 57 C.C.C. (3d) 375, 78 C.R. (3d) 376 (B.C.C.A.).

An accused could be convicted of the offences under both subsec. (1)(a) and subsec. (2), although both charges arose out of the same circumstances. The elements of the two offences are quite different and, in this case, there were other acts beside the providing of the false statements which were instrumental in the forging of the passport: *R. v. Berryman, supra*.

### FRAUDULENT USE OF CERTIFICATE OF CITIZENSHIP / Definition of "certificate of citizenship" and "certificate of naturalization".

58. (1) Every one who, while in or out of Canada,

- (a) uses a certificate of citizenship or a certificate of naturalization for a fraudulent purpose, or
- (b) being a person to whom a certificate of citizenship or a certificate of naturalization has been granted, knowingly parts with the possession of that certificate with intent that it should be used for a fraudulent purpose,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.



(2) In this section, “certificate of citizenship” and “certificate of naturalization”, respectively, mean a certificate of citizenship and a certificate of naturalization as defined by the *Citizenship Act*. R.S., c. C-34, s. 59; 1974-75-76, c. 108, s. 41.

#### CROSS-REFERENCES

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515, except that the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offences of forgery of or uttering a forged passport are found in s. 57. Reference may also be made to the personation offence in s. 403.

#### SYNOPSIS

This section creates the indictable offence of *fraudulently using* a certificate of naturalization or citizenship. It also prohibits *parting with* a certificate of citizenship or naturalization, *knowing and intending* that it will be used fraudulently. The offence is committed whether the improper activities involving these certificates occur inside or outside Canada. The certificates referred to in the section are to be given the meaning set out in the *Citizenship Act*. The maximum sentence for this offence is two years.

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### Sedition

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SEDITIONOUS WORDS / Seditious libel / Seditious conspiracy / Seditious intention.

59. (1) Seditious words are words that express a seditious intention.

(2) A seditious libel is a libel that expresses a seditious intention.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) Without limiting the generality of the meaning of the expression “seditious intention”, every one shall be presumed to have a seditious intention who

(a) teaches or advocates, or

(b) publishes or circulates any writing that advocates,

the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada. R.S., c. C-34, s. 60.

#### CROSS-REFERENCES

Defence of good faith, see s. 60.

Punishment for sedition, see s. 61.

Special provisions for indictment of seditious libel and for proof of the libel, see s. 584. The seditious offences are triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. The offences in this section may be the basis for an application for an authorization to intercept private communications by reason of s. 183. The offence of blasphemous libel is in s. 296, of defamatory libel in ss. 297 to 317 and advocating genocide and hate propaganda in ss. 318 to 320.

#### SYNOPSIS

This section sets out the essential elements of offences relating to sedition which are created in s. 61. Section 59(4) provides two examples of what is *presumed to demonstrate a seditious intention*, but it is expressly stated that this subsection is not intended to exhaustively define what is encompassed by the phrase *seditious intention*. This presumption may be subject to attack under the Canadian Charter of Rights and Freedoms. The heart



of the examples given in this subsection is advocating, without legal authority, the use of force to achieve governmental change within Canada.

Section 59(1) to (3) defines what is meant by seditious words, seditious libel and seditious conspiracy, all of which have, as the cornerstone, the concept of expressing or agreeing to carry out a seditious intention.

### ANNOTATIONS

The leading case on this section is *Boucher v. The King* (1950), 99 C.C.C. 1, [1951] 2 D.L.R. 369, [1951] S.C.R. 265 (after rehearing ordered from 96 C.C.C. 48, [1950] 1 D.L.R. 657, 9 C.R. 127) decided under s. 133 of the 1927 Code which was essentially worded the same as this section. The Court was divided on whether a "seditious intention" required proof in all cases of an intention to incite acts of violence or public disorder. Kerwin, Rand, Kellock and Estey, JJ., were of the view that it did. Taschereau, Cartwright, Fauteux and (semble) Locke, JJ., were of the view that it did in all cases except those related to the administration of justice which required only proof of an intention to bring the administration of justice into hatred or contempt or incite disaffection against it. Rinfret, C.J.C., did not come to a firm conclusion on the matter but merely pointed out that the advocating of force was not the only instance in which there could be a "seditious intention".

### EXCEPTION.

60. Notwithstanding subsection 59(4), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

- (a) to show that Her Majesty has been misled or mistaken in her measures;
- (b) to point out errors or defects in
  - (i) the government or constitution of Canada or a province,
  - (ii) Parliament or the legislature of a province, or
  - (iii) the administration of justice in Canada;
- (c) to procure, by lawful means, the alteration of any matter of government in Canada; or
- (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada. R.S., C. C-34, s. 61.

### CROSS-REFERENCES

The sedition offences are defined in s. 59.

Punishment for sedition offences is in s. 61.

The sedition offences are triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522 only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. The sedition offences may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

### SYNOPSIS

This section sets out several specific exceptions protecting what might otherwise be said to come within the phrase *seditious intention* as expressed in s. 59(4). The focus of the exceptions is to permit legitimate criticism of the Queen or government policies or to procure change in the government by lawful means. In addition, s. 60(d) permits a person to point out matters which may produce ill will among the people of Canada if this is done with the intention of their removal.

### PUNISHMENT OF SEDITIOUS OFFENCES.

61. Every one who

- (a) speaks seditious words,
  - (b) publishes a seditious libel, or
  - (c) is a party to a seditious conspiracy,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 62.

#### CROSS-REFERENCES

The sedition offences are defined in s. 59. Note the good faith exception in s. 60.

Special provision for indictment of seditious libel, see s. 584.

Special provisions for indictment of seditious libel and for proof of the libel, see s. 584.

The sedition offences are triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. The offences referred to in this section may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

#### SYNOPSIS

This section creates indictable offences relating to sedition and provides for a maximum sentence upon conviction of 14 years. The gravamen of these offences is expressing a seditious intention, either through speaking words evincing such intention or publishing such words. The third offence also involves seditious intention and prohibits conspiring to carry out this intention.

#### OFFENCES IN RELATION TO MILITARY FORCES / Definition of “member of a force”.

##### 62. (1) Every one who wilfully

- (a) interferes with, impairs or influences the loyalty or discipline of a member of a force,
  - (b) publishes, edits, issues, circulates or distributes a writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by a member of a force, or
  - (c) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by a member of a force,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

##### (2) In this section, “member of a force” means a member of

- (a) the Canadian Forces; or
- (b) the naval, army or air forces of a state other than Canada that are lawfully present in Canada. R.S., c. C-34, s. 63.

#### CROSS-REFERENCES

“Canadian Forces” is defined in s. 2. “Counsels” is defined in s. 22(3). The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *Regina v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515 except that the accused is eligible for release by the officer in charge pursuant to s. 498.

Other provisions also deal with offences concerning the military, see, for example, s. 53, inciting to mutiny; s. 54, assisting deserter; ss. 419, 420, offences in relation to military uniforms and certificates and military stores.

Reference should also be made to the National Defence Act, R.S.C. 1985, c. N-5.

#### SYNOPSIS

This section prohibits activity designed to create disloyalty, insubordination, mutiny or

refusal of duty by military forces in Canada. Subsection (2) expands the section to apply to both Canadian forces and the armed forces of any other nation which are lawfully present in Canada. Section 62(1)(a) spells out a variety of activities which are prohibited, including interfering with the loyalty or discipline of a member of the forces. Section 62(1)(b) focuses on participation in activities such as the publication, circulation and distribution of written material advocating such insubordination, disloyalty, mutiny or refusal of duty. Section 62(1)(c) prohibits urging, counselling, or in any way causing the same range of improper activities by a member of a force as is set out in s. 62(1)(b).

The maximum sentence for this indictable offence is five years.

## ***Unlawful Assemblies and Riots***

### **UNLAWFUL ASSEMBLY / Lawful assembly becoming unlawful / Exception.**

**63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they**

**(a) will disturb the peace tumultuously; or**

**(b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.**

**(2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.**

**(3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein. R.S., c. C-34, s. 64.**

### **CROSS-REFERENCES**

Arrest powers for breach of the peace, see ss. 30, 31.

Being a member of an unlawful assembly is a summary conviction offence pursuant to s. 66. The trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2).

Related provisions concerning riots, including procedure for reading of proclamation to disperse rioters and offences relating to riots, see ss. 64, 65, 67, 68, 69. Use of force to suppress a riot and the duty of officers to disperse rioters, see ss. 32 and 33. The offence of causing a disturbance is in s. 175.

### **SYNOPSIS**

Section 63 sets out what constitutes an *unlawful assembly*, and also provides for certain exceptions. Stripped to its essentials, s. 63(1) requires that three or more persons be involved, and that they assemble in a way, or behave in such a way after assembling, that causes others in the neighbourhood to be afraid that the assembly will either disturb the peace tumultuously or provoke others to do so. Tumultuous means chaotic, disorderly, clamorous or uproarious. It must be shown that the assembly has gathered together *with the intention to carry out a common purpose*, and that the *fears* of those in the area of the assembly are *based on reasonable grounds*. If the offence lies under s. 63(1)(b) (provoking others), the accused have the defence of reasonable cause.

Simplified, s. 63(2) provides that any assembly, which was initially lawful may become an unlawful assembly if the people assembled conduct themselves in a manner



which would have brought them within s. 63(1), had they done so at the outset of the assembly. Again, it must be shown that there was a common purpose for the assembly under this paragraph.

Subsection (3) exempts persons from criminal liability if they have assembled for the *purpose of protecting the dwelling house* of any of those assembled from others who wish to break and enter this dwelling with the intention of committing therein an indictable offence.

## ANNOTATIONS

A grievance against the authorities does not provide a legal right to occupy a roadway, which is a public highway over which all members of the public are entitled to traverse: *R. v. Thomas* (1971), 2 C.C.C. (2d) 514, [1971] 2 W.W.R. 734 (B.C. Co. Ct.).

Provided that the accused is part of the assembly which has become unlawful through the conduct of its members then it is no defence that he was passively acquiescent: *R. v. Paulger and Les* (1982), 18 C.C.C. (3d) 78 (B.C. Co. Ct.).

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## RIOT.

**64. A riot is an unlawful assembly that has begun to disturb the peace tumultuously. R.S., c. C-34, s. 65.**

## CROSS-REFERENCES

Section 63, definition of “unlawful assembly”; s. 65, punishment of rioters; s. 67, procedure for reading of proclamation to disperse rioters; s. 68, offences relating to reading of proclamation; s. 69, offence for failure of peace officer to suppress riot; ss. 32 and 33, use of force to suppress a riot and the duty of officers to disperse rioters.

## ANNOTATIONS

It is essential to proof of a riot that there be actual or threatened force and violence, in addition to public disorder, confusion and uproar. Moreover, even if a tumultuous disturbance of the peace breaks out during an assembly, the accused must be shown first to have taken some part in that disturbance in one way or another. In addition, the requirement that the persons in the neighbourhood of the assembly fear “on reasonable grounds” that the members of the assembly will disturb the peace tumultuously requires that these grounds be manifest to any reasonable person within the assembly. What is required is at least objective foresight of the consequences set out in s. 63. Finally, the accused must be shown not only to have acted as a participant, but also to have intended to take part in the riot or to have been so reckless as to have acted as if he did so intend. The offence therefore requires proof of a guilty intent, does not impose absolute liability and therefore does not violate s. 7 of the Charter: *R. v. Brien* (1993), 86 C.C.C. (3d) 550, [1994] N.W.T.R. 59 (S.C.).

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## PUNISHMENT OF RIOTER.

**65. Every one who takes part in a riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 66.**

## CROSS-REFERENCES

Definition of “riot”, see s. 64. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515 except that the accused is eligible for release by the officer in charge pursuant to s. 498. Conviction for this offence may, in certain circumstances, attract imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(2). Procedure for reading of proclamation to disperse rioters, see s. 67 and offences relating to reading of proclamation, see s. 68. Offence for failure of peace officer to suppress riot, see s. 69. Use of force to suppress a riot and the duty of officers to disperse rioters, see ss. 32 and 33.



**PUNISHMENT FOR UNLAWFUL ASSEMBLY.**

**66. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 67.**

**CROSS-REFERENCES**

Definition of "unlawful assembly", see s. 63. The trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is governed by s. 515, except that the accused is eligible for release by a peace officer or the officer in charge pursuant to ss. 496, 497 and 498. Arrest powers for breach of the peace, see ss. 30, 31. Related provisions concerning riots, including procedure for reading of proclamation to disperse rioters and offences relating to riots, see ss. 64, 65, 67, 68, 69. Use of force to suppress a riot and the duty of officers to disperse rioters, see ss. 32 and 33. The offence of causing a disturbance is in s. 175.

**ANNOTATIONS**

The actions of only a few members can turn the assembly into an unlawful one as defined in s. 63 and thereby render all members of the assembly liable to be convicted of the offence under this section: *R. v. Kalyn et al.* (1980), 52 C.C.C. (2d) 378 (Sask. Prov. Ct.).

**READING PROCLAMATION.****67. A person who is**

- (a) a justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff,
- (b) a warden or deputy warden of a prison, or
- (c) the institutional head of a penitentiary, as those expressions are defined in subsection 2(1) of the *Corrections and Conditional Release Act*, or that person's deputy,

who receives notice that, at any place within the jurisdiction of the person, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as is safe, if the person is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:

Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. **GOD SAVE THE QUEEN. R.S., c. C-34, s. 68; 1994, c. 44, s. 5.**

**CROSS-REFERENCES**

Definition of "justice", see s. 2. Definition of riot, see s. 64. The definition of sheriff or mayor will be found in the relevant provincial legislation. A justice, sheriff and mayor are peace officers as defined by s. 2. Offences of obstructing a peace officer, see s. 129 and assaulting a peace officer in execution of duty, see s. 270. The offence of taking part in a riot is in s. 65. Punishment of offences in relation to reading of proclamation, see s. 68. Offence by peace officer in failing to suppress riot, see s. 69. Use of force to suppress a riot and the duty of officers to disperse rioters, see ss. 32 and 33.

**SYNOPSIS**

Section 67 provides for what is commonly referred to as "*reading the riot act*" by a justice, mayor or sheriff (or lawful deputy of the latter two officials) or the head of a prison or penitentiary. The prerequisites for reading the proclamation are that there be *12 or more people* who are unlawfully and riotously assembled and that the official is satisfied that a riot is in progress. The official must then command silence, and shall read, or cause another to read, the "riot act" in a loud voice from as close to those assembled as is safe.

The precise words set out in the Criminal Code need not be used, so long as the words are “of like effect”.

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#### OFFENCES RELATED TO PROCLAMATION.

**68. Every one is guilty of an indictable offence and liable to imprisonment for life who**

- (a) opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in section 67 so that it is not made;
- (b) does not peaceably disperse and depart from a place where the proclamation referred to in section 67 is made within thirty minutes after it is made; or
- (c) does not depart from a place within thirty minutes when he has reasonable grounds to believe that the proclamation referred to in section 67 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it. R.S., c. C-34, s. 69.

#### CROSS-REFERENCES

Procedure for reading proclamation, see s. 67 and cross-references noted under that section. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. Conviction for these offences will, in certain circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

#### SYNOPSIS

Section 68 creates a number of indictable offences which flow from the reading of the “riot act” pursuant to s. 67, or an effort to do so. The maximum punishment for these offences is imprisonment for life.

Section 68(a) sets out a number of different means of obstructing the efforts of the person who is about to begin, or who has begun, to read the “riot act”. The actions of the accused must prevent the completion or the reading of the proclamation. There is no intention specified in the paragraph beyond the intention to do the specified acts *wilfully and with force* to thwart the reading of the proclamation.

Section 68(b) makes it an offence not to leave the location where the “riot act” was read and to disperse peacefully within 30 minutes of it being read.

Section 68(c) imposes liability for failing to depart and disperse in similar terms to that described in para. (b) if the accused had *reasonable grounds to believe* that the proclamation, although not read, would have been, had the official not been thwarted from doing so.

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#### NEGLECT BY PEACE OFFICER.

**69. A peace officer who receives notice that there is a riot within his jurisdiction and, without reasonable excuse, fails to take all reasonable steps to suppress the riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 70.**

#### CROSS-REFERENCES

“Peace officer” is defined in s. 2. Definition of “riot”, see s. 64. Procedure for reading proclamation to disperse rioters, see s. 67 and see cross-references noted under that section. Use of force to suppress a riot and the duty of officers to disperse rioters, see ss. 32 and 33. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515 except that the accused is eligible for release by the officer in charge pursuant to s. 498.

**ANNOTATIONS**

An action against a police officer for damages as the result of the killing of a person taking part in a riot by the officer was dismissed where the officer was found to be acting lawfully within the scope of his duty imposed by this section and s. 32: *Herbert v. Martin* (1930), 54 C.C.C. (2d) 257, [1931] S.C.R. 145.

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***Unlawful Drilling***

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**ORDERS BY GOVERNOR IN COUNCIL / General or special order / Punishment.**

- 70. (1) The Governor in Council may, by proclamation, make orders**
- (a) to prohibit assemblies, without lawful authority, of persons for the purpose**
    - (i) of training or drilling themselves,**
    - (ii) of being trained or drilled to the use of arms, or**
    - (iii) of practising military exercises; or**
  - (b) to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.**
- (2) An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.**
- (3) Every one who contravenes an order made under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 71.**

**CROSS-REFERENCES**

"Proclamation" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21, and procedure for issuing proclamations in s. 18 of that Act. Publication of proclamations is governed by the Statutory Instruments Act, R.S.C. 1985, c. S-22.

The accused has an election as to mode of trial pursuant to s. 536(2).

Release pending trial is governed by s. 515 except that the accused is eligible for release by the officer in charge pursuant to s. 498.

**SYNOPSIS**

Section 70 authorizes the Governor in Council (Cabinet) to make orders which prohibit various types of assemblies for the purpose of activities such as the training or drilling of groups, practising military exercises or arms training. The section only applies if the assembly is without lawful authority. It also prohibits persons who are assembled *for any purpose* from undertaking any of the prohibited activities.

Subsection (2) states that an order made under s. 70(1) may be general or made specifically applicable at a particular area, assembly and so on. One example of the latter would be an order prohibiting a particular private paramilitary training school from being run within Canada.

If the accused contravenes an order proclaimed under s. 70(1), s. 70(3) makes this an indictable offence punishable by up to five years imprisonment. Basic principles of criminal responsibility (and s. 7 of the Canadian Charter of Rights and Freedoms) would require that there be proof that the accused knew of the existence of the relevant order.

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***Duels***

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**DUELLING.**

- 71. Every one who**



(a) challenges or attempts by any means to provoke another person to fight a duel,  
 (b) attempts to provoke a person to challenge another person to fight a duel, or  
 (c) accepts a challenge to fight a duel,  
 is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 72.

#### CROSS-REFERENCES

The accused has an election as to mode of trial for this offence, pursuant to s. 536(2). Release pending trial is governed by s. 515 except that the accused is eligible for release by the officer in charge pursuant to s. 498. Conviction for this offence may in some circumstances attract imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(2).

#### ANNOTATIONS

The act of the accused in loading a gun and carrying it out to the street in acceptance of a challenge by the deceased constitutes an unlawful act within this section which will support a charge of manslaughter notwithstanding the shot which killed the deceased was fired accidentally: *R. v. Lelievre* (1962), 132 C.C.C. 288, 32 D.L.R. (2d) 723 (Ont. C.A.).

### *Forcible Entry and Detainer*

#### FORCIBLE ENTRY / Matters not material / Forcible detainer / Questions of law.

72. (1) A person commits forcible entry when that person enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace.

(1.1) For the purposes of subsection (1), it is immaterial whether or not a person is entitled to enter the real property or whether or not that person has any intention of taking possession of the real property.

(2) A person commits forcible detainer when, being in actual possession of real property without colour of right, he detains it in a manner that is likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person who is entitled by law to possession of it.

(3) The questions whether a person is in actual and peaceable possession or is in actual possession without colour of right are questions of law. R.S., c. C-34, s. 73; R.S.C. 1985, c. 27 (1st Supp.), s. 10.

#### CROSS-REFERENCES

Punishment for this offence is prescribed by s. 73 and see cross-references under that section as to mode of trial. There are a number of related provisions as follows: ss. 30 and 31, arrest and detention for breach of the peace; s. 40, defence of dwelling against person forcibly breaking or entering dwelling house; ss. 41 and 42, defence of real property.

The offence of break and enter with intent to commit an indictable offence is defined by s. 348. The term "colour of right" is not defined, but likely embraces an honest, although mistaken, belief of entitlement to the property although the mistake is based on a mistake of law or fact. [See discussion of colour of right in relation to theft in *R. v. Howson*, [1966] 3 C.C.C. 348 (Ont. C.A.).]

#### SYNOPSIS

Section 72 sets out what constitutes forcible entry or detainer.

Section 72(1) states that *forcible entry* requires proof that the accused entered real property that was actually peaceably possessed by another. It must be further shown that the accused did so in a manner that is *likely to produce either a breach of the peace* or a



*reasonable apprehension* of a breach of the peace. Section 72(1.1) provides the clarification that it is irrelevant whether the accused is entitled to enter the property or whether the accused intends to try to take possession of it. Section 72(3) specifies that the issue of whether a person is in actual and peaceable possession is a question of law.

Section 72(2) spells out what comprises *forcible detainer*. It focuses upon the *improper retention of real property* by an accused who does *not have a colour of right* for doing so against the person who has a lawful right to possess this property. The accused must be in actual possession of the real property. It must be shown that the manner of detaining the property is likely to cause a breach of the peace or the reasonable apprehension of this occurring. Subsection (3) provides that the question of whether the accused is in actual possession without colour of right is a question of law. This means that the judge will determine these issues.

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#### **PUNISHMENT.**

- 73. Every person who commits forcible entry or forcible detainer is guilty of**  
**(a) an offence punishable on summary conviction; or**  
**(b) an indictable offence and liable to imprisonment for a term not exceeding two years.** R.S., c. C-34, s. 74; R.S.C. 1985, c. 27 (1st Supp.), s. 11; 1992, c. 1, s. 58.

#### **CROSS-REFERENCES**

Where the prosecution proceeds by way of summary conviction, the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the prosecution proceeds by way of indictment, then the accused has an election as to mode of trial pursuant to s. 536(2), except that the accused is eligible for release by the peace officer and officer in charge pursuant to ss. 496, 497 and 498. Conviction for this offence may in some circumstances attract imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(2).

#### **SYNOPSIS**

This section sets out the punishment for offences committed under s. 72 (forcible entry or detainer). The offence may be prosecuted by way of summary conviction or by indictment. In the latter case, the maximum sentence is two years imprisonment.

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## **Piracy**

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#### **PIRACY BY LAW OF NATIONS / Punishment.**

- 74. (1) Every one commits piracy who does any act that, by the law of nations, is piracy.**  
**(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.** R.S., c. C-34, s. 75; 1974-75-76, c. 105, s. 3.

#### **CROSS-REFERENCES**

There is no definition of piracy in the Criminal Code, apparently because there was no internationally recognized definition of piracy when the Code was first enacted. In their text, *Canadian Criminal Law, International and Transnational Aspects* (Butterworths, 1981), Williams and Castel suggest that the 1958 Geneva Convention on the High Seas, to which Canada is not a party, is generally declaratory of established principles relating to piracy. Articles 15 and 16 of that Convention are as follows:

### Article 15

Piracy consists of any of the following acts:

- (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any state;
- (2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

### Article 16

The acts of piracy, as defined in Article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

As to unavailability of defence of compulsion by threats, see s. 17. The offence in this section is triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. Where the offence is committed on the territorial sea or on internal waters, see s. 477. Conviction for this offence will require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

### SYNOPSIS

Section 74 makes it an indictable offence to commit any act which is defined by the law of nations as *piracy*.

Subsection (2) provides for a maximum sentence of imprisonment for life regardless of whether the act of piracy takes place in or out of Canada.

### PIRATICAL ACTS.

#### 75. Every one who, while in or out of Canada,

- (a) steals a Canadian ship,
  - (b) steals or without lawful authority throws overboard, damages or destroys anything that is part of the cargo, supplies or fittings in a Canadian ship,
  - (c) does or attempts to do a mutinous act on a Canadian ship, or
  - (d) counsels a person to do anything mentioned in paragraph (a), (b) or (c),
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 76; R.S.C. 1985, c. 27 (1st Supp.), s. 7(3).

### CROSS-REFERENCES

“Counsels” is defined in s. 22(3). “Steal” is defined in s. 2 as theft. Theft is defined in s. 322. Inciting to mutiny is also an offence under s. 53.

The offences in this section are triable only by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. Where the offence is committed on the territorial sea or on internal waters, see s. 477. Conviction for this offence may, in some circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

### SYNOPSIS

This indictable offence deals with *piracy*, but is limited to such acts committed in relation to a *Canadian ship*. The maximum sentence upon conviction for any of the offences created by this section is 14 years.

Paragraph (a) prohibits stealing a Canadian ship. Paragraph (b) prohibits, *without lawful authority*, throwing anything overboard, stealing, or damaging either the cargo of the

ship or any part of supplies or fittings of the ship. Paragraph (c) states that doing or attempting to do a mutinous act on a Canadian ship is an offence. Finally, para. (d) makes it an offence to counsel any one to do any of the acts in the aforementioned paragraphs.

## Offences against Air or Maritime Safety

1993, c. 7, s. 2.

### HIJACKING.

76. Every one who, unlawfully, by force or threat thereof, or by any other form of intimidation, seizes or exercises control of an aircraft with intent

- (a) to cause any person on board the aircraft to be confined or imprisoned against his will,
  - (b) to cause any person on board the aircraft to be transported against his will to any place other than the next scheduled place of landing of the aircraft,
  - (c) to hold any person on board the aircraft for ransom or to service against his will, or
  - (d) to cause the aircraft to deviate in a material respect from its flight plan,
- is guilty of an indictable offence and liable to imprisonment for life. 1972, c. 13, s. 6.

### CROSS-REFERENCES

Definition of "flight", see s. 7(8).

This offence, if committed outside Canada, is deemed to have been committed in Canada where the accused is found in Canada (s. 7(2)). As to place of trial, see s. 7(5). Availability of plea of *autrefois*, see s. 7(6). Requirement of consent of Attorney General of Canada where offence committed outside Canada and accused is not a Canadian citizen, see s. 7(7). As to territorial jurisdiction where offence committed in Canada, see s. 476(d). The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for first degree murder under s. 231(5)(a), and the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5). Conviction for this offence will require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

### SYNOPSIS

Section 76 prohibits, as an indictable offence, hijacking of aircraft and provides that a person is liable to life imprisonment upon conviction.

It must be shown that the accused acted unlawfully and used either *force or the threat* thereof, or any other form of intimidation *with the intention* of procuring one of the results described in paras. (a) to (d). Briefly stated, the prohibited acts relate to confining any one against their will on a plane, holding such persons for ransom, transporting any person on a plane against their will, or causing a plane to be diverted from its scheduled flight plan. Also prohibited is forcing any person on the plane from serving against their will.

### ENDANGERING SAFETY OF AIRCRAFT OR AIRPORT.

77. Every one who

- (a) on board an aircraft in flight, commits an act of violence against a person that is likely to endanger the safety of the aircraft,
- (b) using a weapon, commits an act of violence against a person at an airport serving international civil aviation that causes or is likely to cause serious injury or death and that endangers or is likely to endanger safety at the airport,



- (c) causes damage to an aircraft in service that renders the aircraft incapable of flight or that is likely to endanger the safety of the aircraft in flight,
  - (d) places or causes to be placed on board an aircraft in service anything that is likely to cause damage to the aircraft, that will render it incapable of flight or that is likely to endanger the safety of the aircraft in flight,
  - (e) causes damage to or interferes with the operation of any air navigation facility where the damage or interference is likely to endanger the safety of an aircraft in flight,
  - (f) using a weapon, substance or device, destroys or causes serious damage to the facilities of an airport serving international civil aviation or to any aircraft not in service located there, or causes disruption of services of the airport, that endangers or is likely to endanger safety at the airport, or
  - (g) endangers the safety of an aircraft in flight by communicating to any other person any information that the person knows to be false,
- is guilty of an indictable offence and liable to imprisonment for life. 1972, c. 13, s. 6; 1993, c. 7, s. 3.

#### CROSS-REFERENCES

Definition of “flight”, see s. 7(8). Aircraft deemed to be in service, see s. 7(9). Assault is defined in s. 265.

This offence, if committed outside Canada, is deemed to have been committed in Canada where the accused is found in Canada (s. 7(2)). As to place of trial, see s. 7(5). Availability of plea of *autrefois*, see s. 7(6). Requirement of consent of Attorney General of Canada where offence committed outside Canada and accused is not a Canadian citizen, see s. 7(7). As to territorial jurisdiction where offence committed in Canada, see s. 476(d). The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Conviction for this offence may in some circumstances require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

#### SYNOPSIS

Section 77 creates five indictable offences relating to endangering aircraft safety while in flight or rendering an aircraft incapable of flight. Upon conviction under s. 77, a person is liable to imprisonment for life.

Paragraphs (a) and (e) involve actions by the accused *during flight*. The former makes it an offence to commit an assault that is *likely to endanger* the safety of the aircraft. Paragraph (e) imposes criminal liability upon any one who *communicates* any information to another that the *accused knows is false* and *endangers the safety* of the aircraft. Note that, unlike the other paragraphs in this section, para. (e) requires actual danger to result from the accused’s action.

Paragraphs (b) and (c) prohibit activities which either result in damage to the aircraft so that it is *likely to endanger the safety* of the aircraft or make it incapable of flight. Paragraph (d) prohibits interference with air navigation facilities which is likely to endanger aircraft in flight. The doing of an action specified in one of these paragraphs which has the likelihood of producing the endangerment is sufficient to make out the offence.

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#### OFFENSIVE WEAPONS AND EXPLOSIVE SUBSTANCES / Definition of “civil aircraft”.

78. (1) Every one, other than a peace officer engaged in the execution of his duty, who takes on board a civil aircraft an offensive weapon or any explosive substance

- (a) without the consent of the owner or operator of the aircraft or of a person duly authorized by either of them to consent thereto, or
- (b) with the consent referred to in paragraph (a) but without complying with all terms and conditions on which the consent was given,



is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this section, "civil aircraft" means all aircraft other than aircraft operated by the Canadian Forces, a police force in Canada or persons engaged in the administration or enforcement of the *Customs Act*, or the *Excise Act*. 1972, c. 13, s. 6; R.S.C. 1985, c. 1 (2nd Supp.), s. 213(3).

#### CROSS-REFERENCES

Definitions of "Canadian Forces", "peace officers", "offensive weapon", "explosive substance", see s. 2.

Pursuant to s. 7(1), offences, whether inside or outside Canada, in relation to aircraft registered in Canada, or on any aircraft in flight, if the flight terminates in Canada, are deemed to be committed in Canada. Requirement of consent of Attorney General of Canada where proceedings instituted under s. 7 and accused is not a Canadian citizen, see s. 7(7). As to territorial jurisdiction where offence committed in Canada, see s. 476(d). The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Conviction for this offence may attract the imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

#### SYNOPSIS

This section makes it an indictable offence, subject to a number of exceptions, to take an *offensive weapon or explosive device on board a civilian aircraft*. Subsection (2) provides a definition of "civil aircraft".

Peace officers, engaged in the lawful execution of their duty, are exempted from the operation of the section. Also exempt are persons who have the consent of the owner or operator of the aircraft or a duly authorized representative of either. If conditions are imposed as part of such an agreement, it is still an offence to take explosives or offensive weapons on the aircraft *unless the accused acts in compliance with all of the terms and conditions imposed upon the consent*. The maximum sentence for an offence under this section is 14 years.

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**SEIZING CONTROL OF SHIP OR FIXED PLATFORM/ Endangering safety of ship or fixed platform/ False communication/ Threats causing death or injury/ Definitions/ "fixed platform"/ "ship".**

78.1. (1) Every one who seizes or exercises control over a ship or fixed platform by force or threat of force or by any other form of intimidation is guilty of an indictable offence and liable to imprisonment for life.

(2) Every one who

- (a) commits an act of violence against a person on board a ship or fixed platform,
  - (b) destroys or causes damage to a ship or its cargo or to a fixed platform,
  - (c) destroys or causes serious damage to or interferes with the operation of any maritime navigational facility, or
  - (d) places or causes to be placed on board a ship or fixed platform anything that is likely to cause damage to the ship or its cargo or to the fixed platform,
- where that act is likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

(3) Every one who communicates information that endangers the safe navigation of a ship, knowing the information to be false, is guilty of an indictable offence and liable to imprisonment for life.

(4) Every one who threatens to commit an offence under paragraph (2)(a), (b) or (c) in order to compel a person to do or refrain from doing any act, where the threat is

likely to endanger the safe navigation of a ship or the safety of a fixed platform, is guilty of an indictable offence and liable to imprisonment for life.

(5) In this section,

“fixed platform” means an artificial island or a marine installation or structure that is permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes;

“ship” means every description of vessel not permanently attached to the seabed, other than a warship, a ship being used as a naval auxiliary or for customs or police purposes or a ship that has been withdrawn from navigation or is laid up; 1993, c. 7, s. 4.

## ***Dangerous Substances***

### **DUTY OF CARE RE EXPLOSIVE.**

**79. Every one who has an explosive substance in his possession or under his care or control is under a legal duty to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance. R.S., c. C-34, s. 77.**

#### **CROSS-REFERENCES**

Definition of “explosive substance”, see s. 2. Definition of “possession”, see s. 4(3).

Offences for breach of duty of care re explosives, see s. 80. Note that it would seem the criminal negligence offences would also apply, see ss. 219, 220, 221.

Other offences in relation to explosives: s. 78 (take explosives aboard civil aircraft); s. 81 (using explosive); s. 82 (unlawful possession of explosives).

Although “bodily harm” is not defined in this Part, reference might be made to the definition of that term in the assault section, s. 2.

#### **SYNOPSIS**

Section 79 imposes a legal duty upon anyone, who has possession, care or control over an *explosive substance*, to use *reasonable care to prevent bodily harm, death or property damage* arising from the substance.

### **BREACH OF DUTY.**

**80. Every one who, being under a legal duty within the meaning of section 79, fails without lawful excuse to perform that duty, is guilty of an indictable offence and, if as a result an explosion of an explosive substance occurs that**

- (a) causes death or is likely to cause death to any person, is liable to imprisonment for life; or**
- (b) causes bodily harm or damage to property or is likely to cause bodily harm or damage to property, is liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 78.**

#### **CROSS-REFERENCES**

Definition of “explosive substance”, see s. 2. Although “bodily harm” is not defined for this Part, reference might be made to s. 2. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Conviction for this offence may, in some circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

Other offences in relation to explosives: s. 78 (taking explosives aboard civil aircraft); s. 81 (using explosives); s. 82 (unlawful possession).

**SYNOPSIS**

Section 80 makes it an indictable offence for anyone upon whom a legal duty regarding explosives was imposed by the terms of s. 79 to breach that duty. It provides for punishment upon conviction which varies depending on the harm which was likely to result or did result from the failure of the accused to perform that duty. Note that there must be an actual explosion for this section to come into operation. The accused may rely upon a lawful excuse for the failure.

If death resulted or was likely to result, the accused is liable to life imprisonment. For lesser potential or actual harm, the punishment is a maximum of 14 years.

**ANNOTATIONS**

This section does not contain an included offence of failing to discharge the duty to take reasonable care under s. 79 when no explosion results: *R. v. Yanover and Gerol* (1985), 20 C.C.C. (3d) 300 (Ont. C.A.).

**USING EXPLOSIVES / Punishment.****81. (1) Every one commits an offence who**

- (a) does anything with intent to cause an explosion of an explosive substance that is likely to cause serious bodily harm or death to persons or is likely to cause serious damage to property;
- (b) with intent to do bodily harm to any person
  - (i) causes an explosive substance to explode,
  - (ii) sends or delivers to a person or causes a person to take or receive an explosive substance or any other dangerous substance or thing, or
  - (iii) places or throws anywhere or at or on a person a corrosive fluid, explosive substance or any other dangerous substance or thing;
- (c) with intent to destroy or damage property without lawful excuse, places or throws an explosive substance anywhere; or
- (d) makes or has in his possession or has under his care or control any explosive substance with intent thereby
  - (i) to endanger life or to cause serious damage to property, or
  - (ii) to enable another person to endanger life or to cause serious damage to property.

**(2) Every one who commits an offence under subsection (1) is guilty of an indictable offence and liable**

- (a) for an offence under paragraph (1)(a) or (b), to imprisonment for life; or
- (b) for an offence under paragraph (1)(c) or (d), to imprisonment for a term not exceeding fourteen years. *R.S., c. C-34, s. 79.*

**CROSS-REFERENCES**

Definition of "explosive substance", see s. 2. Definition of possession, see s. 4(3).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Conviction for this offence may, in some circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substance under s. 100(1).

Other offences in relation to explosives: s. 78 (taking explosive aboard civil aircraft); s. 80 (breach of duty of care in relation to explosives); s. 82 (possession without lawful excuse).

**SYNOPSIS**

This section makes certain actions relating to dangerous substances into indictable offences and provides for the punishment of such actions.

Section 81(1)(a) and (b) prohibit actions done which may result in bodily harm to



another or, in the case of para. (a), either bodily harm or serious damage to property. Violations of either paragraph carry a maximum sentence of life imprisonment. Section 81(1)(a) requires that the accused did the action with the intention of causing the explosion of an explosive device. Section 81(1)(b) requires that the accused intended to cause bodily harm to another by doing one of the things specified in subparas. (i) to (iii). Note that para. (a) requires the *likelihood* of *serious* bodily harm or death, but not the *intent* to cause such harm. On the other hand, para. (b) requires the intent to harm but no likelihood that such harm result.

Section 81(1)(c) makes it an offence to place or throw an explosive device. However, it must be shown that the accused did the act with the intention of damaging or destroying property without lawful excuse.

Section 81(1)(d) relates to the possession, care or control over such a device. To make out the offence under this paragraph, it must be shown that the accused had the intention by the possession, etc., of the device to either endanger life, cause serious property damage or to enable another to do so.

The maximum sentence for offences under s. 81(1)(c) and (d) is 14 years.

### ANNOTATIONS

A conspiracy to violate para. (1)(a) may be based on possession of explosives where the requisite intent is shown, notwithstanding the existence of the specific possession offence in para. (1)(d): *R. v. Musitano et al.* (1985), 24 C.C.C. (3d) 65, 53 O.R. (2d) 321 (Ont. C.A.).

### POSSESSION WITHOUT LAWFUL EXCUSE.

**82. Every one who, without lawful excuse, the proof of which lies on him, makes or has in his possession or under his care or control any explosive substance is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.** R.S., c. C-34, s. 80; R.S.C. 1985, c. 27 (1st Supp.), s. 12.

### CROSS-REFERENCES

Definition of “explosive substance”, see s. 2. Definition of possession, see s. 4(3).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Other offences in relation to explosives: s. 78 (taking explosive aboard civil aircraft); s. 80 (breach of duty of care in relation to explosives); s. 81 (using explosives).

### ANNOTATIONS

The burden imposed on the accused by this section does not apply until the Crown proves beyond a reasonable doubt that the accused had possession of the explosives: *Mongeau v. The Queen* (1957), 25 C.R. 195 (Que. C.A.).

## Prize Fights

### ENGAGING IN PRIZE FIGHT / Definition of “prize fight”.

**83. (1) Every one who**

- (a) engages as a principal in a prize fight,
- (b) advises, encourages or promotes a prize fight, or
- (c) is present at a prize fight as an aid, second, surgeon, umpire, backer or reporter,

**is guilty of an offence punishable on summary conviction.**



(2) In this section, "prize fight" means an encounter or fight with fists or hands between two persons who have met for that purpose by previous arrangement made by or for them, but a boxing contest between amateur sportsmen, where the contestants wear boxing gloves of not less than one hundred and forty grams each in mass, or any boxing contest held with the permission or under the authority of an athletic board or commission or similar body established by or under the authority of the legislature of a province for the control of sport within the province, shall be deemed not to be a prize fight. R.S., c. C-34, s. 81; R.S.C. 1985, c. 27 (1st Supp.), s. 186.

#### CROSS-REFERENCES

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section prohibits *prize fights* as defined by s. 83(2). The definition is tailored to exclude sanctioned bouts and amateur boxing if the match meets the criteria in subsec. (2).

This summary conviction offence may be committed by being one of the pugilists, advising or encouraging others to fight or by promoting the fight. The presence of certain persons is also an offence if the person is there to act in one of the specific capacities which are prohibited, including that of surgeon, second, reporter, umpire, aid or backer.

## Part III / FIREARMS AND OTHER OFFENSIVE WEAPONS

### Interpretation

**NOTE:** Part III replaced 1995, c. 39, s. 139 (to come into force by order of the Governor in Council). See text following s. 117.

**DEFINITIONS** / "Antique firearm" / "Chief provincial firearms officer" / "Commissioner" / "Firearm" / "Firearms acquisition certificate" / "Firearms officer" / "Genuine gun collector" / "Large-capacity cartridge magazine" / "Local registrar of firearms" / "Permit" / "Prohibited weapon" / "Registration certificate" / "Regulations" / "Restricted weapon" / Barrel length / Weapon to be a restricted weapon / Certain weapons deemed not to be firearms / Designated officer or constable.

**84. (1) For the purposes of this Part,**

"antique firearm" means any firearm manufactured before 1898 that was not designed to use rim-fire or centre-fire ammunition and that has not been redesigned to use such ammunition, or, if so designed or redesigned, is capable only of using rim-fire or centre-fire ammunition that is not commonly available in Canada;

"chief provincial firearms officer" means a person who has been designated in writing by the Attorney General of a province as the chief provincial firearms officer for that province;

"Commissioner" means the Commissioner of the Royal Canadian Mounted Police;

"firearm" means any barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to

a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm;

“firearms acquisition certificate” means a firearms acquisition certificate issued by a firearms officer under section 106 or 107;

“firearms officer” means any person who has been designated in writing as a firearms officer by the Commissioner or the Attorney General of a province or who is a member of a class of persons that has been so designated;

“genuine gun collector” means an individual who possesses or seeks to acquire one or more restricted weapons that are related or distinguished by historical, technological or scientific characteristics, has knowledge of those characteristics, has consented to the periodic inspection, conducted in a reasonable manner and in accordance with the regulations, of the premises in which the restricted weapons are to be kept and has complied with such other requirements as prescribed by regulation respecting knowledge, secure storage and the keeping of records in respect of the restricted weapons;

“large-capacity cartridge magazine” means any device or container from which ammunition may be fed into the firing chamber of a firearm;

“local registrar of firearms” means any person who has been designated in writing as a local registrar of firearms by the Commissioner or the Attorney General of a province or who is a member of a class of police officers or police constables that has been so designated;

“permit” means a permit issued under section 110;

“prohibited weapon” means

- (a) any device or contrivance designed or intended to muffle or stop the sound or report of a firearm,
- (b) any knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife,
- (c) any firearm, not being a restricted weapon described in paragraph (c) or (c.1) of the definition of that expression in this subsection, that is capable of, or assembled or designed and manufactured with the capacity of, firing projectiles in rapid succession during one pressure of the trigger, whether or not it has been altered to fire only one projectile with one such pressure,
- (d) any firearm adapted from a rifle or shotgun, whether by sawing, cutting or other alteration or modification, that, as so adapted, has a barrel that is less than 457 mm in length or that is less than 660 mm in overall length, or
- (e) a weapon of any kind, not being an antique firearm or a firearm of a kind commonly used in Canada for hunting or sporting purposes, or a part, component or accessory of such a weapon, or any ammunition, that is declared by order of the Governor in Council to be a prohibited weapon, or
- (f) a large-capacity cartridge magazine prescribed by regulation;

“registration certificate” means a restricted weapon registration certificate issued under section 109;

“regulations” means regulations made by the Governor in Council pursuant to section 116;

“restricted weapon” means

- (a) any firearm, not being a prohibited weapon, designed, altered or intended to be aimed and fired by the action of one hand,
- (b) any firearm that

- (i) is not a prohibited weapon, has a barrel that is less than 470 mm in length and is capable of discharging centre-fire ammunition in a semi-automatic manner, or
  - (ii) is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or
  - (c) any firearm that is designed, altered or intended to fire bullets in rapid succession during one pressure of the trigger and that, on January 1, 1978, was registered as a restricted weapon and formed part of a gun collection in Canada of a genuine gun collector,
  - (c.1) any firearm that is assembled or designed and manufactured with the capability of firing projectiles in rapid succession with one pressure of the trigger, to the extent that
    - (i) the firearm is altered to fire only one projectile with one such pressure,
    - (ii) on October 1, 1992, the firearm was registered as a restricted weapon, or an application for a registration certificate was made to a local registrar of firearms in respect of the firearm, and the firearm formed part of a gun collection in Canada of a genuine gun collector, and
  - (iii) subsections 109(4.1) and (4.2) were complied with in respect of that firearm, or
  - (d) a weapon of any kind, not being a prohibited weapon or a shotgun or rifle of a kind that, in the opinion of the Governor in Council, is reasonable for use in Canada for hunting or sporting purposes, that is declared by order of the Governor in Council to be a restricted weapon.
- (1.1) For the purposes of paragraph (d) of the definition "prohibited weapon" and of subparagraph (b)(i) of the definition "restricted weapon" in subsection (1), the length of a barrel of a firearm means
- (a) in the case of a revolver, the distance from the muzzle of the barrel to the breach end immediately in front of the cylinder; and
  - (b) in any other case, the distance from the muzzle of the barrel to and including the chamber, but not including the length of any part or accessory including parts or accessories designed or intended to suppress the muzzle flash or reduce recoil.
- (1.2) Where the Governor in Council makes an order referred to in paragraph (e) of the definition "prohibited weapon" in subsection (1), the Governor in Council may also, by order, declare that a person who possesses a weapon referred to in that paragraph prior to the coming into force of the order referred to in that paragraph shall only retain the ownership and possession of the weapon if the person obtains a registration certificate in respect of the weapon in accordance with section 109 and, where the Governor in Council makes such an order, the weapon is deemed to be a restricted weapon for that person for the purposes of this Act.
- (2) Notwithstanding the definition "firearm" in subsection (1), for the purposes of the definitions "prohibited weapon" and "restricted weapon" in that subsection and for the purpose of section 93, subsections 97(1) and (3) and sections 102, 104, 105 and 116, the following weapons shall be deemed not to be firearms:
- (a) an antique firearm unless
    - (i) but for this subsection, it would be a restricted weapon, and
    - (ii) the person in possession thereof intends to discharge it;
  - (b) any device designed, and intended by the person in possession thereof, for use exclusively for
    - (i) signalling, notifying of distress or firing stud cartridges, explosive-driven rivets or similar industrial ammunition, or
    - (ii) firing blank cartridges; and



- (c) any shooting device designed, and intended by the person in possession thereof, for use exclusively for
    - (i) slaughtering of domestic animals,
    - (ii) tranquilizing animals, or
    - (iii) discharging projectiles with lines attached thereto; and
  - (d) any other barrelled weapon where it is proved that that weapon is not designed or adapted to discharge a shot, bullet or other projectile at a muzzle velocity exceeding 152.4m per second or to discharge a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4m per second.
- (3) A police officer or police constable designated in writing by the Commissioner or the Attorney General of a province for the purposes of this subsection or who is a member of a class of police officers or police constables that has been so designated may perform such functions and duties of a local registrar of firearms under subsections 109(1) to (6) and subsections 110(3) and (4) as are specified in the designation. R.S., c. C-34, s. 82; 1976-77, c. 53, s. 3; R.S.C. 1985, c. 27 (1st Supp.), s. 186; 1991, c. 40, s. 2.

#### CROSS-REFERENCES

“Weapon” and “offensive weapon” are defined in s. 2. The terms “police officer” and “police constable” are not themselves defined but both are peace officers as defined by s. 2.

The various offences may be related to the definitions in this section as follows: s. 85, use of a firearm while committing indictable offence; s. 86, pointing and careless use, etc., of firearm; ss. 93, 94, 97, offences relating to transfer of firearms; s. 103(10), violation of firearms prohibition order; s. 104(1), failing to report finding of firearm; s. 104(3), defacing serial number on firearm; s. 105, offences relating to firearms business; s. 87, possession of weapon for purpose dangerous to the public peace or for purpose of committing an offence; s. 88, unlawful possession of weapon while attending public meeting; s. 89, carrying concealed weapon; s. 90, possession of prohibited weapon; s. 95, importing, etc., of prohibited weapon; s. 104(1), failing to report finding of prohibited weapon; s. 91, possession of restricted weapon; s. 96, transfer, etc., of restricted weapon; s. 104(1), failing to report finding of restricted weapon; s. 104(2), failing to report loss of restricted weapon; s. 113, offences relating to certificates and permits.

Publication of Orders is governed by the Statutory Instruments Act, R.S.C. 1985, c. S-22.

#### SYNOPSIS

This section sets out *definitions* for use throughout Part III of the Criminal Code which deals with firearms and other weapons. The definitions of *restricted weapon* and *prohibited weapon* in subsec. (1) are subject to the exclusions noted in s. 84(2).

Section 84(3) permits designated police officers or constables to perform the duties of the local registrar as they relate to making an application for registration of a restricted weapon (see ss. 109(1) to (6) and 110(3) and (4)).

#### ANNOTATIONS

“**Firearm**” – This definition includes not only a barrelled weapon that is actually capable of causing serious bodily injury or death but also anything that has the potential of becoming a firearm through an adaptation. The acceptable amount of adaptation, and the time required therefor, for something still to remain within the definition is dependent upon the nature of the offence where the definition is involved. The purpose of each section must be identified and the amount, nature, and time spent for adaptation determined so as to give effect to Parliament’s intention when enacting the particular section: *R. v. Covin and Covin* (1983), 8 C.C.C. (3d) 240, 3 D.L.R. (4th) 558, [1983] 1 S.C.R. 725 (5:0).

There is no burden on the Crown to negative what theoretically might be a defence, that the pistol was not a firearm in the sense that it was incapable of firing bullets or misfires, but has no foundation in the evidence. “If there is evidence on the record either

*viva voce* or based upon an examination of the exhibit itself from which it can be reasonably inferred that the alleged firearm is, because of some physical defect or inadequacy, incapable of being fired then, depending on the circumstances, it might be that it is something less than a firearm . . .": *R. v. Marchesani*, [1970] 1 C.C.C. 350, [1970] 2 O.R. 57 (H.C.J.).

**"Prohibited weapon"** – A knife may come within para. (b) whether or not as a knife it comes within the ordinary meaning of weapon and whether or not it was designed to be used as a prohibited weapon if in fact its blade through wear and tear or alteration can be fully opened for use by applying centrifugal force or gravity to the blade. It is the capability and not the design of the knife which determines whether or not it is a prohibited weapon. The words "any knife that has a blade that opens automatically by . . . centrifugal force" should be interpreted as meaning one that opens by means of a centrifugal force applied to the blade and not to the handle. The word "open" in the definition means open with the capacity for use as a weapon. Any knife which, when held in a position where the handle is above the blade and the blade drops open at or about a 90-degree angle to the handle and by gravity continues to open fully, available for use, when the handle is placed in a vertical position or when centrifugal force is applied to a partially opened blade is a knife having a blade that opens automatically by gravity or centrifugal force and is therefore a prohibited weapon: *R. v. Richard and Walker* (1981), 63 C.C.C. (2d) 333, 24 C.R. (3d) 373 (N.B.C.A.).

A knife which will only open by holding the blade and applying centrifugal force to the handle is not within the definition. However, a knife although not originally so designed which through long use opens by application of centrifugal force to the blade is a prohibited weapon: *R. v. Archer* (1983), 6 C.C.C. (3d) 129 (Ont. C.A.).

Despite the fact that an additional manual operation had to be performed, before the knife, a so-called "butterfly knife," was in a position to be opened automatically by centrifugal force and that some skill was required to perform the operation did not prevent the knife from being a prohibited weapon: *R. v. Vaughan* (1991), 69 C.C.C. (3d) 576, [1991] 3 S.C.R. 691, 45 Q.A.C. 302 (5:0).

The word "weapon" in para. (e) of the definition should be given a broader meaning than as defined in s. 2, to encompass any article or device that can, on occasion, be used to inflict injury, harm or death to a person whether used offensively or defensively. Thus, in the absence of a challenge to the power of the Governor in Council to designate the device as a prohibited weapon on the basis that it does not fall within this normal everyday meaning of weapon, a prohibited weapon under para. (e) is simply what the Governor in Council has declared to be a prohibited weapon: *R. v. K.(A.)* (1991), 68 C.C.C. (3d) 135, 9 C.R. (4th) 269, 9 W.A.C. 244 (B.C.C.A.), leave to appeal to S.C.C. refused 70 C.C.C. (3d) vi. *Contra: R. v. Murray* (1985), 24 C.C.C. (3d) 568, 7 O.A.C. 127 (Ont. C.A.) where it was held that the definition of "weapon" in s. 2 applies to a charge under s. 90 and, thus, the Crown must also prove that the device was a weapon within that definition.

The unassembled parts of a silencer do not come within the definition in para. (a): *R. v. Ross* (1984), 16 C.C.C. (3d) 175 (Ont. Prov. Ct.).

**"Restricted weapon"** – A determination by the Governor in Council under para. (d) that a particular weapon is in this class is not subject to judicial review: *Lawrence v. The Queen* (1978), 42 C.C.C. (2d) 230, [1978] 2 F.C. 782 (T.D.).

A pistol, although lacking a magazine when found in the possession of the accused, comes within para. (a) of this definition, notwithstanding that in this state two hands would be required to fire. Once the magazine was loaded, it could be fired with one hand and was thus "designed" to be aimed and fired by the action of one hand: *R. v. Watkins and Graber* (1987), 33 C.C.C. (3d) 465 (B.C.C.A.).

An antique pistol whose firing pin had been filed down and which had not apparently been used was not a firearm within the meaning of this section. The evidence was that a

replacement part could not easily have been found and the pistol could not have been put in a condition capable of firing in a reasonable time: *R. v. J.F.* (1987), 41 C.C.C. (3d) 81 (Que. C.A.).

## Offences Related to the Use of Firearms and other Offensive Weapons

85. [Repealed. 1995, c. 39, s. 139.] [For text of the new s. 85 please see p. CC/177.]

**POINTING A FIREARM / Careless use, etc. of firearm / Storage, etc. of firearms.**

86. (1) Every one who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded,

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(2) Every one who, without lawful excuse, uses, carries, handles, ships or stores any firearm or ammunition in a careless manner or without reasonable precautions for the safety of other persons

- (a) is guilty of an indictable offence and liable to imprisonment
  - (i) in the case of a first offence, for a term not exceeding two years, and
  - (ii) in the case of a second or subsequent offence, for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

**NOTE:** Subsection (2) re-enacted by 1991, c. 40, s. 3 as subsecs. (2) and (3) (that part of s. 3 which enacts subsec. (2) to come into force by order of the Governor in Council, however, subsec. (2) as enacted by 1991, c. 40, s. 3 repealed by 1995, c. 39, s. 163 (to come into force by order of the Governor in Council)). The unproclaimed text printed in *lightface italics* reads as follows:

*Careless handling of firearm.*

(2) Every person who uses, carries, handles, ships or stores any firearm or ammunition in a manner that shows wanton or reckless disregard for the lives or safety of other persons

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(3) Every person who stores, displays, handles or transports any firearm in a manner contrary to a regulation made under paragraph 116(1)(g)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 84; 1976-77, c. 53, s. 3; 1991, c. 40, s. 3.

## CROSS-REFERENCES

"Firearm" is defined in s. 84(1).

Where the prosecution seeks the higher penalty prescribed by subsec. (2)(a)(ii), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. Note that no reference to the prior conviction may be made in the indictment, by virtue of s. 664.

Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for



the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offences in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

This section creates two offences: subsec. (1) deals with *pointing a firearm*; subsec. (2) relates to the *careless storage*, or *use of a firearm or ammunition*.

Subsection (1) creates a general intent offence which is proven if a firearm is pointed (loaded or not) at another and there is no lawful excuse for so doing. If the pointing of the firearm was an excessive reaction to a situation, such as removing unarmed trespassers whom one is not afraid of, no lawful excuse will be made out.

Subsection (2) requires that it be proven that the care used to deal with the weapon fell below the reasonable standard of care required to ensure that no person is endangered by the weapon. In addition, it must be shown that there is no lawful excuse for the apparent carelessness. Case-law has established that the offence is proven if only a single person is endangered, notwithstanding the use of the words "other persons" in the section.

## ANNOTATIONS

**Subsec. (1)** – The offence created by this subsection is one of general intent for the purpose of the self-induced intoxication defence: *R. v. Kelly* (1984), 13 C.C.C. (3d) 203, 50 Nfld. & P.E.I.R. 106 (Nfld. Dist. Ct.).

**Subsec. (2)** – This offence requires proof of conduct showing a marked departure from the standard of care of a reasonably prudent person in the circumstances. So interpreted this provision does not violate s. 7 of the Canadian Charter of Rights and Freedoms. This offence can also constitute the underlying or predicate offence for unlawful act manslaughter: *R. v. Gosset*, [1993] 3 S.C.R. 76, 83 C.C.C. (3d) 494, 23 C.R. (4th) 280; *R. v. Finlay*, [1993] 3 S.C.R. 103, 83 C.C.C. (3d) 513, 23 C.R. (4th) 321.

The offence of use of a firearm in a careless manner was made out where the accused intentionally discharged a firearm over the head of another hunter in order to scare him: *R. v. Zimmer* (1981), 60 C.C.C. (2d) 190 (B.C.C.A.).

The offence under this subsection is not included in the offence of pointing a firearm under subsec. (1): *R. v. Morrison* (1991), 66 C.C.C. (3d) 257 (B.C.C.A.).

In a series of cases, the Supreme Court of Canada had occasion to explore the fault element in cases of so-called "penal negligence" apparently as distinguished from criminal negligence. Careless use of a firearm would be one of these offences. In *R. v. Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189. McLachlin J. writing for a majority of the court suggested the following approach to proof of such offences. The first question is whether the *actus reus* is established. This requires that the negligence constitute a marked departure from the standards of a reasonable person in all the circumstances of the case. The next question is whether the *mens rea* is established. Normally the *mens rea* for objective foresight of risk of harm is inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. The normal inference that a person who committed a manifestly dangerous act failed to direct their mind to the risk and the need to take care may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. Short of incapacity, personal factors are not relevant whether those factors might indicate, for example, either a lack of experience or a special experience. Also see: *R. v. Gosset*, *supra*; *R. v. Naglik*, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335; and *R. v. Finlay*, *supra*.

A finding of careless storage cannot be based upon the personal opinion of a police officer. Where existing regulations dealing with the storage of firearms and ammunition were not relevant, as in the instant case, it was encumbant upon the Crown to adduce

expert evidence to establish that the storage of the firearms and ammunition was careless: *R. v. Halliday* (1995), 100 C.C.C. (3d) 574, 82 O.A.C. 150 (C.A.), leave to appeal to S.C.C. refused 103 C.C.C. (3d) vi. In considering carelessness, the federal firearm storage regulations are relevant in determining the appropriate standard for those who are transporting or storing guns: *R. v. Blanchard* (1994), 103 C.C.C. (3d) 360 (Y.T.T.C.).

## Offences Related to Possession of Firearms and other Offensive Weapons

### POSSESSION OF WEAPON OR IMITATION.

**87. Every one who carries or has in his possession a weapon or imitation thereof, for a purpose dangerous to the public peace or for the purpose of committing an offence, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 85; 1976-77, c. 53, s. 3.**

#### CROSS-REFERENCES

“Weapon” is defined in s. 2 and “possession” is defined in s. 4(3).

An accused charged with this offence may elect his mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515. A person found guilty of the offence in this section is liable to the mandatory prohibition order for possession of firearms, ammunition and explosives prescribed by s. 100(1) if violence against a person is used, threatened or attempted and otherwise liable to the discretionary prohibition order prescribed by s. 100(2).

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

#### SYNOPSIS

This section is broader than the immediately preceding sections as it deals with “weapons” or an “imitation thereof”, not firearms. The definition of “weapon” in s. 2 applies so that anything designed as a weapon or which the accused intends to use as a weapon satisfies the definition. The crucial element in this offence is the *purpose* for which the accused has the weapon. Merely using the weapon in a way which is in fact *dangerous* will not make out the charge unless it is proven that this was the accused’s purpose for possessing the weapon. All circumstances surrounding the possession of the weapon, including its use, if any, will be considered to determine the accused’s purpose in possessing the weapon.

#### ANNOTATIONS

**Elements of offence** – The offence, contrary to this section, requires proof of possession and proof that the purpose of that possession was one dangerous to the public peace. There must, at some time, be a meeting of these two elements and generally the purpose will have been formed prior to the taking of possession and will continue as possession is taken. However, the elements of the offence must be distinguished from the evidentiary problems which can arise as demonstrated by cases such as *R. v. Proverbs*, *infra*, where the proof of the unlawful purpose is only through the actual use of the weapon. In this case, *R. v. Cassidy* (1989), 50 C.C.C. (3d) 193 (S.C.C.) (7:0), the court held that it did not have to determine whether the accused could never be convicted if the actual use was the only evidence of the purpose since there was evidence adduced of formation of the unlawful purpose prior to use of the weapon.

The purpose for which the accused had possession of the weapon must be determined at an instant of time which precedes its use. The use of the weapon in a manner dangerous to the public peace does not constitute the offence although the formation of the unlawful purpose may be inferred from the circumstances in which the weapon was used. Thus, if the accused, in fear of harm to himself in his own home loaded, on the

sudden, a weapon which he had not had for a purpose dangerous to the public peace and only intended to use it to defend himself in the event that his premises were broken into, unaware that it was the police seeking entry to execute a warrant, then the offence was not made out: *R. v. Proverbs* (1983), 9 C.C.C. (3d) 249 (Ont. C.A.).

**Relevance of self-defence** – The subjective purpose, *i.e.*, self-defence, of a person carrying an offensive weapon is only a factor which should be considered in determining whether an offence has been committed. Therefore, notwithstanding the explanation given by the possessor of the weapon the trial Judge may still convict if the other circumstances in the evidence prove a purpose dangerous to the public peace: *R. v. Nelson* (1972), 8 C.C.C. (2d) 29, 19 C.R.N.S. 88 (Ont. C.A.) (4:1).

This section does not prohibit persons arming themselves for self-protection and in the absence of other circumstances the offence under this section is not committed if the accused carries for self-defence a weapon that is an appropriate instrument with which to repel, in a lawful manner, the type of attack reasonably apprehended and if the accused is competent to handle the weapon and likely to use it responsibly: *R. v. Sulland* (1982), 2 C.C.C. (3d) 68, 41 B.C.L.R. 167 (C.A.).

**Meaning of "weapon"** – A broken beer bottle was held to be a weapon within the meaning of "offensive weapon" in s. 2 so as to support a conviction under this section: *R. v. Allan* (1971), 4 C.C.C. (2d) 521 (N.B.C.A.). As also was sulphuric acid where the accused intended to inflict injury, albeit to himself in a suicide attempt. The further element of the purpose dangerous to the public peace was established where the accused exposed others to danger, namely those whom he knew would attempt to frustrate his suicide: *R. v. Dugan* (1974), 21 C.C.C. (2d) 45 (Ont. Prov. Ct.). Similarly, *R. v. Pelly*, [1980] 1 W.W.R. 120 (Sask. Prov. Ct.).

**Proof of offence** – The possession by the accused of weapons in his own home does not preclude a finding of a purpose dangerous to the public peace: *R. v. Stavroff* (1979), 48 C.C.C. (2d) 353, 101 D.L.R. (3d) 193 (S.C.C.) (7:0).

Evidence that the accused was in a "skid-row" bar and attempted to hide a jack-knife with a 4-inch blade when the police entered the bar, where there was no evidence of any disturbance in the bar, the police merely being on routine patrol, was not sufficient to support an inference that the possession was for a purpose dangerous to the public peace: *R. v. Halvorsen* (1979), 46 C.C.C. (2d) 543, 10 C.R. (3d) 252 (B.C.C.A.).

## WHILE ATTENDING PUBLIC MEETING.

**88. Every one who, without lawful excuse, has a weapon in his possession while he is attending or is on his way to attend a public meeting is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 86; 1976-77, c. 53, s. 3.**

## CROSS-REFERENCES

"Weapon" is defined in s. 2 and "possession" is defined in s. 4(3).

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

This section focuses on the circumstances under which the accused possesses a weapon. If the accused has a weapon *while attending* or *on the way* to a *public meeting*, the accused is guilty unless there is a lawful excuse for the possession of the weapon. An example of



such an excuse would be that the accused is a peace officer armed in the line of duty (see s. 92). No additional intention, such as the intention to use the weapon, is required.

### CARRYING CONCEALED WEAPON.

**89. Every one who carries a weapon concealed, unless he is the holder of a permit under which he may lawfully so carry it,**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or**
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 87; 1976-77, c. 53, s. 3.**

### CROSS-REFERENCES

“Weapon” is defined in s. 2.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

The Criminal Code does not in terms provide for a permit to carry a concealed weapon, but see s. 84 which defines “permit” as a permit issued under s. 110 relating to permits to carry restricted weapons and note the exemptions for peace officers etc. in s. 92.

Section 115 reverses the burden of proof that the person was the holder of a permit but also provides that a document purporting to be a permit is evidence of the statements contained therein.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

### ANNOTATIONS

**Meaning of “carries”** – In a case decided under the old s. 85 it was held that a person carries a weapon if it is in an automobile of which he has care and control and it was not necessary that the accused have the weapon on his person: *R. v. Hanabury*, *infra*.

**Meaning of “concealed”** – To prove concealment it must be established that the accused took steps to hide an object that he knew to be a weapon so that it would not be observed or come to the notice of others. On the other hand, a gun which is carried in a gun case will not be considered concealed. In most cases the gun carrying case will resemble the firearm itself so that it cannot be considered to be hidden. Wrapping a firearm in a blanket or canvass and securing it with a rope as required by some provincial regulations should also not be considered to be concealing the weapon. In most cases the wrapped weapon will still resemble a firearm and not be considered to be concealed. Finally placing of a firearm in a locked trunk in a locked and unattended vehicle in compliance with Federal regulations must be considered an exception to the carrying a concealed weapon offence: *R. v. Felawka*, [1993] 4 S.C.R. 199, 85 C.C.C. (3d) 248, 25 C.R. (4th) 70.

### POSSESSION OF PROHIBITED WEAPON / Prohibited weapon in motor vehicle / Saving provision / Classes of persons / Large-capacity cartridge magazines / *Idem*.

**90. (1) Every one who has in his possession a prohibited weapon**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or**
- (b) is guilty of an offence punishable on summary conviction.**

(2) Every one who is an occupant of a motor vehicle in which he knows there is a prohibited weapon

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(3) Subsection (1) does not apply to a person who comes into possession of a prohibited weapon by operation of law and thereafter, with reasonable despatch, lawfully disposes thereof.

(3.1) [Subsec. (3.1), as enacted by 1991, c. 28, s. 6, *repealed* 1994, c. 44, s. 6.]

(3.1) Subsection (1) does not apply in a province with respect to any person designated by the Attorney General of the province as a person who belongs to a class of persons who require a prohibited weapon described in paragraph (c), (e) or (f) of the definition "prohibited weapon" in subsection 84(1) or any component or part thereof for a purpose that the Governor in Council prescribes by regulation to be an industrial purpose, or to any person who is under the direct and immediate supervision of such a person.

(3.2) Notwithstanding anything in this Act, no person is guilty of an offence under subsection (1) by reason only that the person possesses a prohibited weapon described in paragraph (f) of the definition of that expression in subsection 84(1), where

- (a) that person has been authorized in writing by the local registrar of firearms to be a person who may possess such a weapon for use in conjunction with a firearm that is suitable for use in shooting competitions designated by the Attorney General and is lawfully possessed by the person and where the person has complied with all conditions for the possession of that weapon that are prescribed by regulations or that are required by the local registrar of firearms in the particular circumstances and in the interests of the safety of the person or of any other person; or
- (b) that person is a person who is designated for the purposes of paragraph 95(3)(b).

(4) Subsection (2) does not apply to an occupant of a motor vehicle in which there is a prohibited weapon where, by virtue of subsection (3) or section 92, subsection (1) does not apply to the person who is in possession of that weapon. R.S., c. C-34, s. 88; 1976-77, c. 53, s. 3; 1991, c. 28, s. 6; 1991, c. 40, ss. 4, 35; 1994, c. 44, s. 6.

#### CROSS-REFERENCES

"Weapon" and "motor vehicle" are defined in s. 2 and "prohibited weapon" is defined in s. 84. Reference should also be made to restricted weapons orders made by the Governor in Council and the exemption for certain types of weapons by virtue of s. 84.

"Possession" is defined in s. 4(3).

An authorization to intercept private communications may be obtained in relation to an offence under this section by virtue of ss. 183 and 186.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section is liable depending on the circumstances to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note related offences: s. 95, importing etc. of prohibited weapon; s. 104(1), failing to report finding of prohibited weapon; s. 95.1, making automatic firearm.

Note exemption for peace officers, members of the armed forces etc. in s. 92.

The special search and seizure provisions in relation to prohibited weapons are set out in ss. 101 to 103.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

This section proscribes the *possession of prohibited weapons* (as defined in s. 84). The accused must be aware of the characteristics of the weapon which make it prohibited or be reckless about such features. A mistake of law as to whether the weapon is prohibited affords no defence.

Under subsec. (2), anyone who is an occupant of a motor vehicle which he *knows* contains a prohibited weapon, is guilty of an offence.

The offences created by subsecs. (1) and (2) are subject to exceptions as set out in subsecs. (3), (3.11), (3.2) and (4). Subsection (3) provides the defence that the person in possession of such a weapon obtained it by lawful means and disposed of it within a reasonable time. Subsection (4) states that the person in the car, referred to in subsec. (2), will not be held liable if the person in possession of the prohibited weapon is a peace officer or other person permitted to have such a weapon pursuant to s. 92(1).

## ANNOTATIONS

**Elements of offence / *mens rea*** – *Mens rea* is an element of this offence and where the prohibited weapon is a knife “that opens automatically by gravity or centrifugal force” as defined in s. 84(1)(b), ignorance by the accused that the knife possessed this quality is a defence to a charge under this section: *R. v. Phillips* (1978), 44 C.C.C. (2d) 548 (Ont. C.A.).

The requisite *mens rea* is supplied by either knowledge or recklessness with respect to the characteristics of the knife which, in fact, make it a prohibited weapon: *R. v. Archer* (1983), 6 C.C.C. (3d) 129 (Ont. C.A.).

However in *R. v. Richard and Walker* (1981), 63 C.C.C. (2d) 333, 24 C.R. (3d) 373 (N.B.C.A.) it was held that the offence was one of strict liability but it was open to the accused to avoid liability by proof that he did not know that the blade would open by the application of centrifugal force to the blade.

Provided the accused was aware of the characteristics which make the weapon a prohibited weapon, it is no defence that he was unaware that such a weapon was prohibited. The accused’s mistake is one of law: *R. v. Baxter* (1982), 6 C.C.C. (3d) 447 (Alta. C.A.).

**Meaning of prohibited weapon / also see notes under s. 84** – In *R. v. Vokac* (1978), 42 C.C.C. (2d) 201, [1978] 5 W.W.R. 397 (B.C.C.A.) it was held that where the prohibited weapon was defined under Prohibited Weapons Order No. 1, SOR/74-297 as “any device designed to be used for the purpose of injuring, immobilizing or otherwise incapacitating any person by the discharge therefrom of . . . (b) any liquid, spray, powder or other substance that is capable of injuring, immobilizing or otherwise incapacitating any person” the label on the spray canister was admissible as proof of the purpose for which it was designed although the label could not prove the capability of the spray. This latter element was proved by *viva voce* evidence of a police officer who experimented with the spray seized from the accused.

In order to constitute a prohibited weapon it is not sufficient that the device falls within the description set out in a Prohibited Weapons Order. The device must also come within the definition of “weapon” in s. 2: *R. v. Murray* (1985), 24 C.C.C. (3d) 568 (Ont. C.A.). *Contra: R. v. K.(A.)* (1991), 68 C.C.C. (3d) 135, 9 C.R. (4th) 269, 9 W.A.C. 244, leave to appeal to S.C.C. refused 70 C.C.C. (3d) vi, where it was held that the word “weapon” in s. 84(1)(e) should be given a broader meaning than as defined in s. 2 to encompass any article or device that can on occasion be used to inflict injury,



harm or death to a person whether used offensively or defensively. Thus, in the absence of a challenge to the power of the Governor in Council to designate the device as a prohibited weapon on the basis that it does not fall within this normal everyday meaning of weapon, a prohibited weapon under s. 84 is simply what the Governor in Council has declared to be a prohibited weapon.

The acceptable amount of adaptation and the time required therefor, for an inoperable weapon such as a sawed-off rifle to remain within the definition of "firearm" in s. 84 is dependent upon the nature of the offence where the definition is involved. The offence under this section is a continuing one having as its purpose the suppression of possession of devices which constitute a particular danger to the public, such as a sawed-off rifle which can easily be concealed because of its reduced length. In view of the nature of the continuing offence of possession of a prohibited weapon and having regard to the purpose of the section, the acceptable amount of adaptation and the time-span required to render the gun operable would be longer than for other offences. Thus, where the sawed-off rifle could be made operable by insertion of a firing unit which could be obtained from local stores and inserted in less than two minutes, then the weapon was a firearm and a prohibited weapon within the meaning of s. 84: *R. v. Ferguson* (1985), 20 C.C.C. (3d) 256 (Ont. C.A.). *Folld: R. v. Cook* (1989), 48 C.C.C. (3d) 61 (Man. C.A.).

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**REFUSAL AND NOTIFICATION/Request for reference to judge/Hearing/Burden of proof/Order/Appeal/Definition of "appeal court".**

90.1. (1) Where, pursuant to paragraph 90(3.2)(a), a local registrar of firearms refuses to authorize in writing that a person is a person who may possess a prohibited weapon referred to in that paragraph for use in conjunction with a firearm that is suitable for use in shooting competitions designated by the Attorney General, the local registrar of firearms shall notify the person in writing of the refusal and the reasons for it and include in the notification a copy of this section.

(2) A person who has received a notification referred to in subsection (1) may, within 30 days after receiving the notification or within such time as is, before or after the expiration of that period, allowed by a provincial court judge, request in writing the local registrar of firearms to refer the matter to a provincial court judge having jurisdiction in the territorial division in which the person resides.

(3) On a reference by the local registrar of firearms pursuant to subsection (2), the provincial court judge shall fix a date for the hearing of the reference and direct that notice of the hearing be given to the person and to the local registrar of firearms, in such a manner as the provincial court judge may specify.

(4) In a hearing under subsection (3) the burden of proof is on the person to satisfy the provincial court judge that the refusal was not justified.

(5) Where at the conclusion of the hearing under subsection (3), the person has satisfied the provincial court judge that the refusal was not justified, the provincial court judge shall, by order, direct the local registrar of firearms to authorize in writing that the person may possess a prohibited weapon referred to in paragraph 90(3.2)(a) for use in conjunction with a firearm that is suitable for use in shooting competitions designated by the Attorney General and the local registrar of firearms shall immediately comply with the order.

(6) Where a provincial court judge makes an order pursuant to subsection (5), the local registrar of firearms may appeal to the appeal court against the order and the provisions of Part XXVII except sections 816 and 819 and 829 to 836 apply, with such modifications as the circumstances require, in respect of the appeal.

(7) In this section, "appeal court" has the meaning given that expression in subsection 100(11). 1991, c. 40, s. 4.

**CROSS-REFERENCES**

Because of the expanded definition of prohibited weapon to include some types of weapons which might be used in legitimate shooting competitions, namely large-capacity cartridge magazines as defined in para. (f) of the definition of prohibited weapon in s. 84(1), provision is made for giving permission in writing to possess such weapons. This section then sets out the procedure for an appeal by way of a reference to a provincial court judge by the person who has been refused permission. Where the judge overturns the decision of the local registrar, then the local registrar is given a right of appeal to the summary conviction appeal court.

**POSSESSION OF UNREGISTERED RESTRICTED WEAPON / Possession elsewhere than at place authorized / Restricted weapon in motor vehicle / Saving provision / Idem / Idem / Idem.**

**91. (1) Every one who has in his possession a restricted weapon for which he does not have a registration certificate**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

**(2) Every one who has in his possession a restricted weapon elsewhere than at the place at which he is entitled to possess it, as indicated on the registration certificate issued therefor, is, unless he is the holder of a permit under which he may lawfully so possess it,**

- (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) guilty of an offence punishable on summary conviction.

**(3) Every one who is an occupant of a motor vehicle in which he knows there is a restricted weapon is, unless some occupant of the motor vehicle is the holder of a permit under which he may lawfully have that weapon in his possession in such vehicle, or he establishes that he had reason to believe that some occupant of the motor vehicle was the holder of such permit,**

- (a) guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) guilty of an offence punishable on summary conviction.

**(4) Subsection (1) does not apply to a person**

- (a) in respect of a restricted weapon, where a permit relating to the restricted weapon has been issued under subsection 110(1), (2.1) or (3.1) and the person is not the person mentioned in the registration certificate issued in respect of that restricted weapon;
- (a.1) to whom a permit relating to a restricted weapon has been issued under subsection 110(3) or (4) and who possesses the weapon for the purpose for which that permit was issued;
- (b) who has a restricted weapon in his possession while he is under the immediate supervision of a person who may lawfully possess the weapon for the purpose of using the weapon in a manner in which the supervising person may lawfully use it; or
- (c) who comes into possession of a restricted weapon by operation of law and thereafter, with reasonable despatch, lawfully disposes of it or obtains a registration certificate or permit under which he may lawfully possess it.

**(4.1) Subsection (2) does not apply to a person to whom a permit to possess a particular restricted weapon has been issued under subsection 110(1) where the person is not the person mentioned in the registration certificate issued in respect of the restricted weapon, when the person to whom the permit has been issued possesses the restricted weapon at the place authorized by the permit.**

(5) Subsection (3) does not apply to an occupant of a motor vehicle in which there is a restricted weapon where, by virtue of subsection (4) or section 92, subsections (1) and (2) do not apply to the person who is in possession of that weapon.

(6) Subject to sections 100 and 103, subsection 105(4) and to a condition of a probation order referred to in paragraph 737(2)(d), nothing in this Act makes it unlawful for a person to be in possession of a restricted weapon, other than a restricted weapon described in paragraph (c. 1) of the definition of that expression in subsection 84(1), in the ordinary course of a business described in paragraph 105(1)(a) or (b) or subparagraph 105(2)(b)(ii). R.S., c. C-34, s. 89; 1976-77, c. 53, s. 3; 1991, c. 28, s. 7; 1991, c. 40, ss. 5, 36.

**NOTE:** Subsection (6) amended 1995, c. 22, s. 10 (Sch. I, item 5) (to come into force by order of the Governor in Council) by replacing the reference to s. 737(2)(d) with s. 732.1(3)(d), however, 1995, c. 22, s. 10 (Sch. I, item 5) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

#### CROSS-REFERENCES

"Weapon" is defined in s. 2 and "restricted weapon" is defined in s. 84. Reference should also be made to restricted weapons orders made by the Governor in Council and the exemption for certain types of weapons by virtue of s. 84(2).

"Motor vehicle" is defined in s. 2 and "possession" is defined in s. 4(3).

The procedure for obtaining and revocation of a registration certificate for a restricted weapon is set out in ss. 109 and 112. The procedure for a permit to carry a restricted weapon is set out in ss. 110 and 112.

Section 115 reverses the burden of proof that the person was the holder of a permit but also provides that a document purporting to be a permit is evidence of the statements contained therein.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Note related offences: s. 96, sale etc. of restricted weapon; s. 104(1), failing to report finding of restricted weapon, false statements in relation to applications for certificates or permits.

Note exemption for peace officers, members of the armed forces etc. in s. 92.

This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103. Note especially power to seize restricted weapons pursuant to s. 102(1)(a).

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

#### SYNOPSIS

Section 91 regulates the possession of *restricted weapons*. It includes the offence of *possessing* such a weapon *without a registration certificate* (subsec. (1)), being in a *location* not permitted by the permit or registration certificate (subsec. (2)), or being in a motor vehicle in the knowledge that it contains a restricted weapon (subsec. (3)). These offences are subject to specific defences within the subsections creating the offences and the exceptions set out in subsections (4) and (5).

Subsection (6) provides the additional defence for persons in possession of restricted weapons in the ordinary course of a business as set out in s. 105(1) and (2)(b)(ii), unless the person is subject to a prohibition order under Part III of the Criminal Code or as part of a probation order.

Case-law in Ontario indicates that a conviction under this section will not bar a conviction



tion for carrying a concealed weapon (under s. 89), as each offence involves sufficiently distinct elements.

## ANNOTATIONS

While this is a true criminal offence requiring proof of *mens rea*, the accused's ignorance that the weapon was a restricted weapon as designated by an amendment to the Restricted Weapons Order, published in the *Canada Gazette* is ignorance of law and no defence: *R. v. Williams* (1988), 44 C.C.C. (3d) 58 (Y.T. Terr. Ct.).

Similarly, the accused's mistaken belief that the weapon was an antique and therefore not subject to the registration requirements was no defence: *R. v. Létourneau* (1990), 62 C.C.C. (3d) 451 (Que. C.A.).

The exemption in subsec. (4)(c) did not apply to police officers who did not have registration certificates and took possession of restricted weapons at the scene of an investigation with the intention of keeping the weapons for themselves. The officers had attended at the scene of a suicide and, at the insistence of a relative of the deceased, had removed all the firearms from the home. The officers treated the firearms as gifts and only turned them in to the police when their superior learned of the "gift". The term "by operation of law" refers to a situation where the person, from the outset, was justified in acquiring the weapon without first having obtained a certificate: *R. v. Bibeau* (1990), 61 C.C.C. (3d) 339, 1 C.R. (4th) 397 (Que. C.A.).

## AMNESTY PERIODS / *Idem*.

**91.1. (1)** The Governor in Council may make orders specifying periods of time as amnesty periods with respect to weapons or classes of weapons, or explosive substances, and where the Governor in Council makes such an order, no person who, during that period, delivers such a weapon or explosive substance that is unlawfully in the person's possession to a peace officer, local registrar of firearms or firearms officer for registration or destruction or other disposition as provided in the order is, by reason only of the fact that the person was in possession of the weapon or explosive substance prior to the delivery or by reason only of the fact that the person transported the weapon or explosive substance for purposes of the delivery, guilty of an offence under section 82, 90 or 91, as the case may be.

**(2)** Any proceedings taken under section 82, 90 or 91 against any person for any action taken by the person in reliance on subsection (1) following an order referred to therein are a nullity. 1991, c. 40, s. 6.

## MEMBERS OF FORCES, PEACE OFFICERS, ETC. / Museums.

**92. (1)** Notwithstanding anything in this Act,

- (a) a member of the Canadian Forces or of the armed forces of a state other than Canada who is authorized under paragraph 14(a) of the Visiting Forces Act or who is attached or seconded to any of the Canadian Forces,
- (b) a peace officer or a person in the public service of Canada or employed by the government of a province,
- (c) an officer under the Immigration Act, the Customs Act or the Excise Act, or
- (d) a person who, under the authority of the Canadian Forces or a police force that includes peace officers or public officers, imports, manufactures, repairs, alters, modifies or sells weapons for or on behalf of the Canadian Forces or that police force

is not guilty of an offence under this Act by reason only that, in the case of a person described in any of paragraphs (a) to (c), the person is required to possess and possesses a restricted or prohibited weapon for the purpose of the person's duties or employment and, in the case of a person described in paragraph (d), the person pos-

sesses a restricted or prohibited weapon in the course of business on behalf of the Canadian Forces or a police force referred to in that paragraph.

(2) Notwithstanding anything in this Act, no operator of or person employed in a museum established by the Chief of the Defence Staff or a museum approved for the purposes of this Part by the Commissioner or the Attorney General of the province in which it is situated is guilty of an offence under this Act by reason only that the person possesses a restricted or prohibited weapon for the purpose of exhibiting that weapon or of storing, repairing, restoring, maintaining or transporting that weapon for the purpose of exhibiting it. R.S., c. C-34, s. 90; 1976-77, c. 53, s. 3; R.S.C. 1985, c. 1 (2nd Supp.), s. 213(3); 1991, c. 40, s. 7.

#### CROSS-REFERENCES

"Peace officer" and "public officer" and "Canadian Forces" are defined by s. 2. "Restricted weapon" and "prohibited weapon" are defined by s. 84.

By virtue of s. 84, "commissioner" means the Commissioner of the Royal Canadian Mounted Police.

Section 98 provides for further exemptions for peace officers, members of the armed forces, etc.

#### ANNOTATIONS

The exemption in subsec. (1) did not apply to police officers who took possession of restricted weapons with the intention of keeping them for themselves. The officers had attended at the scene of a suicide and, at the insistence of a relative of the deceased, had removed all the firearms from the home. The officers treated the firearms as gifts and only turned them in to the police when their superior learned of the "gift". The officers' act in accepting the gifts had nothing to do with the investigation which they were undertaking: *R. v. Bibeau* (1990), 61 C.C.C. (3d) 339, 1 C.R. (4th) 397 (Que. C.A.).

## Offences Related to Sale, Delivery or Acquisition of Firearms and other Offensive Weapons

### TRANSFER OF FIREARM TO PERSON UNDER 18 / Saving provision.

93. (1) Every one who gives, lends, transfers or delivers any firearm to a person under the age of eighteen years who is not the holder of a permit under which the person may lawfully possess the firearm

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a person lawfully in possession of a firearm who permits a person under the age of eighteen years to use the firearm under the direct and immediate supervision of the person lawfully in possession of the firearm in the same manner in which that person may lawfully use it. R.S., c. C-34, s. 91; 1976-77, c. 53, s. 3; 1991, c. 40, s. 8.

#### CROSS-REFERENCES

"Firearm" is defined by s. 84.

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 110(5) and (6) provides for the granting of permits to possess firearms to persons under the age of 18 years in certain limited circumstances.

Section 115 reverses the burden of proof that the person was the holder of a permit but also provides that a document purporting to be a permit is evidence of the statements contained therein.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of

trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103. Note especially power to seize firearms from minors pursuant to s. 102(1)(b). Note provision for forfeiture of weapons used in commission of an offence, s. 491.

## WRONGFUL DELIVERY OF FIREARMS, ETC.

**94. Every one who sells, barter, gives, lends, transfers or delivers any firearm or other offensive weapon or any ammunition or explosive substance to a person who he knows or has good reason to believe is of unsound mind, is impaired by alcohol or drugs, or is a person who is prohibited by an order made pursuant to section 100 or 103 or by a condition of a probation order referred to in paragraph 737(2)(d) from possessing the firearm or other offensive weapon, ammunition or explosive substance so sold, bartered, given, lent, transferred or delivered,**

**(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or**

**(b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 92; 1976-77, c. 53, s. 3.**

## CROSS-REFERENCES

“Firearm” is defined by s. 84 and “offensive weapon” and “explosive substance” are defined in s. 2. As to meaning of “impaired by alcohol or drugs”, reference might be made to cases noted under s. 253.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

This section is part of comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

This section imposes a duty not to transact in firearms, offensive weapons, ammunition or explosive substances with a person whom the accused knows or has good reason to believe is of *unsound mind*, *impaired by alcohol or drugs* or is the subject of a *prohibition order* under this Part of the Code or as a term of probation. This is an indictable or summary conviction offence. The maximum term of imprisonment on indictment is five years.

## IMPORTING OR DELIVERING PROHIBITED WEAPON/Saving provision/Exception/Saving provision/Idem.

**95. (1) Every person who imports, exports, buys, sells, barter, gives, lends, trans-**



fers or delivers a prohibited weapon or any component or part designed exclusively for use in the manufacture or assembly into a prohibited weapon

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (2) Notwithstanding subsection (1), a person who carries on a business described in paragraph 105(1)(b) may export or import for a purpose that the Governor in Council prescribes by regulation, for the purposes of subsection 90(3.1), to be an industrial purpose a prohibited weapon described in paragraph (c), (e) or (f) of the definition "prohibited weapon" in subsection 84(1) or components or parts thereof, if that person does so under and in accordance with an export permit or an import permit, as the case may be, issued under the Export and Import Permits Act.

(3) Subsection (1) does not apply to a person who

- (a) carries on a business referred to in paragraph 105(1)(a) and who, on behalf of a person described in subsection 90(3.2), imports, buys, sells, barterers, gives, lends, transfers or delivers a prohibited weapon described in paragraph (f) of the definition of that expression in subsection 84(1); or
- (b) manufactures a prohibited weapon described in paragraph (f) of the definition of that expression in subsection 84(1) for the purpose of exporting the prohibited weapon or of selling it in Canada to a person who may lawfully possess such a prohibited weapon, where the person who manufactures the prohibited weapon is designated for the purposes of this subsection by the Attorney General of the province in which the prohibited weapon is manufactured.

(4) Notwithstanding subsection (1), a person who carries on a business described in paragraph 105(1)(b) may transfer to a person designated by the Attorney General of a province pursuant to subsection 90(3.1) a prohibited weapon described in paragraph (c), (e) or (f) of the definition "prohibited weapon" in subsection 84(1) or components or parts thereof.

(5) Notwithstanding subsection (1), a person who is authorized in writing by a local registrar of firearms under paragraph 90(3.2)(a) may import or export a prohibited weapon described in paragraph (f) of the definition "prohibited weapon" in subsection 84(1), and to which the authorization applies, for personal use in shooting competitions designated under paragraph 90(3.2)(a). R.S., c. C-34, s. 93; 1976-77, c. 53, s. 3; 1991, c. 28, s. 8; 1991, c. 40, ss. 9, 37; 1993, c. 25, s. 93.

#### CROSS-REFERENCES

"Prohibited weapon" is defined in s. 84.

Note the related offence of possession of a prohibited weapon in s. 90 and offences in relation to found prohibited weapons in s. 104.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note exemption for peace officers, members of the armed forces etc. in s. 98.

This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special provision for warrantless search for prohibited weapons is in s. 101.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

**SYNOPSIS**

This provision imposes a broad *bar against transactions involving prohibited weapons or parts* thereof designed exclusively for use in such weapons. As with s. 90, the accused must know, or be reckless about the character of the weapon or components which make it prohibited. The offence created by this section is punishable, on summary conviction or on indictment, by a maximum term of imprisonment of five years.

**MAKING AUTOMATIC FIREARM.**

**95.1.** Every person who, without lawful justification or excuse, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, firing projectiles in rapid succession during one pressure of the trigger is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction. 1991, c. 40, s. 9.

**CROSS-REFERENCES**

This section complements the definition of prohibited weapon in para. (c) of the definition of that term in s. 84(1). The actual offence of possession of a prohibited weapon is set out in s. 90. The penalty and procedure for both these offences is the same and thus see notes under s. 90.

**DELIVERY OF RESTRICTED WEAPON TO PERSON WITHOUT PERMIT / Saving provision / Importation.**

**96.** (1) Every one who sells, barter, gives, lends, transfers or delivers any restricted weapon to a person who is not the holder of a permit authorizing him to possess that weapon

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a person lawfully in possession of a restricted weapon who permits a person who is not the holder of a permit authorizing him to possess that weapon to use the weapon under his immediate supervision in the same manner in which he may lawfully use it.

(3) Every one who imports any restricted weapon when he is not the holder of a permit authorizing him to possess that weapon

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 94; 1976-77, c. 53, s. 3.

**CROSS-REFERENCES**

“Weapon” is defined in s. 2 and “restricted weapon” is defined in s. 84. Reference should also be made to restricted weapons orders made by the Governor in Council and the exemption for certain types of weapons by virtue of s. 84(2).

The procedure for obtaining and revocation of a registration certificate for a restricted weapon is set out in ss. 109 and 112, and for a permit to carry a restricted weapon is set out in ss. 110 and 112.

Section 115 reverses the burden of proof that the person was the holder of a permit but also provides that a document purporting to be a permit is evidence of the statements contained therein.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in

s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note: Related offences: s. 91, possession of restricted weapon; s. 104(1), failing to report finding of restricted weapon, false statements in relation to applications for certificates or permits.

Note exemption for peace officers, members of the armed forces etc. in s. 92.

This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103. Note, especially, power to seize restricted weapons pursuant to s. 102(1)(a).

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

Section 96 creates additional offences relating to transactions or transfers of *restricted weapons* to persons *without the requisite permit*. Subsection (1) provides broad prohibitions covering actions ranging from giving to delivering restricted weapons to a person who does not hold a proper permit. However, subsec. (2) allows a permit-holder to let another person use a restricted weapon in the same manner as the permit-holder may, so long as he remains within the immediate supervision of the permit holder.

The section also *prohibits the importation* of a restricted weapon unless the importer has a permit to possess such a weapon.

Both offences under this section are punishable on summary conviction or indictment, with the maximum term of imprisonment on indictment being five years.

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## DELIVERY OF FIREARM TO PERSON WITHOUT FIREARMS ACQUISITION CERTIFICATE / Saving provision / Acquisition of firearm without firearms acquisition certificate / Saving provision.

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97. (1) Every one who sells, barter, gives, lends, transfers or delivers any firearm to a person who does not, at the time of such sale, barter, giving, lending, transfer or delivery or, in the case of a mail-order sale, within a reasonable time prior thereto, produce a firearms acquisition certificate for inspection by the person selling, bartering, giving, lending, transferring or delivering the firearm, that that person has no reason to believe is invalid or was issued to a person other than the person so producing it,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to a person

(a) lawfully in possession of a firearm who lends the firearm

(i) to a person for use by that person in his company and under his guidance or supervision in the same manner in which he may lawfully use it,

(ii) to a person who requires the firearm to hunt or trap in order to sustain himself or his family, or

(iii) to a person who is the holder of a permit issued under subsection 110(1), (6) or (7) permitting the lawful possession of the firearm;

(b) who returns a firearm to a person who lent it to him in circumstances described in paragraph (a);

(c) who comes into possession of a firearm in the ordinary course of a business described in paragraph 105(1)(a) and who returns the firearm to the person from whom it is received; or

(d) who is a peace officer, local registrar of firearms or firearms officer who returns a firearm to a person who had lawfully possessed the firearm and subsequently lost it or from whom it had been stolen.



- (3) Every one who imports or otherwise acquires possession in any manner whatever of a firearm while he is not the holder of a firearms acquisition certificate
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (4) Subsection (3) does not apply to a person who
- (a) acquires a firearm in circumstances such that, by virtue of subsection (2), subsection (1) does not apply to the person from whom he acquires the firearm;
  - (b) reacquires a firearm from a person to whom he lent the firearm;
  - (c) imports a firearm at a time when he is not a resident of Canada;
  - (d) comes into possession of a firearm by operation of law and thereafter, with reasonable despatch, lawfully disposes of it or obtains a firearms acquisition certificate under which he could have lawfully acquired the firearm;
  - (e) comes into possession of a firearm in the ordinary course of a business described in paragraph 105(1)(a) or (b) or 105(2)(a) or (b); or
  - (f) has lawfully possessed a firearm and has subsequently lost it, or from whom it had been stolen, and who then reacquires it from a peace officer, local registrar of firearms or firearms officer or finds it and so reports to a peace officer, local registrar of firearms or firearms officer. R.S., c. C-34, s. 95; 1976-77, c. 53, s. 3; 1978-79, c. 10, s. 1; 1991, c. 40, ss. 10, 38.

### Transitional provision

1991, c. 40, s. 34 provides as follows:

34. Notwithstanding subsection 48(1) of the Criminal Law Amendment Act, 1977, a permit issued under subsection 110(5) of the Criminal Code or under section 97 of the Criminal Code, as that section read immediately before the coming into force of section 3 of the Criminal Law Amendment Act, 1977, other than a permit that is expressed to be issued for a specified period, ceases to be in force or have any effect on the day that is ninety days after the date of the coming into force of this section, unless the permit is revoked before that day.

### CROSS-REFERENCES

“Firearm” and “firearms acquisition certificate” are defined in s. 84.

The procedure for obtaining a firearms acquisition certificate is set out in s. 106. Section 107 provides for alternatives to firearms acquisition certificate upon agreement with the province.

Section 115 reverses the burden of proof that the person was the holder of a firearms acquisition certificate but also provides that a document, purporting to be a certificate, is evidence of the statements contained therein.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Note exemption for peace officers, members of the armed forces etc. in s. 98. This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103. Note, especially, power to seize firearms pursuant to s. 102(1)(b) from person under the age of 16 years.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

A key document in the legislative scheme to control firearms is the *firearms acquisition certificate*. This section prohibits a wide range of activities, including *giving or delivering a firearm to a person who does not produce for inspection a valid firearms acquisition certificate* either at or before the transfer of the weapon. Certain exceptions to liability under this section are set out in subsec. (2). These include certain types of loans of the weapon or returns following a loan, as well as the case in which the certificate is not produced but is in fact possessed by the transferee.

Liability also attaches, under subsec. (3), to the *person who acquires a firearm without a valid firearms acquisition certificate*, unless the action comes within the saving provisions of subsec. (4). Offences under this section are punishable on indictment by a maximum term of imprisonment of two years, or on summary conviction.

**MEMBERS OF FORCES, PEACE OFFICERS, ETC. / Importation, etc., on behalf of armed forces and police forces / Importation, etc., on behalf of museums.**

## 98. (1) Notwithstanding sections 95 to 97,

(a) a member of the Canadian Forces, or of the armed forces of a state other than Canada, referred to in paragraph 92(1)(a),

(b) a peace officer or a person in the public service of Canada or employed by the government of a province, or

(c) a peace officer or a person employed in a museum established by the Chief of the Defence Staff or a museum approved for the purposes of this Part by the Commissioner or the Attorney General of the province in which it is situated

is not guilty of an offence under this Act by reason only that the person imports or otherwise acquires possession in any manner of any weapon or component or part of a weapon in the course of the duties or employment of that person.

(2) Notwithstanding sections 95 to 97, a person who, under the authority of the Canadian Armed Forces or a police force that includes peace officers or public officers of a class referred to in paragraph (1)(b), imports, manufactures, repairs, alters, modifies or sells weapons or components or parts of weapons for or on behalf of the Canadian Armed Forces or such a police force is not guilty of an offence under this Act by reason only that that person so imports or manufactures weapons or components or parts thereof or that he sells, barters, gives, lends, transfers or delivers weapons or components or parts thereof to the Canadian Armed Forces or such a police force.

(3) Notwithstanding sections 95 to 97, a person who, under the supervision of an operator or of a person employed in a museum established by the Chief of the Defence Staff or a museum approved for the purposes of this Part by the Commissioner or the Attorney General of the province in which it is situated, imports, buys, repairs, restores or maintains weapons or components or parts of weapons for or on behalf of the museum is not guilty of an offence under this Act by reason only that the person so imports, buys, repairs, restores or maintains weapons or components or parts thereof or sells, barters, gives, lends, transfers or delivers weapons or components or parts thereof to the museum. R.S., c. C-34, s. 96; 1976-77, c. 53, s. 3; R.S.C. 1985, c. 27 (1st Supp.), s. 13; 1991, s. 40, s. 11.

## CROSS-REFERENCES

The terms "Attorney General", "Canadian Forces", "peace officer", "public officer" and "weapon" are defined in s. 2. "Commissioner" is defined in s. 84. Also see s. 92 which exempts some of the same persons referred to in this section from offences under the Code.

## SYNOPSIS

This section acts as an *exception to liability otherwise triggered by ss. 95 to 97*, which relate to transactions involving restricted or prohibited weapons or involving acquisition of

firearms by persons without valid firearms acquisition certificates. Subsections (1) and (2) exempt wide categories of law enforcement and armed forces personnel and those who supply them with weapons from the operation of ss. 95 to 97.

Subsection (3) extends the exemption from liability under the same sections to those who are acting under the supervision of an approved museum and who are engaged in the handling or transportation of the weapons for the museum.

### EXCEPTION.

**99. Notwithstanding sections 96 and 97, a person is not guilty of an offence under this Act by reason only that he transfers or delivers**

(a) any restricted weapon to a person who carries on a business described in subparagraph 105(2)(b)(ii), or

(b) any firearm, other than a restricted weapon, to a person who carries on a business described in subsection 105(1) or subparagraph 105(2)(b)(ii)

for use in the course of that business. R.S., c. C-34, s. 97; 1976-77, c. 53, s. 3.

### CROSS-REFERENCES

The terms “firearm” and “restricted weapon” are defined in s. 84.

### SYNOPSIS

Section 99 *exempts* persons who would otherwise be guilty of an offence under s. 96 (delivering, etc., a restricted weapon to a person without a permit) or s. 97 (delivering, etc., a firearm to a person without a valid firearms acquisition certificate), if the transfer is to a person carrying on one of the *class of businesses* described in s. 105. Note that the exemption regarding restricted weapons is more limited and covers only those businesses involved in the transportation or shipping of restricted firearms or ammunition (per s. 105(2)(b)(ii)).

## Prohibition Orders, Seizure and Forfeiture

**ORDER PROHIBITING POSSESSION OF FIREARMS, ETC.** / Where order not to be made / Criteria / Reasons / Discretionary order prohibiting possession of firearms, etc. / Duration of order / Definition of “release from imprisonment” / Application for order of prohibition / Fixing date for hearing and notice / Hearing of application and disposition / Hearing of reference and disposition / Revocation on order / Idem / Where hearing may proceed *ex parte* / Appeal to appeal court in certain cases / Definitions / “appeal court” / “provincial court judge” / Possession of firearm, ammunition, etc., while prohibited by order / Defence.

**100. (1)** Where an offender is convicted or discharged under section 736 of an indictable offence in the commission of which violence against a person is used, threatened or attempted and for which the offender may be sentenced to imprisonment for ten years or more or of an offence under section 85, the court that sentences the offender shall, subject to subsections (1.1) to (1.3), in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order that commences on the day on which the order is made and expires not earlier than

(a) in the case of a first conviction for such an offence, ten years, and

(b) in any other case, life,

after the time of the offender’s release from imprisonment after conviction for the offence or, if the offender is not then imprisoned or subject to imprisonment, after the time of the offender’s conviction or discharge for that offence.



**NOTE:** Subsection (1) amended 1995, c. 22, s. 10 (Sch. I, item 6) (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730, however, 1995, c. 22, s. 10 (Sch. I, item 6) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

(1.1) The court is not required to make an order under subsection (1) where the court is satisfied that the offender has established that

- (a) it is not desirable in the interests of the safety of the offender or of any other person that the order be made; and
- (b) the circumstances are such that it would not be appropriate to make the order.

(1.2) In considering whether the circumstances are such that it would not be appropriate to make an order under subsection (1), the court shall consider

- (a) the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission;
- (b) whether the offender needs a firearm for the sustenance of the offender or the offender's family; and
- (c) whether the order would constitute a virtual prohibition against employment in the only vocation open to the offender.

(1.3) Where the court does not make an order under subsection (1), the court shall give reasons why the order is not being made.

(2) When an offender is convicted or discharged under section 736 of

- (a) an offence involving the use, carriage, possession, handling or storage of any firearm or ammunition,
- (b) an offence, other than an offence referred to in subsection (1), in the commission of which violence against a person was used, threatened or attempted, or
- (c) an offence described in subsection 39(1) or (2) or 48(1) or (2) of the Food and Drugs Act or in subsection 4(1) or (2) or 5(1) of the Narcotic Control Act,

the court that sentences the offender, in addition to any other punishment that may be imposed for the offence, shall consider whether it is desirable, in the interests of the safety of the offender or of any other person, to make an order prohibiting the offender from possessing any firearm or any ammunition or explosive substance and ordering the offender to surrender any firearms acquisition certificate that the offender possesses, and where the court decides that it is not desirable, in the interests of the safety of the offender or of any other person, for the offender to possess any of those things, the court shall so order.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (Sch. I, item 7) (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730, however, 1995, c. 22, s. 10 (Sch. I, item 7) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

**NOTE:** Subsection (2)(c) replaced 1996, Bill C-8, s. 65 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

- (c) *an offence described in subsection 5(3) or (4) or 6(3) of the Controlled Drugs and Substances Act,*

(2.1) An order referred to in subsection (2) may be for any period of time specified in the order but shall not expire later than ten years after the time of the offender's release from imprisonment after conviction for the offence to which the order relates, or, if the offender is not then imprisoned or subject to imprisonment, after the time of the offender's conviction or discharge from that offence.

(3) For the purposes of subsections (1) and (2), "release from imprisonment" means

release from confinement by reason of expiration of sentence, commencement of mandatory supervision or grant of parole other than day parole.

(4) Where a peace officer believes on reasonable grounds that it is not desirable in the interests of the safety of any person that a particular person should possess any firearm or any ammunition or explosive substance, he may apply to a provincial court judge for an order prohibiting that particular person from having in his possession any firearm or any ammunition or explosive substance.

(5) On receipt of an application made pursuant to subsection (4) or on a reference by a firearms officer, pursuant to subsection 106(7), of his opinion that it is not desirable in the interests of the safety of an applicant for a firearms acquisition certificate or of any other person that the applicant for a firearms acquisition certificate acquire a firearm, the provincial court judge to whom the application or reference is made shall fix a date for the hearing of the application or reference and direct that notice of the hearing be given to the person against whom the order of prohibition is sought or the applicant for the firearms acquisition certificate and the firearms officer, as the case may be, in such manner as the provincial court judge may specify.

(6) At the hearing of an application made pursuant to subsection (4), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order of prohibition is sought and where, at the conclusion of the hearing, the provincial court judge is satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person against whom the order of prohibition is sought or of any other person that the person against whom the order is sought should possess any firearm or any ammunition or explosive substance, the provincial court judge shall make an order prohibiting him from having in his possession any firearm or any ammunition or explosive substance for any period of time, not exceeding five years, specified in the order and computed from the day the order is made.

(7) At the hearing of a reference referred to in subsection (5), the provincial court judge shall hear all relevant evidence presented by or on behalf of the firearms officer and the applicant for a firearms acquisition certificate and where, at the conclusion of the hearing, the firearms officer has satisfied the provincial court judge that the opinion of the firearms officer that it is not desirable in the interests of the safety of the applicant or of any other person that the applicant acquire a firearm is justified, the provincial court judge shall, by order, confirm that opinion and the refusal to issue the firearms acquisition certificate and may prohibit the applicant from possessing any firearm, ammunition or explosive substance for any period, not exceeding five years, specified in the order and computed from the day the order is made.

(7.1) Where an order is made under subsection (1), (2) or (7), any firearms acquisition certificate that is held by the person who is the subject of the order is automatically revoked.

(8) Where, at the conclusion of a hearing referred to in subsection (7), the firearms officer has not satisfied the provincial court judge that his opinion that it is not desirable in the interests of the safety of the applicant for a firearms acquisition certificate or of any other person that the applicant for a firearms acquisition certificate acquire a firearm is justified, the provincial court judge shall, by order, direct the firearms officer to issue to that person a firearms acquisition certificate and, on payment of the fee, if any, fixed for such a certificate, the firearms officer shall forthwith comply with the direction.

(9) A provincial court judge may proceed *ex parte* to hear and determine an application made pursuant to subsection (4) or a reference referred to in subsection (5) in the absence of the person against whom the order of prohibition is sought or the

applicant for a firearms acquisition certificate, as the case may be, in circumstances in which a summary conviction court may, pursuant to Part XXVII, proceed with a trial in the absence of the defendant as fully and effectually as if the defendant had appeared.

(10) Where a provincial court judge

- (a) makes an order pursuant to subsection (6) or (7), the prohibited person, or
- (b) refuses to make an order pursuant to subsection (6), or makes an order pursuant to subsection (8), the Attorney General

may appeal to the appeal court against the order or refusal to make an order, as the case may be, and the provisions of Part XXVII except sections 816 to 819 and 829 to 838 apply, with such modifications as the circumstances require, in respect of such an appeal.

(11) In this section,

“appeal court” means

- (a) in the Province of Ontario, the Ontario Court (General Division) sitting in the region, district or county or group of counties where the adjudication was made,
- (b) in the Province of Quebec, the Superior Court,
- (b.1) [*Repealed. 1992, c. 51, s. 33(1).*]
- (c) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- (d) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court, and
- (e) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, the Supreme Court;

**NOTE:** Definition “appeal court” amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting para. (e). The text of para. (e), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (e) *in the Provinces of Nova Scotia and British Columbia, the Yukon Territory, the Northwest Territories and Nunavut, the Supreme Court;*

“provincial court judge” means a provincial court judge having jurisdiction in the territorial division where the person against whom the relevant application for an order of prohibition was brought or in respect of whom the reference was made, as the case may be, resides.

(12) Every one who has in his possession any firearm or any ammunition or explosive substance while he is prohibited from doing so by any order made pursuant to this section

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction.

(13) An order made pursuant to subsection (1), (2), (6) or (7) shall

- (a) specify a reasonable period within which the person against whom the order is made may surrender to a police officer or firearms officer, to be disposed of as the Attorney General directs, or otherwise lawfully dispose of any firearm or any ammunition or explosive substance lawfully possessed by that person prior to the making of the order, and during which subsection (12) does not apply to that person; and
- (b) state that if that person fails to dispose of the firearm, ammunition or explosive substance within the period specified in the order, the firearm, ammunition or explosive substance is forfeited to Her Majesty and must be surrendered to a police officer or firearms officer to be disposed of as the Attorney General



directs. R.S., c. C-34, s. 98; 1976-77, c. 53, s. 3; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), s. 14; c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 2; 1990, c. 17, s. 8; 1991, c. 40, s. 12; 1992, c. 51, s. 33.

#### CROSS-REFERENCES

The terms “firearm”, “firearms officer” and “firearms acquisition certificate” are defined in s. 84 and the terms “explosive substance”, “peace officer” and “provincial court judge” in s. 2. The terms “parole”, “day parole” and “mandatory supervision” are defined by the Parole Act, R.S.C. 1985, c. P-2. The reference in subsec. (9) to the power of a summary conviction court to proceed with a trial *ex parte* is to s. 803(2). Where the prosecution elects to proceed by indictment in respect of the offence in subsec. (12) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498. Presumably, a person found guilty of the offence in this section is liable to a further discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. The orders made under subssecs. (1) and (2) are included in the definition of sentence in s. 673 and thus appealable as a sentence appeal in indictable proceedings to the Court of Appeal under Part XXI. The order under subsec. (2) is also included in the definition of sentence in s. 785 and thus appealable as a sentence appeal under Part XXVII where the order was made in summary conviction proceedings. This section is part of a comprehensive scheme relating to the sale, handling and use of firearms provided for in this Part. The special search and seizure provisions in relation to firearms are set out in ss. 101 to 103. In addition to the orders which may be made under subssecs. (1) and (2), an accused placed on probation can be required as a term of probation not to own, possess or carry any weapon: s. 737(2)(d). As some of the provisions of Part XXVII apply to an order made under subssecs. (6), (7) and (8), a further appeal will lie from the decision under subsec. (10) of the appeal court (defined in subsec. (11)) to the Court of Appeal (as defined in s. 673) with leave on a question of law alone, pursuant to s. 839.

The making of a prohibition order under this section must be reported to the Commissioner under s. 114(3).

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

#### SYNOPSIS

This provision creates *prohibition orders* against the *possession of firearms, ammunition or explosive devices*. These orders are imposed on offenders convicted (or discharged) in connection with offences involving *violence*, threats of violence or firearms.

*Subsection (1)* imposes a *mandatory prohibition* of at least ten years for a first such offence, and life in any other case, if the underlying offence is punishable by 10 years or more imprisonment or is the offence of using a firearm to commit an indictable offence (s. 85). The duration of the order begins to run upon the release of the offender from any term of imprisonment.

Subsections (1.1) to (1.3), however, allow a court to relieve against the harshness of subsec. (1) in special circumstances. It would appear that Parliament envisaged that the prohibition order need not be made in circumstances analogous to those in which some courts had created a constitutional exemption from the operation of the predecessor to this section. In general, the courts had granted a constitutional exemption where the effect of the order would be to deprive the accused [usually a member of the First Nations] from pursuing an occupation such as hunting and trapping for which possession of a firearm was a necessity. In granting the exemption, the court would sometimes also place the accused on probation with terms as to the custody of the firearm when the accused did not need it to pursue his occupation.

*Subsection (2)* gives the court a *discretion* and permits making a prohibition order of up

to ten years if the underlying offence is other than one noted in subsec. (1) and involves the use, threatened or attempted use of violence, is a firearm offence or certain drug offences.

The third category of such order arises when a police officer applies to a provincial court judge, on the basis of reasonable grounds, that it is not desirable in the interest of safety of any person, including the person against whom the order is sought that a particular person possess firearms, ammunition or explosives. Subsections (4) to (11) provide a detailed procedure, which is to be followed at such hearings and provides for a right of appeal against the making of, or the refusal to make, such an order.

Subsection (12) creates the offence of possession of firearms, ammunition or explosives in contravention of a prohibition order under this section. This offence is punishable on summary conviction or on indictment. The maximum term of imprisonment on indictment is five years.

Subsection (13) provides that a prohibition order made under this section must set out a reasonable time within which the person may dispose of the prohibited objects by turning them over to the authorities or otherwise. During the time specified in the order for disposal, the accused may not be prosecuted under subsec. (12).

## ANNOTATIONS

**Subsec. (1) / Circumstances in which order must be made** – An order is to be made under this subsection whether or not a firearm was used in the commission of the offence: *R. v. Savard* (1979), 55 C.C.C. (2d) 286, 11 C.R. (3d) 309 (Que. C.A.); *R. v. Broome* (1981), 63 C.C.C. (2d) 426, 24 C.R. (3d) 254 (Ont. C.A.).

Further, the order must be made even where the commission of violence is not an essential element of the offence (as in break and enter with intent to commit an indictable offence under s. 348) it being sufficient that violence occurred in a manner which was closely related to the commission of the offence: *R. v. Howard* (1981), 60 C.C.C. (2d) 344 (B.C.C.A.).

The phrase “against a person” in this subsection refers to a person other than the accused and thus this subsection does not apply where the offence arises out of a suicide attempt and violence was not used against any other person: *R. v. Vandermeulen* (1986), 33 C.C.C. (3d) 286 (B.C.C.A.).

**Making of order under para. (b) where previous conviction** – The mandatory prohibition is to be imposed even where the previous conviction for an offence, in the commission of which violence was used, threatened or attempted was registered prior to the proclamation of this section: *R. v. Keays* (1983), 10 C.C.C. (3d) 229 (Ont. C.A.).

Where the Crown relies on a previous conviction for “robbery while armed” there must be evidence that violence was used, threatened or attempted, it being possible to commit such an offence without the use, threat or attempted use of violence: *R. v. Keays, supra*.

Where the Crown seeks the longer prohibition for a subsequent conviction as provided for in para. (b) it must give notice as required by s. 665: *R. v. Jobb* (1988), 43 C.C.C. (3d) 476, [1988] 6 W.W.R. 268, 67 Sask. R. 315 (C.A.).

**Subsec. (1.1)** – In *R. v. Austin* (1994), 94 C.C.C. (3d) 252 (B.C.C.A.), McEachern C.J.B.C. dissenting held that an order must be made absent proof by the offender that it is not in the interests of the safety of the offender or any other person that a prohibition order be made. Even if the accused can meet this requirement, the court must then consider the factors in subsec. 1.2 and any other relevant matters. The dissenting opinion of McEachern C.J.B.C. was affirmed by the S.C.C., 103 C.C.C. (3d) 384, 105 W.A.C. 160n.

**Subsec. (2)** – This subsection rather than subsec. (1) applied where the accused was convicted of the offence contrary to s. 87 involving the discharge of a rifle into the air in the presence of other persons. For subsec. (1) to apply, the indictable offence must itself

have an aspect of violence in its carrying out or execution: *R. v. Cardinal* (1980), 52 C.C.C. (2d) 269, 22 A.R. 241 (C.A.). *Contra*: *R. v. Blinch* (1994), 90 C.C.C. (3d) 346, 72 W.A.C. 140 (B.C.C.A.).

The phrase “in the commission of which violence against a person was used, threatened or attempted” modifies only the word “offence” and an order may be made under this subsection with respect to a use, carriage, possession, handling, shipping or storage charge that does not involve the use, attempt or threat of violence: *R. v. Myers* (1984), 13 C.C.C. (3d) 59, 32 Alta. L.R. (2d) 97 (C.A.). Similarly: *R. v. Boucher* (1991), 65 C.C.C. (3d) 446 (Que. C.A.) where it was pointed out that the French version of this section is erroneous.

**Subsec. (6)** – This subsection is *intra vires* Parliament: *Re Motiuk and The Queen* (1981), 60 C.C.C. (2d) 161, 127 D.L.R. (3d) 146 (B.C.S.C.); *R. v. Anderson* (1981), 59 C.C.C. (2d) 439 (Ont. Co. Ct.).

The scheme of the pre-emptive prohibition under this section is that, pursuant to subsec. (4), a peace officer, acting on reasonable grounds, may apply to a provincial court judge for an order prohibiting a particular person from possessing a firearm. The peace officer is not required to act solely on the basis of evidence that would be admissible at trial. At the subsequent hearing under s. 100(6), the provincial court judge must be satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or of others, that the subject of the prohibition application should possess a firearm. The provincial court judge thus confirms the existence of the reasonable grounds which led the peace officer to launch the application. It was not intended that the judge strictly apply the rules of evidence. Rather, the judge must simply be satisfied that the peace officer had reasonable grounds to believe as he did, that is, that there was an objective basis for the reasonable grounds on which the peace officer acted. Accordingly, hearsay evidence is admissible at a firearm prohibition hearing under this section. Frailties in the evidence are a matter of weight. In considering what weight to attach to hearsay evidence, the judge should take into account the explanation, if any, for not making the best evidence available. Further, the Crown bears the burden of proof and in considering the weight of the evidence a judge must scrutinize the evidence to ensure that it is credible and trustworthy: *R. v. Zeolkowski* (1989), 50 C.C.C. (3d) 566, [1989] 1 S.C.R. 1378, 61 D.L.R. (4th) 725 (5:0).

**Subsec. (13)** – This subsection is mandatory and where the order fails to specify a reasonable time for disposal of the firearm, ammunition or explosives then the order is defective and cannot support a conviction under subsec. (12): *R. v. MacCallum* (1982), 66 C.C.C. (2d) 414, 39 N.B.R. (2d) 262 (Q.B.). *Contra*: *R. v. Avery* (1986), 30 C.C.C. (3d) 16 (N.W.T.C.A.) where it was held that even if the order failed to comply with this subsection, until set aside it must be complied with and could support a conviction for the offence contrary to subsec. (12).

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#### SEARCH AND SEIZURE / Disposition / Definition of “dwelling-house”.

**101. (1)** Whenever a peace officer believes on reasonable grounds that an offence is being committed or has been committed against any of the provisions of this Act relating to prohibited weapons, restricted weapons, firearms or ammunition and that evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and may seize anything by means of or in relation to which that officer believes on reasonable grounds the offence is being committed or has been committed.



(2) Anything seized pursuant to subsection (1) shall be dealt with in accordance with sections 490 and 491.

(3) For the purposes of this section, "dwelling-house" does not include a unit that is designed to be mobile other than such a unit that is being used as a permanent residence. R.S., c. C-34, s. 99; 1972, c. 17, s. 2; 1974-75-76, c. 19, s. 1, c. 48, s. 25; 1976-77, c. 53, s. 3; 1991, c. 40, s. 13.

#### CROSS-REFERENCES

The terms "firearm", "prohibited weapon" and "restricted weapon" are defined in s. 84. "Dwelling house" is defined in s. 2 although, bear in mind subsec. (3). "Peace officer" is defined in s. 2. Search of a dwelling house would have to be pursuant to a warrant as authorized by s. 487 or 487.1. As well, s. 103 provides for the issuance of a search warrant or for a warrantless search where there are grounds for believing that it is not desirable in the interests of safety for a person to have possession, custody or control of a firearm, offensive weapon, ammunition or explosive substance. Seizure of restricted weapons, prohibited weapons and firearms is also authorized in certain circumstances under s. 102. Reference should also be made to s. 8 of the Canadian Charter of Rights and Freedoms. A person searched pursuant to this section would be detained within the meaning of s. 10 of the Charter and therefore see notes under that section. Use of force in enforcement of the law is principally dealt with in s. 25. Obstructing a peace officer in the execution of his duty is an offence under s. 129 and assaulting a peace officer in the execution of his duty is an offence under s. 270.

#### ANNOTATIONS

In *R. v. Singh* (1983), 8 C.C.C. (3d) 38, 7 C.R.R. 132 (Ont. C.A.), it was held that the officers had the requisite reasonable grounds for a search under the predecessor to this section. The accused roughly fitted the description of a suspect in a multiple shooting which took place only a short time before and not far from where the accused was seen. As well, he had a noticeable bulge in his pocket and refused to make eye-contact with the officers. In these circumstances, there was no unreasonable search and seizure in breach of s. 8 of the Charter of Rights and Freedoms.

#### SEIZURE / Exception—immediate supervision / Return / Forfeiture.

##### 102. (1) Notwithstanding section 101, a peace officer who finds

- (a) a person in possession of any restricted weapon who fails then and there to produce, for inspection by the peace officer, a registration certificate or permit under which he may lawfully possess the weapon,
  - (b) a person under the age of sixteen years in possession of any firearm who fails then and there to produce, for inspection by the peace officer, a permit under which he may lawfully possess the firearm, or
  - (c) any person in possession of a prohibited weapon,
- may, unless possession of the restricted weapon, firearm or prohibited weapon by the person in the circumstances in which it is so found is authorized by any provision of this Part, seize the restricted weapon, firearm or prohibited weapon.

(1.1) A person under the age of eighteen years is authorized to be in possession of a firearm where

- (a) the person is under the direct and immediate supervision of another person who may lawfully possess the firearm; or
- (b) the person possesses a permit under which the person may lawfully possess the firearm.

(2) Where a person from whom a restricted weapon, firearm or prohibited weapon was seized under subsection (1), within fourteen days after the seizure, claims it and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody thereof, a registration certificate or permit under which

the person from whom the seizure was made is lawfully entitled to possess the restricted weapon, firearm or prohibited weapon, the restricted weapon, firearm or prohibited weapon shall forthwith be returned to that person.

(3) Where any restricted weapon, firearm or prohibited weapon that was seized pursuant to subsection (1) is not returned as and when provided by subsection (2), a peace officer shall forthwith take it before a provincial court judge who may, after affording the person from whom it was seized or the owner thereof, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, declare it to be forfeited to Her Majesty, whereupon it shall be disposed of as the Attorney General directs. R.S., c. C-34, s. 100; 1976-77, c. 53, s. 3; 1991, c. 28, s. 9; 1991, c. 40, s. 14.

#### CROSS-REFERENCES

The terms “firearm”, “prohibited weapon”, “restricted weapon”, “registration certificate” and “permit” are defined in s. 84. “Peace officer” and “provincial court judge” are defined in s. 2. Section 101 provides an additional warrantless search and seizure power. As well, s. 103 provides for the issuance of a search warrant or for a warrantless search where there are grounds for believing that it is not desirable in the interests of safety for a person to have possession, custody or control of a firearm, offensive weapon, ammunition or explosive substance. Reference should also be made to s. 8 of the Canadian Charter of Rights and Freedoms. Use of force in enforcement of the law is principally dealt with in s. 25. Obstructing a peace officer in the execution of his duty is an offence under s. 129 and assaulting a peace officer in the execution of his duty is an offence under s. 270.

#### SYNOPSIS

This provision permits the *warrantless seizure* of certain types of *weapons and firearms*. Prohibited weapons, restricted weapons for which the person does not produce a registration certificate or permit, or firearms, which are in the possession of a person under 16 who does not produce a permit, may be seized under s. 102(1). However, subsec. (2) *requires the return* of restricted weapons or firearms possessed by a person under 16, *if a permit* or certificate is produced within *14 days* after the seizure, if the possession at the time of the seizure was in accordance with the terms of the permit or certificate.

If the weapon or firearm is not returned pursuant to subsec. (2), the police *shall bring an application to a provincial court judge for the forfeiture* of the weapon. The person from whom the weapon is seized, or the owner of the weapon, has the opportunity to establish that he or she had lawful possession of the weapon.

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APPLICATION FOR WARRANT TO SEIZE / Seizure without warrant / Return to justice / Where certificate not seized / Application for disposition / *Ex parte* hearing / Hearing of application / Finding and order of court / Where no finding or application / Restriction of authorization, etc. / Appeal / Definitions / “appeal court” / “justice” / Possession while prohibited by order.

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103. (1) Where, on application to a justice made by a peace officer with respect to any person, the justice is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of that person, or of any other person, that that person possess, or have custody or control of, any firearm or other offensive weapon or any ammunition or explosive substance, the justice may issue a warrant authorizing the search for and seizure of any firearm or other offensive weapon or any ammunition, explosive substance, authorization referred to in subsection 90(3.2), firearms acquisition certificate, registration certificate issued under section 109 or permit issued under section 110, in the possession, custody or control of that person.

(2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds for believing that it is not desirable in the interests of the safety of

that person, or of any other person, that that person possess, or have custody or control of, any firearm or other offensive weapon or any ammunition or explosive substance, the peace officer may, where the conditions for obtaining a warrant under subsection (1) exist but by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any firearm or other offensive weapon or any ammunition, explosive substance, authorization referred to in subsection 90(3.2), firearms acquisition certificate, registration certificate issued under section 109 or permit issued under section 110, in the possession, custody or control of that person.

(3) A peace officer who executes a warrant referred to in subsection (1) or who conducts a search without warrant under subsection (2) shall forthwith make a return to the justice by whom the warrant was issued or, if no warrant was issued, to a justice by whom a warrant might have been issued showing

- (a) in the case of an execution of a warrant, the articles, if any, seized and the date of execution of the warrant; and
- (b) in the case of a search without warrant, the grounds on which it was concluded that the peace officer was entitled to conduct the search and the articles, if any, seized.

(3.1) Where a peace officer who performs a seizure under subsection (1) or (2) is unable to seize an authorization referred to in subsection 90(3.2), a firearms acquisition certificate, a registration certificate issued under section 109 or a permit issued under section 110, the authorization, firearms acquisition certificate, registration certificate or permit is automatically revoked.

(4) Where any articles have been seized pursuant to subsection (1) or (2), the justice by whom a warrant was issued, or, if no warrant was issued, a justice by whom a warrant might have been issued shall, on application for an order for the disposition of the articles so seized made by the peace officer within thirty days after the date of execution of the warrant or of the seizure without warrant, as the case may be, fix a date for the hearing of the application and direct that notice of the hearing be given to such persons or in such manner as the justice may specify.

(4.1) A justice may proceed to hear and determine an application under subsection (4) in the absence of the person against whom the order is sought in circumstances in which a summary conviction court may, pursuant to Part XXVII, proceed with a trial in the absence of the defendant as fully and effectually as if the defendant had appeared.

(5) At the hearing of an application under subsection (4), the justice shall hear all relevant evidence, including evidence respecting the value of the articles in respect of which the application was made.

(6) If, following the hearing of an application under subsection (4) made with respect to any person, the justice finds that it is not desirable in the interests of the safety of that person or of any other person that that person should possess, or have custody or control of, any firearm or other offensive weapon or any ammunition or explosive substance, the justice may

- (a) order that any or all of the articles seized be disposed of on such terms as the justice deems fair and reasonable, and give such directions concerning the payment or application of the proceeds, if any, of the disposition as the justice sees fit; and
- (b) where the justice is satisfied that the circumstances warrant such action,
  - (i) order that the possession by that person of any firearm or other offensive weapon or any ammunition or explosive substance specified in the order, or of all such articles, be prohibited during any period, not exceeding five



years, specified in the order and computed from the day on which the order is made, and

- (ii) order that any firearms acquisition certificate issued to the person be revoked and prohibit the person from applying for a firearms acquisition certificate for any period referred to in subparagraph (i).

(7) Any articles seized pursuant to subsection (1) or (2) in respect of which

- (a) no application under subsection (4) is made within thirty days after the date of execution of the warrant or of the seizure without warrant, as the case may be, or
- (b) where an application under subsection (4) is made within the period referred to in paragraph (a), the justice does not make a finding as described in subsection (6)

shall be returned to the person from whom they were seized.

(7.1) Where, pursuant to subsection (7), articles are returned to a person from whom they were seized and an authorization, a firearms acquisition certificate, a registration certificate or a permit has been revoked pursuant to subsection (3.1), the justice referred to in paragraph (7)(b) may order that the revocation be reversed and that the authorization, firearms acquisition certificate, registration certificate or permit be restored.

(8) Where a justice

- (a) makes an order under subsection (6) with respect to any person, that person, or
- (b) does not make a finding as described in subsection (6) following the hearing of an application under subsection (4), or makes the finding but does not make an order to the effect described in paragraph (6)(a) or to the effect described in paragraph (6)(b), the Attorney General

may appeal to the appeal court against the making of the order, or against the failure to make the finding or to make an order to the effects so described, as the case may be, and the provisions of Part XXVII except sections 816 to 819 and 829 to 838 apply, with such modifications as the circumstances require, in respect of the appeal.

(9) In this section,

“appeal court” has the meaning given that expression in subsection 100(11);

“justice” means a justice having jurisdiction in the territorial division where the person with respect to whom an application is made under subsection (1) or the person with respect to whom a search without warrant is made under subsection (2) resides.

(10) Every person who possesses any firearm or other offensive weapon or any ammunition, explosive substance or firearms acquisition certificate while prohibited from doing so by any order made pursuant to paragraph (6)(b)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 101; 1976-77, c. 53, s. 3; 1991, c. 40, s. 15.

#### CROSS-REFERENCES

The term “firearm” is defined in s. 84. “Offensive weapon”, “explosive substance”, “peace officer” and “justice” are defined in s. 2. Sections 101 and 102 provide additional warrantless search and seizure powers. As well, a search warrant could be issued under ss. 487 and 487.1 in the circumstances set out therein. Reference should also be made to s. 8 of the Canadian Charter of Rights and Freedoms. Use of force in enforcement of the law is principally dealt with in s. 25. Obstructing a peace officer in the execution of his duty is an offence under s. 129 and assaulting a peace officer in the execution of his duty is an offence under s. 270. Under s. 29, an officer executing a warrant is

to have it with him where feasible and to produce it when requested. Misconduct by peace officers in execution of process is an offence under s. 128.

As some of the provisions of Part XXVII apply to an appeal under subsec. (8), a further appeal will lie from the decision of the appeal court (defined in s. 100(11)) to the Court of Appeal (as defined in s. 673) with leave on a question of law alone, pursuant to s. 839. Where the prosecution elects to proceed by indictment in respect of the offence in subsec. (10) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Presumably, a person found guilty of the offence in this section is liable to a further discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. The making of a prohibition order under subsec. (6)(b) must be reported to the Commissioner under s. 114(3).

## SYNOPSIS

This section deals primarily with the issuance of a warrant to seize firearms, etc., and the procedure for the disposition of weapons so seized. Subsection (1) permits a peace officer to make an application to a *justice* for a *warrant to search for and seize firearms, offensive weapons, ammunition or explosive substances* or any permit or certificate, or authorization. It must be shown that there are *reasonable grounds* to believe that it is against the interests of the *safety* of the person in possession, control or custody of the weapons, etc., or any other person, for such possession to continue. Subsection (2) permits a *warrantless search and seizure* by a peace officer in the same circumstances as subsec. (1), if it is *impractical*, for reasons of safety, to obtain a warrant.

Subsection (3) requires a *return to the justice* after a seizure is made under either subsec. (1) or (2). If the search is made without warrant, the officer must also set out the grounds upon which the search was made and why the seizure of the objects is justified. Subsections (4) to (9) create the procedure for a hearing after seizure, to determine if the weapons, etc., seized should be returned or disposed of, and whether a prohibition order should be made against the person who had been in possession, control or custody of the items seized. Provision is also made for an order revoking a firearms acquisition certificate and prohibiting application for one. The section provides for an appeal from the making or the refusal to make a prohibition order under this section.

Subsection (10) creates the offence of being in violation of a prohibition order made under this section, and the offence may be tried by way of indictment or summary conviction procedure, with a maximum punishment on indictment of a five year term of imprisonment.

## ANNOTATIONS

This section is *intra vires* Parliament, being within the criminal law power under s. 91(27) of the Constitution Act, 1867 and designed to reduce the incidence of violent crime: *A.-G. Can. v. Pattison*; *A.-G. Can. v. Metcalf et al.* (1981), 59 C.C.C. (2d) 138, 21 C.R. (3d) 255, [1981] 4 W.W.R. 611 (Alta. C.A.).

**Subsec. (1)** – The bare, unsupported allegation that the persons were members of a motorcycle gang shown to be involved in violent criminal activity was not a sufficient basis for the issuance of a search warrant under this section. On the other hand, it may be that, if it were shown that the persons wore the gang “colours” or insignia and thus were identified with the gang then there would be a basis for issuing the warrant: *R. v. Conrad* (1989), 51 C.C.C. (3d) 311 (Alta. C.A.).

**Subsec. (2)** – This subsection, which authorizes search of premises, does not infringe

s. 8 of the Charter of Rights and Freedoms: *R. v. Smith* (1988), 5 W.C.B. 164 (Ont. Prov. Ct.).

**Subsec. (4)** – The warrant having been quashed, it was not open to the Crown to proceed with a disposition hearing under this subsection and the firearms must be returned to their owners: *R. v. Merchant*; *R. v. Buettner* (1991), 64 C.C.C. (3d) 316, 79 Alta. L.R. (2d) 316 (C.A.).

## ***Found, Lost, Mislaid, Stolen and Defaced Firearms and other Weapons***

**FINDING WEAPON / Lost weapon, etc. / Tampering with serial number / Exception / Evidence / Punishment.**

**104. (1)** Every one commits an offence who, on finding a prohibited weapon, restricted weapon or firearm that he has reasonable grounds to believe has been lost or abandoned, does not with reasonable despatch

- (a) deliver it to a peace officer, a local registrar of firearms or a firearms officer; or
- (b) report to a peace officer, a local registrar of firearms or a firearms officer that he has found it.

**(2)** Every one commits an offence who, having lost or mislaid a restricted weapon for which he has a registration certificate or permit or having had the weapon stolen from his possession, does not with reasonable despatch report to a peace officer or a local registrar of firearms that he has lost or mislaid the weapon or that the weapon has been stolen from him.

**(3)** Every one commits an offence who, without lawful excuse, the proof of which lies on that person,

- (a) alters, defaces or removes a serial number on a firearm; or
- (b) possesses a firearm knowing that the serial number thereon has been altered, defaced or removed.

**(3.1)** No person is guilty of an offence under paragraph (3)(b) by reason only of possessing a restricted weapon the serial number on which has been altered, defaced or removed, where that serial number has been replaced and a registration certificate has been issued in respect of the restricted weapon that mentions the new serial number.

**(4)** In proceedings under subsection (3), evidence that a person possesses a firearm the serial number of which has been wholly or partially obliterated otherwise than through normal use over time is, in the absence of evidence to the contrary, proof that the person possesses the firearm knowing that the serial number thereon has been altered, defaced or removed.

**(5)** Every one who contravenes this section

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 102; 1976-77, c. 53, s. 3; 1991, c. 40, s. 16.

### **CROSS-REFERENCES**

The terms “firearm”, “prohibited weapon”, “restricted weapon”, “registration certificate”, “permit”, “local registrar of firearms” and “firearms officer” are defined in s. 84. “Peace officer”, “weapon”, and “provincial court judge” are defined in s. 2. Where the prosecution elects to proceed by indictment in respect of an offence in this section then the accused may elect his mode of



trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496 and 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

## SYNOPSIS

This section creates offences dealing with *losing* and *finding weapons* and *tampering with serial numbers* on firearms.

Subsection (1) creates an offence of omission, which is triggered by the failure of a *finder* of a prohibited or restricted weapon or a firearm, which the finder has *reasonable grounds* to believe is lost or abandoned, to turn over such a weapon to authorities or to report its finding.

Subsection (2) focuses on the person who *loses a weapon* or has it stolen and creates an offence of omission for failing to report the loss or theft to authorities within a reasonable time.

Subsections (3) and (4) deal with either possession of a firearm with an *altered* or *defaced serial number* or for so altering a weapon. However, subsec. (3.1) allows for a new serial number to be registered in which case no offence is committed. Subsection (3) permits a lawful excuse to be raised but places the onus of establishing it upon the accused. Subsection (4) creates the *presumption of knowledge* that the weapon has been so altered if the weapon in the accused's possession has a totally or partially obliterated serial number other than from normal use over time. Subsection (5) sets the punishment for this offence, which may be prosecuted by summary conviction or indictment. The maximum term of imprisonment on indictment is five years.

## Museums and Weapons Businesses

RECORD OF TRANSACTION IN WEAPONS OR FIREARMS, ETC. / Requirements / Firearms acquisition certificate / Exception / Report of loss, destruction or theft / Form of report / Permit to carry on business / Application / Statement of location / Statement of location / Each location separate / Handling, secure storage, etc. / Idem / Handling and transportation / Punishment.

105. (1) Every person who operates a museum approved for the purposes of this Part by the Commissioner or the Attorney General of the province in which it is situated, or who carries on a business that includes

- (a) the manufacturing, buying or selling at wholesale or retail, storing, importing, repairing, modifying or taking in pawn of restricted weapons or firearms, or, in the case referred to in subsection 95(2), the importing, buying, selling, transferring or delivering, at wholesale or retail, of prohibited weapons described in paragraph (f) of the definition "prohibited weapon" in subsection 84(1), or
- (b) the manufacturing, importing or exporting, for a purpose that the Governor in Council prescribes by regulation, for the purposes of subsection 90(3.1), to be an industrial purpose, of prohibited weapons described in paragraph (c), (e) or (f) of the definition "prohibited weapon" in subsection 84(1) or components or parts thereof,

shall meet the requirements set out in subsection (1.1).

(1.1) Every person who operates a museum referred to in subsection 105(1), or who carries on a business described in paragraph (1)(a) or (b) shall

- (a) keep records of transactions entered into by that person with respect to the prohibited or restricted weapons or firearms or the prohibited weapons or the components or parts thereof referred to in paragraph (1)(b), as the case may be, in a form prescribed by the Commissioner and containing such information as is prescribed by the Commissioner;
- (b) keep an inventory of all the prohibited or restricted weapons or firearms, or the prohibited weapons or the components or parts thereof referred to in paragraph (1)(b), as the case may be, on hand at the location of the museum or at that person's place of business;
- (c) produce the records and inventory for inspection at the request of any police officer or police constable or any other person authorized by regulations made by the Governor in Council pursuant to paragraph 116(1)(a) or (b), as the case may be, to enter any place where the museum is located or any place where the business described in paragraph (1)(a) or (b), as the case may be, is carried on; and
- (d) mail a copy of the records and inventory to the Commissioner or to any person authorized by subsection 110(5) to issue a permit to carry on the business in accordance with any request in writing made by the Commissioner or person so authorized.

(1.2) [Subsec. (1.2), as enacted by 1991, c. 40, s. 18(2), *repealed*; 1994, c. 44, s. 7.]

(1.2) A person who operates a museum referred to in subsection (1) or who carries on a business described in paragraph (1)(a) or (b) shall ensure that any person employed in or in connection with the museum or business whose duties include the handling of firearms or restricted or prohibited weapons holds a firearms acquisition certificate.

(1.3) Notwithstanding subsection (1.2), the Attorney General of the province in which a manufacturing business referred to in that subsection is located may designate, for the purposes of this subsection, any person or class of persons employed in or in connection with the business, as a person who need not hold a firearms acquisition certificate for the purposes of employment.

(2) A person who

- (a) operates a museum referred to in subsection (1) or carries on a business referred to in paragraph (1)(a) or (b), or
- (b) carries on a business that includes
  - (i) the manufacturing, buying or selling at wholesale or retail or importing of ammunition, or
  - (ii) the transportation or shipping of prohibited or restricted weapons, firearms or ammunition

shall immediately report to a local registrar of firearms or a peace officer any loss, destruction or theft of any restricted weapon, firearm or ammunition, or any loss, destruction, theft or transfer of any prohibited weapon or component or part thereof, that occurs in the operation of the museum or in the course of the business.

(3) A report made pursuant to subsection (2) shall be in a form prescribed by the Commissioner and shall be made forthwith after the loss, destruction or theft occurs or is discovered.

(4) No person shall carry on a business described in subsection (1) or subparagraph (2)(b)(i) unless he is the holder or a permit to carry on that business.

**NOTE:** Subsection (4) re-enacted by 1991, c. 40, s. 39(4)(a) (was to come into force on the coming into force of s. 18(3), but re-enactment now postponed until some future date, however, subsec. (4) as enacted by 1991, c. 40, s. 39(4) repealed by 1995, c. 39, s. 164 (to come into force by order of the Governor in Council)). The unproclaimed text printed in *lightface italics* reads as follows:

(4) *No person shall carry on a business described in paragraph (1)(a) or (b) unless the person holds a permit to carry on that business.*

(4.1) A permit referred to in subsection (4) may be issued by the chief provincial firearms officer to

- (a) any person who wishes to carry on a business described in paragraph (1)(a) or subparagraph 2(b)(i); or
- (b) a person designated by the Attorney General of the province in which the business is or is to be carried on, and who is a member of a class of persons who require a prohibited weapon described in paragraph (c), (e) or (f) of the definition "prohibited weapon" in subsection 84(1) or parts thereof for a purpose that the Governor in Council describes by regulations to be an industrial purpose,

and who applies for such a permit using the form described by the Commissioner.

(4.2) Every application for a permit referred to in subsection (4) shall be accompanied by a statement signed by the applicant that describes the location of the applicant's place of business for which the permit is required and its ordinary hours of operation and every applicant must furnish a new statement to the chief provincial firearms officer immediately prior to any change in any of the information contained in the statement.

(5) Where a person operates a museum referred to in subsection (1), or carries on a business described in paragraph (1)(a) or (b) or in subparagraph (2)(b)(i), at more than one location, each location shall be deemed for the purposes of this section and regulations made pursuant to paragraphs 116(1)(a) to (c) to be a separate museum or business.

(6) No person shall, in the course of operating a museum referred to in subsection (1) or of carrying on a business described in paragraph (1)(a) or (b) or in subparagraph (2)(b)(i),

- (a) handle, store, display or advertise any restricted weapon, firearm or ammunition in a manner that contravenes any regulation made pursuant to paragraph 116(1)(a); or
- (b) sell by mail-order any restricted weapon, firearm or ammunition in a manner that contravenes any regulation made pursuant to paragraph 116(1)(c).

(6.1) No person shall, in the course of carrying on a business described in paragraph (1)(b), handle or store any prohibited weapon referred to in that paragraph or any component or part thereof in a manner that contravenes any regulation made by the Governor in Council pursuant to paragraph 116(1)(a.1).

(7) No person shall, in the course of operating a museum referred to in subsection (1) or of carrying on a business described in paragraph (1)(a) or (b) or paragraph (2)(a) or (b), knowingly handle, ship, store or transport any firearm or ammunition, or any prohibited weapon referred to in paragraph (1)(b) or any component or part thereof, in a manner that contravenes any regulation made by the Governor in Council pursuant to paragraph 116(1)(d).

(8) Every one who contravenes subsection (1), (2), (4), (6), (6.1) or (7)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 103; 1976-77, c. 53, s. 3; 1991, c. 28, s. 10; 1991, c. 40, ss. 17, 18, 39; 1994, c. 44, s. 7.

#### CROSS-REFERENCES

The terms "firearm", "restricted weapon", "local registrar of firearms" and "Commissioner" are



defined in s. 84. Police officers and police constables are within the definition of “peace officer” in s. 2. A permit to operate a business described in this section is obtained pursuant to s. 110(5). Where the prosecution elects to proceed by indictment in respect of an offence in this section then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496 and 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

## SYNOPSIS

Section 105 deals with the *record keeping and regulation of businesses* which manufacture, sell, buy, import, repair or otherwise deal with *restricted weapons, firearms and ammunition*. Subsection (8) creates offences triable by summary conviction or by indictment for breaches of the requirements which this section imposes upon such businesses. The person carrying on the business must ensure that the business has the proper permits and complies with regulations made pursuant to s. 116 regarding dealing with restricted weapons, firearms or ammunition and must report any loss or theft from the business involving weapons or ammunition, or any destruction of weapons. Breaches of these requirements are punishable on summary conviction or indictment, with the maximum term of imprisonment or indictment being five years.

## Firearms Acquisition Certificates

**CONSIDERATION OF APPLICATION AND ISSUANCE OF FIREARMS ACQUISITION CERTIFICATE / Appearance and photograph / Exception for renewals / Where no certificate may be issued / Notice/where prohibition order / Coming into force of para. (2)(c) / Deemed notice / Notice to be given / Material to accompany notice / Reference to provincial court judge / Application for firearms acquisition certificate / No civil liability / Further information / Investigation / Limitation / Form of and term for certificate / Exception / Validity of certificate / Refusal to issue / Reference to provincial court judge / Fixing date for hearing and notice / Burden of proof / Hearing of reference and disposition / Appeal to appeal court in certain cases / Definition of “appeal court”.**

**106.** (1) Where a firearms officer who has received an application for a firearms acquisition certificate and the fee prescribed by regulation does not, after considering the information contained in the application, any further information that is submitted to the firearms officer pursuant to a requirement under subsection (9) and such other information as may reasonably be regarded as relevant to the application, have notice of any matter that may render it desirable in the interests of the safety of the applicant or of any other person that the applicant should not acquire a firearm, the firearms officer shall, subject to subsection (2), and after at least twenty-eight days have elapsed since the application was received, issue a firearms acquisition certificate to the applicant.

(1.1) For greater certainty, an application for a firearms acquisition certificate need not be submitted in person, but the firearms officer who receives the application may require that the applicant appear in person before the firearms acquisition certificate is issued and the firearms officer must be satisfied that any photograph of the applicant that is to be attached to the firearms acquisition certificate is a current photograph of the applicant sufficient to accurately identify the applicant.

(1.2) Notwithstanding subsection (1), where an applicant for a firearms acquisition certificate holds a valid firearms acquisition certificate at the time of applying for a new firearms acquisition certificate

- (a) the firearms officer may issue the new firearms acquisition certificate before the twenty-eight days referred to in subsection (1) have elapsed; and
- (b) the fee prescribed by regulation for the new firearms acquisition certificate shall be reduced by one-half.

(2) No firearms acquisition certificate may be issued to a person who

- (a) is under the age of eighteen years;
- (b) is prohibited by an order made pursuant to section 100 or 103 or by a condition of a probation order referred to in paragraph 737(2)(d) from having a firearm in his possession; or

**NOTE:** Subsection (2)(b) amended 1995, c. 22, s. 10 (Sch. I, item 8) (to come into force by order of the Governor in Council) by replacing the reference to s. 737(2)(d) with s. 732.1(3)(d), however, 1995, c. 22, s. 10 (Sch. I, item 8) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

- (c) subject to subsection (2.2), fails to produce evidence in conjunction with an application for a firearms acquisition certificate that the person has, at any time prior to the application,
  - (i) successfully completed a course in, or a test relating to, the safe handling and use of and the laws relating to firearms, that was approved for the purposes of this section by the Attorney General of the province in which the course or test is administered, or
  - (ii) been certified by a firearms officer, in circumstances prescribed by regulation, as meeting the criteria of competence in the safe handling and use of firearms and the laws relating to firearms prescribed by regulation.

that, at the time he completed the course or test, was approved for the purposes of this section by the Attorney General of the province in which he took the course or test.

(2.1) Where a firearms officer certifies that an applicant is competent for the purposes of subparagraph 106(2)(c)(ii), the firearms officer shall immediately so inform the chief provincial firearms officer in writing and shall give reasons for the certification.

(2.2) In the case of an applicant who has been the subject of an order under subsection 100(1), (2) or (7), the applicant shall produce evidence that the applicant successfully completed both the course and the test referred to in subparagraph (2)(c)(i) after the expiration of the order.

(3) Paragraph (2)(c) shall come into force in any province only on a day fixed in a proclamation declaring that paragraph to be in force in that province.

(4) A firearms officer shall be deemed to have notice of a matter that may render it desirable in the interests of the safety of an applicant for a firearms acquisition certificate or of any other person that the applicant should not acquire a firearm and a provincial court judge, on a reference pursuant to subsection (7), is entitled to confirm the opinion of a firearms officer that it is not desirable in the interests of the safety of the applicant or of any other person that the applicant should acquire a firearm, where it is made to appear to the judge that

- (a) the applicant has been convicted within five years immediately preceding the date of the application, in proceedings on indictment, of
  - (i) an offence in the commission of which violence against another person was used, threatened or attempted, or
  - (ii) an offence under this Part;

- (b) the applicant, within five years immediately preceding the date of the application, has been treated for a mental disorder, whether in a hospital, mental institute or psychiatric clinic or otherwise and whether or not the applicant was, during that period, confined to such a hospital, institute or clinic, where the disorder was associated with violence or threatened or attempted violence on the part of the applicant against any person;
  - (c) the applicant has a history of behaviour occurring within five years immediately preceding the date of the application, that included violence or threatened or attempted violence on the part of the applicant against any person; or
  - (d) there is another good and sufficient reason for confirming the opinion.
- (5) Where a firearms officer who has received an application for a firearms acquisition certificate has notice of any matter that may render it desirable in the interests of the safety of the applicant or of any other person that the applicant should not acquire a firearm, the firearms officer shall notify the applicant in writing that, in the opinion of the firearms officer, it is not desirable in the interests of the safety of the applicant or of any other person that the applicant acquire a firearm and of the reasons therefor, and that, unless within thirty days after the day on which the notice is received by the applicant or within such further time as is, before or after the expiration of that period, allowed by a provincial court judge, the applicant, in writing, requests the firearms officer to refer the opinion to a provincial court judge for confirmation or variation thereof, the application for the firearms acquisition certificate will be refused.
- (6) A notice given by a firearms officer under this section shall be accompanied by a copy or an extract of the provisions of this section and of subsections 100(5) to (13).
- (7) On receipt by a firearms officer, within the time provided in subsection (5), of a request in writing to refer his opinion referred to in that subsection to a provincial court judge for confirmation or variation thereof, the firearms officer shall forthwith comply with that request.
- (8) An application for a firearms acquisition certificate shall be made to a firearms officer in a form prescribed by the Commissioner and shall be accompanied by the names of two persons who belong to a class of persons prescribed by regulation who have known the applicant for at least three years and who can confirm that the information on the application, and any further information submitted pursuant to subsection (9), is true.
- (8.1) No person who is referred to in subsection (8) incurs any civil liability by reason of any action taken by that person in connection with the person's name having accompanied an application for a firearms acquisition certificate.
- (9) A firearms officer who has received an application for a firearms acquisition certificate may require the applicant to submit such further information in addition to that included in the application as may reasonably be regarded as relevant for the purpose of determining whether there is any matter that might render it dangerous for the safety of the applicant or of any other person if the applicant acquired a firearm.
- (9.1) Without restricting the scope of the inquiries a firearms officer may make under subsection (1), a firearms officer who has received an application for a firearms acquisition certificate may conduct an investigation which may consist of interviews with the applicant's neighbours, community/social workers, spouse, dependents, or whomever in the opinion of the firearms officer may provide information pertaining to whether the applicant has a history of violent behaviour, including violence in the home.



(10) No local registrar of firearms, firearms officer or other person shall require as information, to be submitted by an applicant for a firearms acquisition certificate or permit, details concerning the makes or serial numbers of shotguns or rifles of a type, kind or design commonly used in Canada for hunting or sporting purposes.

(11) The firearms acquisition certificate shall be in a form prescribed by the Commissioner, shall, except where the Commissioner deems that to do so would be inappropriate, have a photograph of the holder attached to it, and shall be valid for five years after the day on which it is issued, unless it is revoked before that time.

(12) Notwithstanding subsection (11), no fee is payable in respect of a firearms acquisition certificate that is issued to a person who requires a firearm to hunt or trap in order to sustain himself or his family.

(13) A firearms acquisition certificate is valid throughout Canada. R.S., c. C-34, s. 104; 1976-77, c. 53, ss. 3, 47.

(14) Where a firearms officer refuses to issue a firearms acquisition certificate, the firearms officer shall notify the applicant in writing of the refusal and the reasons for it and include in the notification a copy of this subsection and subsections (15) to (20).

(15) Where a firearms officer refuses to issue a firearms acquisition certificate, the applicant may, within thirty days after being notified of the refusal or within such further time as is, before or after the expiration of that period, allowed by a provincial court judge, request, in writing, the firearms officer to refer the matter to a provincial court judge having jurisdiction in the territorial division in which the applicant resides.

(16) On a reference by a firearms officer pursuant to subsection (15), the provincial court judge shall fix a date for the hearing of the reference and direct that notice of the hearing be given to the applicant and to the firearms officer, in such manner as the provincial court judge may specify.

(17) In a hearing under subsection (16) the burden of proof is on the applicant for the firearms acquisition certificate to satisfy the provincial court judge that the refusal to issue the firearms acquisition certificate was not justified.

(18) Where, at the conclusion of a hearing under subsection (16), the applicant has satisfied the provincial court judge that the refusal to issue the firearms acquisition certificate was not justified, the provincial court judge shall, by order, direct the firearms officer to issue to the applicant a firearms acquisition certificate and the firearms officer shall immediately comply with the order.

(19) Where a provincial court judge makes an order pursuant to subsection (18), the firearms officer may appeal to the appeal court against the order, and the provisions of Part XXVII except sections 816 to 819 and 829 to 838 apply, with such modifications as the circumstances require, in respect of the appeal.

(20) In this section, "appeal court" has the meaning given that expression in subsection 100(11). R.S., c. C-34, s. 104; 1976-77, c. 53, ss. 3, 47; 1991, c. 40, s. 19.

#### CROSS-REFERENCES

The terms "firearm", "firearms acquisition certificate", "Commissioner", "local registrar of firearms", "permit" and "firearms officer" are defined in s. 84. "Attorney General", "weapon" and "provincial court judge" are defined in s. 2. Age, for the purpose of subsec. (2)(a), is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Under s. 110(7), a firearms officer may, in some circumstances, issue a permit to a person under the age of 18 years to possess a firearm other than a restricted weapon. Transfer of a firearm to a person under the age of 18 years without such a

permit is an offence under s. 93. The term “proceedings on indictment” in subsec. (4)(a) would not include a conviction made in proceedings under Part XXVII, even though the offence was a Crown option offence. Delivery of a firearm to a person without a firearms acquisition certificate is an offence under s. 97. Section 107 provides for alternative firearms acquisition certificates upon agreement with the province. Making a false statement on an application for a certificate, altering or defacing a certificate and failing to deliver up a certificate when prohibited from possessing firearms are offences under s. 113. Section 114 requires the Commissioner to keep a registry of applications for firearms acquisition certificates which have been refused.

## SYNOPSIS

This section stipulates which criteria are to be applied in *granting a firearms acquisition certificate* and the proper procedure for so doing. It also sets out who is *prevented* from having such a certificate, which includes *persons with convictions* within the last five years for a firearms offence, or an offence involving the use, or threat of use, of violence. Another excluded group are persons who have suffered from a *mental disorder* which was accompanied by violence, threat of violence or attempted use of violence against themselves or another within the last five years. A third prohibited group are persons whose behaviour showed violence or threat of violence to themselves or another within five years. Other persons who may not receive a certificate are those under 18 years of age, those who are under a prohibition order and those who have not completed a firearms safety test or course.

If a firearms officer determines not to issue a certificate, the applicant must be notified of the refusal and the reasons for the refusal. Applicants so refused have the right to ask that the refusal be referred to a provincial court judge who may confirm or vary the decision. Case-law has held that such hearings may be conducted with more relaxed rules of evidence than trials. At the hearing, the burden of proof is on the applicant and if the judge reverses the officer, then the officer may appeal to the appeal court.

Subsection (9) gives the firearms officer the power to require the applicant for a firearms acquisition certificate to provide additional information beyond that normally required, if the information sought is reasonably relevant to the purpose of determining if it might be dangerous for the applicant to have a firearm.

The fee for a firearms acquisition certificate is \$10, but is waived if the applicant requires the firearm to hunt or trap to support himself. The certificate is valid throughout Canada for five years.

## ANNOTATIONS

**Grounds for refusing certificate** – It was not grounds for refusing the application for a firearms acquisition certificate that the applicant’s father was associated with an outlaw motorcycle gang. The applicant himself was a good student, had completed a firearms handling course and had a legitimate reason for acquiring the firearm for big game hunting: *Wrin v. Milton* (1987), 82 N.S.R. (2d) 1 (Co. Ct.). However, the spouse of the gang member was properly refused a certificate. She was an active participant in the activities of the gang and the officer’s finding that it was desirable, in the interests of the safety of the applicant or any other person, that she not acquire firearms was supported by the evidence: *Milton v. Wrin* (1987), 81 N.S.R. (2d) 446 (Co. Ct.).

## FIREARMS ACQUISITION CERTIFICATE FOR OTHER PERSONS / Application.

107. (1) Notwithstanding subsection 106(2), the Governor in Council may make regulations prescribing the persons, other than individuals, or classes of such persons to which firearms acquisition certificates may be issued, and subsections 106(1), (5) to (7), (9) to (11) and (13) to (20) apply, with such modifications as the circumstances require, in respect of firearms acquisition certificates issued to such persons.

(2) An application for a firearms acquisition certificate by a person or a member of a

class of persons prescribed pursuant to subsection (1) shall be made to a firearms officer in a form prescribed by the Commissioner. R.S., c. C-34, s. 105; 1976-77, c. 53, s. 3; 1991, c. 40, s. 20.

#### CROSS-REFERENCES

The procedure for issuing firearms acquisition certificates is set out in s. 106 and see cross-references under that section. The term "firearms acquisition certificate", is defined in s. 84. "Attorney General" is defined in s. 2.

#### AGREEMENTS WITH PROVINCES.

108. The Minister of Justice of Canada, with the approval of the Governor in Council, may enter into agreements with the governments of the provinces for the coordination, to the maximum extent possible, of the administration of sections 106, 107, 109, 109.1 and 110 with the administration by provinces of provincial laws and programs relating to game hunting, firearms competency testing and firearms safety training. R.S., c. C-34, s. 106; 1976-77, c. 53, s. 3; 1991, c. 40, s. 20.

### *Restricted Weapon Registration Certificates*

APPLICATION FOR REGISTRATION CERTIFICATE / Permit to convey / Limitation / Idem / Idem / Changes / Time of ownership / Distribution of copies of application / Matters to be reported to Commissioner / Registration certificate / Limitation.

109. (1) An application for a registration certificate in respect of a restricted weapon shall be in a form prescribed by the Commissioner and shall be made to a local registrar of firearms.

(2) On receiving an application for a registration certificate, a local registrar of firearms may issue a permit under subsection 110(4) authorizing the applicant to convey the weapon to him for examination.

(3) A registration certificate may be issued only where a local registrar of firearms indicates on the copy of the application for the certificate that is sent to the Commissioner pursuant to subsection (5) that

- (a) the applicant for the certificate is the holder of a firearms acquisition certificate and is eighteen or more years of age, and
- (b) the restricted weapon to which the application relates bears a serial number sufficient to distinguish it from other restricted weapons or, in the case of an antique firearm that does not bear such a serial number, it is accurately described in the application,

and further that the restricted weapon to which the application relates

- (c) is required by the applicant
  - (i) to protect life,
  - (ii) for use in connection with his lawful profession or occupation,
  - (iii) for use in target practice under the auspices of a shooting club approved for the purposes of this section by the Attorney General of the province in which the premises of the shooting club are located or by an agent specially designated by that Attorney General in writing for the purpose of this subsection, or
  - (iv) for use in target practice in accordance with conditions proposed to be attached to the permit to be issued in respect of the restricted weapon under subsection 110(1),
- (d) will form part of a gun collection of the applicant who is a genuine gun collector and who has complied with any regulations relating to the secure storage of,



and the keeping of records respecting, restricted weapons made pursuant to subsection 116(1), or

(e) is or is deemed pursuant to paragraph 116(f) to be a relic for the purposes of this Part.

(4) A registration certificate may only be issued in respect of a restricted weapon described in paragraph (c) of the definition “restricted weapon” in subsection 84(1) where a local registrar of firearms, in addition to the matters referred to in subsection (3), indicates on the copy of the application that is sent to the Commissioner pursuant to subsection (5) that the restricted weapon will form part of a gun collection of the applicant who is a genuine gun collector whose collection includes one or more restricted weapons described in that paragraph.

(4.1) A registration certificate may only be issued in respect of a restricted weapon described in paragraph (c.1) of the definition “restricted weapon” in subsection 84(1) where a local registrar of firearms, in addition to the matters referred to in subsection (3),

(a) indicates on the copy of the application that is sent to the commissioner pursuant to subsection (5) that the restricted weapon will form part of a gun collection of the applicant who is a genuine gun collector whose collection includes one or more restricted weapons described in that paragraph; and

(b) describes on the copy referred to in paragraph (a) all alterations that have been made to the restricted weapon to enable it to fire only one projectile with one pressure of the trigger.

(4.2) Where the description of the alterations referred to in paragraph (4.1)(b) changes in respect of a restricted weapon, the restricted weapon registration certificate issued in respect of the weapon is automatically revoked and the holder of that certificate shall immediately apply for a new registration certificate in respect of the weapon.

(4.3) Notwithstanding anything in this Act, no registration certificate may be issued in respect of a restricted weapon described in paragraph (c.1) of the definition “restricted weapon” in subsection 84(1) to a person who did not lawfully possess such a restricted weapon at the time of the coming into force of this subsection.

(5) The local registrar of firearms by whom an application for a registration certificate is received shall

(a) send one copy thereof to the Commissioner;

(b) deliver one copy thereof to the applicant for the certificate; and

(c) retain one copy thereof.

(6) Where a local registrar of firearms to whom an application for a registration certificate is made has notice of any matter that may render it desirable in the interests of the safety of the applicant or any other person that the applicant should not possess a restricted weapon, he shall report that matter to the Commissioner and he may, if the restricted weapon is conveyed to him for examination, hold the weapon pending the final disposition of the application for a registration certificate in respect thereof.

(7) On receiving an endorsed copy of an application for a registration certificate, the Commissioner shall, subject to subsections (3) and (4) and section 112, register the restricted weapon described in the application and issue a restricted weapon registration certificate therefor to the applicant, in such form as the Commissioner may prescribe, indicating thereon the place at which the holder of the certificate is thereby entitled to possess the restricted weapon.

(8) No place other than the usual dwelling-house of the applicant for a registration

certificate or his ordinary place of business may be indicated on the registration certificate as the place at which the holder of the certificate is thereby entitled to possess the restricted weapon to which the certificate relates. 1976-77, c. 53, s. 3; 1991, c. 40, s. 21.

#### CROSS-REFERENCES

The terms "registration certificate", "restricted weapon", "Commissioner", "local registrar of firearms", "permit" and "firearms acquisition certificate" are defined in s. 84. The term "dwelling-house" is defined in s. 2. The Commissioner may refuse to issue the registration certificate pursuant to s. 112 and may also revoke the certificate. A person authorized to issue a permit may revoke it under s. 112(2). These decisions may be appealed pursuant to s. 112. Age, for the purpose of subsec. (3)(a), is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Making a false statement on an application for a certificate, altering or defacing a certificate, failing to deliver up a certificate which has been revoked or when prohibited from possessing firearms are offences under s. 113. Section 114 requires the Commissioner to keep a registry of registration certificates that have been issued and revoked and applications which have been refused. Possession of a restricted weapon without a registration certificate or in contravention of the terms of the certificate or any permit are offences under s. 91.

#### SYNOPSIS

This provision sets out detailed procedures for an *application* for a *registration certificate* for *restricted weapons*. As part of the application process, s. 109(2) requires that the weapon be examined by a local registrar of firearms, who will issue a special permit to allow the applicant to transport the weapon for the purpose of this examination. Such registration certificates are only available to persons 18 years of age or more, are limited to weapons bearing serial numbers (except in the case of antiques) and may only be issued for one of the limited purposes listed in the section. Permissible purposes include possession by gun collectors, use for target practice, use in connection with the applicant's lawful employment, or to protect life. Subsection (8) limits certificates to authorizing possession at either home or usual place of business.

The local registrar of firearms receives the application and a copy is forwarded to the Commissioner of the R.C.M.P. The Commissioner shall issue the certificate unless the requirements of the section are not met. If the local registrar of firearms knows any reason why it is desirable that an applicant not receive a certificate, the registrar must advise the Commissioner and may retain the weapon (if it has been turned in for examination) until the Commissioner makes a determination about the applicant.

#### ANNOTATIONS

In view of subsec. (8), the registrar has no power to designate some other place, such as the premises of a gun club, as the place where the owner may store the restricted weapon: *R. v. Wilson* (1984), 17 C.C.C. (3d) 126 (Alta. Q.B.).

#### REGISTRATION CERTIFICATE FOR OTHER PERSONS.

109.1. Notwithstanding paragraphs 109(3)(a) and (d), the Governor in Council may make regulations prescribing the persons, other than individuals, or classes of such persons, to which restricted weapon registration certificates may be issued, and subsections 109(1) to (3) and (5) to (8) apply, with such modifications as the circumstances require, in respect of registration certificates issued to such persons. 1991, c. 40, s. 22.

## *Carriage Permits, Business Permits and Minors Permits*

PERMIT TO CARRY RESTRICTED WEAPON / Limitation / Temporary permit to carry / Permit to transport restricted weapon / Temporary storage permit / Contents of permit / Validity of permit / Permit to convey restricted weapon / Permit to carry on business / Permits to persons hunting as a way of life / Permit to person between 12 and 18 years of age / Idem / Where no fee payable and fee for business permits / Validity of permit / Form and conditions of permit.

110. (1) A permit that authorizes a person to possess a particular restricted weapon, whether or not that person is the person mentioned in the registration certificate issued in respect of the weapon, elsewhere than at the place at which the person is otherwise entitled to possess it, as indicated on the registration certificate issued in respect thereof, may be issued by the Commissioner, the Attorney General of a province, a chief provincial firearms officer or a member of a class of persons that has been designated in writing for that purpose by the Commissioner or the Attorney General of a province, and remains in force until the expiration of the period for which it is expressed to be issued, unless it is revoked before that expiration.

(2) A permit described in subsection (1) may be issued only where the person authorized to issue it is satisfied that the applicant therefor requires the restricted weapon to which the application relates

- (a) to protect life;
- (b) for use in connection with his lawful profession or occupation;
- (c) for use in target practice under the auspices of a shooting club approved for the purposes of this section by the Attorney General of the province in which the premises of the shooting club are located; or
- (d) for use in target practice in accordance with the conditions attached to the permit.

(2.1) A permit may be issued by a person authorized to issue a permit under subsection (1) that authorizes a person who does not reside in Canada to possess and carry between the places specified in the permit a restricted weapon described in the permit for use in a target shooting competition that is held under the auspices of a shooting club referred to in subparagraph 109(3)(c)(iii), and remains in force until the expiration of the period for which it is expressed to be issued, unless it is revoked before that expiration.

(3) A permit to transport a restricted weapon from one place to another place specified therein may be issued by a local registrar of firearms to any person who is required to transport that weapon by reason of a change of residence or for any other *bona fide* reason, and shall remain in force until the expiration of the period for which it is expressed to be issued, unless it is sooner revoked.

(3.1) A permit that authorizes a holder of a registration certificate in respect of a restricted weapon to temporarily store the restricted weapon elsewhere than at the place at which that holder is otherwise entitled to possess it may be issued by a local registrar of firearms jointly to the holder and an individual under whose control the restricted weapon is to be stored.

(3.2) A permit described in subsection (3.1) shall describe that restricted weapon in respect of which it is issued, shall specify the place at which that restricted weapon is to be stored and shall authorize, in addition to the storage of the weapon, either person named in the permit to transport the restricted weapon, prior to the beginning of the period of storage, to the place where it is to be stored and, after the end of the period of storage, to the place at which the holder of the restricted weapon registra-



tion certificate in respect of the restricted weapon is entitled to possess that restricted weapon.

(3.3) A permit described in subsection (3.1) shall remain in force until the expiration of the period, not exceeding one year, for which it is expressed to be issued, unless it is revoked before that expiration, but either the holder of the registration certificate in respect of the restricted weapon in respect of which the permit is issued or the individual under whose control the restricted weapon is stored may apply to the local registrar of firearms for renewal of the permit.

(4) A permit authorizing an applicant for a registration certificate to convey the weapon to which the application relates to a local registrar of firearms may be issued by a local registrar of firearms and shall remain in force until the expiration of the period for which it is expressed to be issued, unless it is sooner revoked.

(5) A permit to carry on a business described in paragraph 105(1)(a) or (b) or subparagraph 105(2)(b)(i) may be issued by the Commissioner, the Attorney General or the chief provincial firearms officer of the province where the business is or is to be carried on or by any person whom the Commissioner or the Attorney General designates in writing for that purpose, the fee payable on application for such a permit is the fee prescribed by regulation, and the permit remains in force until the expiration of the period, not exceeding one year, for which it is expressed to be issued, unless it is revoked before that expiration.

#### Transitional provision

1991, c. 40, s. 34 provides as follows:

34. Notwithstanding subsection 48(1) of the Criminal Law Amendment Act, 1977, a permit issued under subsection 110(5) of the Criminal Code or under section 97 of the Criminal Code, as that section read immediately before the coming into force of section 3 of the Criminal Law Amendment Act, 1977, other than a permit that is expressed to be issued for a specified period, ceases to be in force or have an effect on the day that is ninety days after the date of the coming into force of this section, unless the permit is revoked before that day.

(6) A permit to possess a firearm, other than a restricted weapon, may be issued by a firearms officer to a person under the age of eighteen years who hunts or traps as a way of life if the firearms officer is satisfied that the person needs to hunt or trap in order to sustain the person or the person's family and the application for the permit includes a consent to the issuance of the permit signed by a parent of the applicant or, if a consent by a parent cannot be obtained because of the death of both parents or for any other reason it is not practicable or desirable in the opinion of the firearms officer to whom the application is made to obtain a parent's consent, a person having custody or control of the applicant.

(7) A permit authorizing a person who is twelve or more years of age but under the age of eighteen years to possess a firearm, other than a restricted weapon, may be issued by a firearms officer if the firearms officer is satisfied that the applicant therefor requires such a permit in order to enable the applicant to possess a firearm for the purpose of target practice, game hunting or instruction in the use of firearms in accordance with conditions for supervision attached to the permit signed by a parent of the applicant or, if a consent by a parent cannot be obtained because of the death of both parents or for any other reason it is not practicable or desirable in the opinion of the firearms officer to whom the application is made to obtain a parent's consent, a person having custody or control of the applicant.

(8) A permit mentioned in subsection (6) or (7) shall remain in force until  
(a) the expiration of the period for which it is expressed to be issued, or

(b) the person to whom it is issued attains the age of eighteen years, whichever first occurs, unless it is sooner revoked.

(9) Permits mentioned in subsections (1), (2.1), (3), (3.1), (4), (6) and (7) shall be issued without payment of a fee, but no permit mentioned in subsection (5) may be issued unless the application therefor is accompanied by the fee prescribed by regulation.

(10) No permit, other than

(a) a permit for the possession of a restricted weapon for use as described in paragraph (2)(c),

(b) a permit to transport a restricted weapon from one place to another place specified therein as mentioned in subsection (3),

(b.1) a permit that authorizes a person who does not reside in Canada to possess and carry a restricted weapon for use in a target shooting competition as mentioned in subsection (2.1),

(b.2) a permit that authorizes a holder of a registration certificate in respect of a restricted weapon to temporarily store the restricted weapon elsewhere than at the place at which that holder is otherwise entitled to possess it, as mentioned in subsection (3.1), or

(c) a permit authorizing an applicant for a registration certificate to convey the weapon to which the application relates to a local registrar of firearms as mentioned in subsection (4),

is valid outside the province in which it is issued unless it is issued by the Commissioner or a person designated in writing by him and authorized in writing by him to issue permits valid outside the province and is endorsed for the purposes of this subsection by the person who issued it as being valid within the provinces indicated therein.

(11) Every permit shall be in a form prescribed by the Commissioner, but any person who is authorized to issue a permit relating to any restricted weapon, firearm or ammunition may attach to the permit any reasonable condition relating to the use, carriage, possession, handling or storage of weapons or ammunition that he deems desirable in the particular circumstances and in the interests of the safety of the applicant therefor or any other person. 1976-77, c. 53, s. 3; 1991, c. 40, ss. 23, 40.

#### CROSS-REFERENCES

The terms “registration certificate”, “restricted weapon”, “Commissioner”, “local registrar of firearms”, “chief provincial firearms officer”, “permit” and “firearms acquisition certificate” are defined in s. 84. The terms “dwelling-house” and “Attorney General” are defined in s. 2. A permit may be revoked by any person who is authorized to issue it pursuant to s. 112(2). A person authorized to issue a permit under subsecs. (3) to (7) may refuse to issue it under s. 112(4). These decisions may be appealed pursuant to s. 112. Age, for the purpose of subsec. (7), is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Transferring a firearm to a person under the age of 18 years without a permit is an offence under s. 93. Making a false statement on an application for a permit, altering or defacing a permit, failing to comply with the terms of a permit, failing to deliver up a permit which has been revoked or when prohibited from possessing firearms are offences under s. 113. Section 114 requires the Commissioner to keep a registry of permits that have been issued and revoked and applications which have been refused. Possession of a restricted weapon without a registration certificate or in contravention of the terms of the certificate and without a permit are offences under s. 91.

#### SYNOPSIS

This section sets out the circumstances under which a person may *carry* or *transport restricted weapons* and when permits for firearms other than restricted weapons may be issued to a person *under 18*.

A special permit is required to carry a restricted weapon (in addition to a firearms acquisition certificate, and the registration of the weapon). Subsection (2) provides that the only permissible purposes for which such permits may be issued are target practice (either in connection with the terms of the permit or under the control of an authorized shooting club), in connection with lawful employment or to protect life. In addition, however, provision is made for issuing permits to persons who do not reside in Canada where the person is in Canada to participate in a target shooting competition that is held under the auspices of a shooting club.

Subsections (3) and (4) deal with permits to *transport a restricted weapon*. The purposes for which such permits may be issued are broader and more open-ended in subsec. (3) than in subsec. (2). So long as there is a *bona fide* reason advanced, such as a change in residence, the permit may be issued. A second type of transportation permit allows the holder to convey the weapon to a local registrar of firearms. An example of when such a permit would be required is to permit inspection under s. 109(2).

Subsections (6) and (7) allow persons under 18 years to be issued permits for firearms other than restricted weapons. Subsection (6) allows for persons under 18 years to have such permits if they *hunt or trap* as a way of life and, in most circumstances, the consent of one parent is needed in support of such an application. Subsection (7) empowers firearms officers to issue permits to 12 to 18-year-olds for target practice, game hunting or to get instruction regarding the use of firearms. Again, the consent of a parent is generally required before such a permit is issued.

The permits outlined above are issued without fee.

Subsection (10) limits the validity of most permits to the issuing province unless they are to be used to convey the weapon to the local registrar of firearms or they are issued in relation to target practice under the control of an approved shooting club.

Subsection (11) allows the person issuing the permit to attach such *reasonable conditions* to the permit on the use, carriage, possession, handling, or storage of the weapon or ammunition as are desirable in the interests of safety of the permit holder or others.

Subsection (5) deals with permits to carry on the firearms-related businesses described in s. 105. These permits do require a fee.

## ANNOTATIONS

**Subsec. (1) / Permit to carry firearm** – The applicant for a permit to carry a restricted weapon, having been refused a permit by the Assistant Commissioner, could reapply to the Commissioner. The Commissioner's decision affirming the dismissal of the application should not be interfered with lightly by the courts. Where the Commissioner's reasons indicated that he had considered the relevant factors and not taken into consideration any irrelevant factors then an application for *mandamus* to compel the issuing of the permit must be dismissed. Refusal of the permit in such circumstances does not violate s. 7 of the Charter of Rights and Freedoms: *Commissioner of R.C.M.P. v. Turenko*, [1985] 1 F.C. 669 (C.A.).

The legislative scheme for issuing permits to carry restricted weapons is *intra vires* Parliament, being legislation in relation to criminal law: *Martinoff v. Dawson* (1990), 57 C.C.C. (3d) 482 (B.C.C.A.).

**Subsec. (5) / Permit to carry on business** – While there are no statutory criteria to guide the chief provincial firearms officer in determining whether or not to issue a permit under this subsection he may properly consider the criteria specified in s. 106(3) with respect to the issuance of firearms acquisition certificates. Moreover, the criteria should be applied not only to the applicant but to anyone else who might associate in the business with the applicant, even as an employee: *R. v. Wilke* (No. 2) (1981), 60 C.C.C. (2d) 108 (Ont. Dist. Ct.).

**Subsec. 10 / Territorial jurisdiction** – The Commissioner of the R.C.M.P. has jurisdiction to issue a permit to carry on a business described in s. 105 that is effective in more



than one province. It is not open to the Commissioner to refuse to exercise that jurisdiction solely because of a desire not to interfere with the existing provincial administration of the scheme. No agreement with the provinces can nullify the power which Parliament has given to the Commissioner: *Martinoff v. Canada* (1994), 88 C.C.C. (3d) 341, [1994] 2 F.C. 33, 18 A.T.M.R. L.R. (2d) 191 (C.A.).

#### AGREEMENTS WITH PROVINCES.

111. The Minister of Justice of Canada, with the approval of the Governor in Council, may enter into agreements with the governments of the provinces providing for payments by Canada to the provinces in respect of costs actually incurred by the provinces in the administration of sections 105, 106, 107 and subsection 110(5). 1976-77, c. 53, s. 3; 1991, c. 40, s. 24.

### Refusal to Issue and Revocation of Registration Certificates and Permits, Revocation of Authorizations, Revocation of Firearms Acquisition Certificates and Appeals

REVOCATION OF CERTIFICATE / Revocation of permit / Revocation of authorization / Refusal to issue a certificate / Refusal to issue a permit / Notice to be given / Disposal of restricted weapons, etc. / Idem / Appeal / Service of notice of appeal / Appellant as witness / Disposition of appeal / Burden on applicant / Appeal to appeal court / Definitions / "appeal court" / "provincial court judge".

112. (1) A registration certificate may be revoked by the Commissioner.

(2) A permit may be revoked by any person who is authorized to issue such a permit.

(2.1) An authorization referred to in subsection 90(3.2) may be revoked by a local registrar of firearms.

(3) The Commissioner may refuse to issue a registration certificate where he has notice of any matter that may render it desirable in the interests of the safety of the applicant therefor or any other person that the applicant should not possess a restricted weapon.

(4) Any person who is authorized to issue a permit under any of subsections 110(2.1) to (7) may refuse to issue such a permit where that person has notice of any matter that may render it desirable in the interests of the safety of the applicant therefor or any other person that such a permit should not be issued to the applicant.

(5) Where a registration certificate or a permit is revoked or a firearms acquisition certificate is revoked pursuant to subsection 100(7.1) or 103(3.1) or subparagraph 103(6)(b)(ii) or the issue of any registration certificate or permit is refused under this section, the person by whom it is revoked or by whom its issue is refused shall give notice to the holder of the registration certificate, permit or firearms acquisition certificate or the applicant therefor, as the case may be, in writing, of the revocation or refusal and of the reasons therefor and shall include in the notification a copy or an extract of the provisions of this section.

(6) A notice under subsection (5) shall

(a) specify a reasonable period within which the person affected by the revocation or refusal may surrender to a police officer or otherwise lawfully dispose of any restricted weapon, firearm or ammunition in respect of which the notice applies, and during which that person is not liable to prosecution by reason

only that the person possesses the restricted weapon, firearm or ammunition during that period of time; and

- (b) state that if that person fails to dispose of the restricted weapon, firearm or ammunition within the period specified in the notice, the restricted weapon, firearm or ammunition is forfeited to Her Majesty and must be surrendered to a police officer or firearms officer to be disposed of as the Attorney General directs.

(7) Where an appeal is taken under subsection (8), the period of time referred to in subsection (6) does not commence until that appeal is finally disposed of.

(8) A person who feels himself aggrieved by

- (a) any action or decision taken under this section, or
- (b) the failure of a local registrar of firearms to indicate on the copy of an application for a registration certificate that is sent by him to the Commissioner pursuant to subsection 109(5) any of the matters referred to in subsections 109(3) and (4) that is applicable in respect of the application,

may, within thirty days from the day on which he was notified of the action or decision or became aware of the failure, unless before or after the expiration of that period further time is allowed by a provincial court judge, appeal to a provincial court judge from the action, decision or failure by filing with the provincial court judge a notice of appeal, setting out with reasonable certainty the action, decision or failure complained of and the grounds of appeal, together with such further material as the provincial court judge may require.

(9) A copy of any notice of appeal filed with a provincial court judge under subsection (8) and of any further material required to be filed therewith shall be served within fourteen days of the filing of the notice, unless before or after the expiration of that period further time is allowed by a provincial court judge, on the person who took the action or decision or who was responsible for the failure being appealed from or on such other person as the provincial court judge may direct.

(10) For the purposes of an appeal under subsection (8), the appellant is a competent and compellable witness.

(11) On the hearing of an appeal under subsection (8), the provincial court judge may

- (a) dismiss the appeal; or
- (b) allow the appeal and
  - (i) cancel the revocation of the registration certificate, permit or firearms acquisition certificate or direct that a registration certificate or permit be issued to the applicant therefor, as the case may be, or
  - (ii) direct that a registration certificate be issued notwithstanding the failure referred to in paragraph (8)(b).

(12) A provincial court judge shall dispose of an appeal under subsection (8) heard by him by dismissing it unless the applicant establishes to the satisfaction of the provincial court judge that a disposition referred to in paragraph (11)(b) is warranted.

(13) Where the provincial court judge

- (a) dismisses an appeal under subsection (11), the appellant, or
- (b) allows an appeal under subsection (11),
  - (i) the Attorney General of Canada or counsel instructed by him for the purpose, if the person who took the action or decision or who was responsible for the failure referred to in paragraph (8)(b) that was appealed from to the provincial court judge was the Commissioner or a local registrar of firearms appointed by him, or
  - (ii) the Attorney General or counsel instructed by him for the purpose, in any other case,

may appeal to the appeal court against the dismissal or against the allowing of the appeal, as the case may be, and the provisions of Part XXVII except sections 816 to 819 and 829 to 838 apply, with such modifications as the circumstances require, in respect of that appeal.

(14) In this section,

“appeal court” has the meaning given that expression in subsection 100(11);

“provincial court judge” means a provincial court judge having jurisdiction in the territorial division where the person who feels himself aggrieved as described in subsection (8) resides. 1976-77, c. 53, s. 3; 1991, c. 40, s. 26.

#### CROSS-REFERENCES

The terms “registration certificate”, “permit”, “Commissioner”, “local registrar of firearms” and “firearms officer” are defined in s. 84. “Attorney General”, “weapon”, and “provincial court judge” are defined in s. 2. As some of the provisions of Part XXVII apply to an appeal under subsec. (13), a further appeal will lie from the decision of the appeal court (defined in s. 100(11)) to the Court of Appeal (as defined in s. 673) with leave on a question of law alone, pursuant to s. 839. Time-limits as specified in this section are calculated in accordance with ss. 26 and 27 of the Interpretation Act, R.S.C. 1985, c. I-21. Making a false statement on an application for a permit or certificate, altering or defacing a permit or certificate, and failing to deliver up a permit or certificate which has been revoked are offences under s. 113. Section 114 requires the Commissioner to keep a registry of permits and registration certificates that have been issued and revoked and applications which have been refused.

#### SYNOPSIS

Section 112 permits the Commissioner of the R.C.M.P. to *refuse to issue* registration certificates, regulates how *permits or registration certificates* may be *revoked* and creates an *appeal process* from such decisions.

The Commissioner has the power to refuse a registration certificate if it is desirable in the interests of safety of anyone (including the applicant) (s. 112(3)) or to revoke a registration certificate (s. 112(1)).

Anyone who is authorized to issue permits may revoke the permits described in s. 110(3) to (7) (permits to transport, carry on business in relation to restricted weapons or permits issued to those under 18 years) on the same basis as the Commissioner.

If a registration certificate or permit is not issued or is revoked, reasons must be given to the applicant or holder of the revoked permit or certificate. Such notice must provide a reasonable grace period to turn the weapon over to the authorities or to otherwise dispose of the weapon (s. 112(5) to (7)).

Subsections (8) to (12) create a *right of appeal to a provincial court judge* and prescribe time limits within which the appeal is to be commenced and notice served on the decision-maker whose decision led to the appeal.

Subsection (8) places the onus on the appellant to establish that the decision should be overturned. Subsection (10) states that the appellant is a competent and compellable witness on the appeal. Subsection (11) sets out the power of the provincial judge to dismiss the appeal, or to allow it and order the issuance of the certificate or permit or that the revoked permit or certificate be reissued to the appellant.

Subsection (13) permits a *further appeal* to the superior court in all provinces.

#### ANNOTATIONS

**Subsec. (13)** – A further appeal lies to the Court of Appeal from the decision of the “appeal Court” (defined in s. 100(11)) pursuant to s. 839(1) with leave on a question of law alone: *A.-G. Can. v. Haines and Haines* (1979), 47 C.C.C. (2d) 189, 32 N.S.R. (2d) 60 (App. Div.).



## *Offences Relating to Certificate and Permits*

**FALSE STATEMENTS TO PROCURE FIREARMS ACQUISITION CERTIFICATE, ETC. / Tampering with firearms acquisition certificate, registration certificate or permit / Failure to comply with conditions of permit / Failure to deliver up firearms acquisition certificate, etc.**

113. (1) Every one who, for the purpose of procuring a firearms acquisition certificate, registration certificate or permit for himself or any other person, knowingly makes a statement orally or in writing that is false or misleading or knowingly fails to disclose any information that is relevant to the application for the firearms acquisition certificate, registration certificate or permit

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(2) Every one who, without lawful excuse the proof of which lies on him, alters, defaces or falsifies a firearms acquisition certificate, registration certificate or permit

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(3) Every one who, without lawful excuse, fails to comply with any condition of a permit held by him

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

(4) Every one who,

(a) being a holder of a registration certificate, permit or firearms acquisition certificate that is revoked in accordance with this Part, or

(b) being a person against whom an order prohibiting possession of any firearm or ammunition is made under section 100 or paragraph 103(6)(b), or being prohibited by a condition of a probation order referred to in paragraph 737(2)(d) from having a firearm in his possession,

**NOTE:** Subsection (4)(b) amended 1995, c. 22, s. 10 (Sch. I, item 9) (to come into force by order of the Governor in Council) by replacing the reference to s. 737(2)(d) with s. 732.1(3)(d), however, 1995, c. 22, s. 10 (Sch. I, item 9) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

fails to deliver up the registration certificate or permit or, in a case described in paragraph (b), any firearms acquisition certificate, registration certificate or permit held by him, to a peace officer, a local registrar of firearms or a firearms officer forthwith after the revocation or the making of the order or probation order is guilty of an offence punishable on summary conviction. 1976-77, c. 53, s. 3; 1991, c. 40, s. 27.

### CROSS-REFERENCES

The terms "registration certificate", "permit" and "firearms acquisition certificate" are defined in s. 84. Where the prosecution elects to proceed by indictment in respect of the offences in subssecs. (2) and (3) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). The offence under subsec. (4) is tried by a summary conviction court pursuant to Part XXVII. The punishment for the offence is set out in s. 787 and the limitation period is set out in s. 786(2). In all cases, release pending trial is deter-

mined by s. 515, although the accused is eligible for release by a peace officer under ss. 496 and 497 or by the officer in charge under s. 498. A person found guilty of the offence in this section is liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

## **Registry**

### **REGISTRY TO BE MAINTAINED / Information to be submitted to Commissioner / Idem.**

**114. (1) The Commissioner shall cause a registry to be maintained in which shall be kept a record of**

- (a) every registration certificate that is issued under section 109;**
- (b) every registration certificate that is revoked under subsection 112(1);**
- (c) every application for a registration certificate that is refused under subsection 112(3);**
- (d) every permit issued under subsection 110(5) that is revoked under subsection 112(2);**
- (e) every application for a permit under subsection 110(5) that is refused under subsection 112(4);**
- (f) every application for a firearms acquisition certificate that is refused;**
- (g) every prohibition order made under section 100 or paragraph 103(6)(b); and**
- (h) every probation order to which a condition referred to in paragraph 737(2)(d) is attached.**

**NOTE:** Subsection (1)(h) amended 1995, c. 22, s. 10 (Sch. I, item 10) (to come into force by order of the Governor in Council) by replacing the reference to s. 737(2)(d) with s. 732.1(3)(d), however, 1995, c. 22, s. 10 (Sch. I, item 10) repealed 1995, c. 39, s. 190(c) (to come into force by order of the Governor in Council).

**(2) Each person by whom**

- (a) a firearms acquisition certificate or permit is issued,**
- (b) a permit is revoked, or**
- (c) an application for a permit is refused,**

**shall submit such information in relation thereto at such time and in such form as is prescribed by the regulations for the purpose of enabling the Commissioner to compile the reports referred to in section 117.**

**(3) Every firearms officer by whom an application for a firearms acquisition certificate is refused, every person by whom an application for a permit under subsection 110(5) is refused or by whom a permit issued under that subsection is revoked, every court, judge, justice or provincial court judge that makes a prohibition order under section 100 or paragraph 103(6)(b) and every court that prescribes as a condition of a probation order a condition referred to in paragraph 737(2)(d) shall forthwith cause the Commissioner to be notified thereof. 1976-77, c. 53, s. 3.**

### **CROSS-REFERENCES**

The terms “registration certificate”, “permit”, “firearms acquisition certificate”, “Commissioner” and “firearms officer” are defined in s. 84. “Provincial court judge” and “justice” are defined in s. 2.

## General

ONUS ON THE ACCUSED / Firearms acquisition certificate, etc., as evidence.

115. (1) Where, in any proceedings under any of sections 85 to 113, any question arises as to whether a person is or was the holder of a firearms acquisition certificate, registration certificate or permit, the onus is on the accused to prove that that person is or was the holder of the firearms acquisition certificate, registration certificate or permit.

(2) In any proceedings under any of sections 85 to 113, a document purporting to be a firearms acquisition certificate, registration certificate or permit is evidence of the statements contained therein. 1976-77, c. 53, s. 3.

### CROSS-REFERENCES

The terms "registration certificate", "permit" and "firearms acquisition certificate" are defined in s. 84.

### ANNOTATIONS

**Subsec. (1)** – This subsection, at least as it applies to the offence of unlawful possession of restricted weapons, contrary to s. 91(1) is not unconstitutional by reason of the guarantee to the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms: *R. v. Schwartz* (1988), 45 C.C.C. (3d) 97, 66 C.R. (3d) 251, [1988] 2 S.C.R. 443 (4:2).

### REGULATIONS / Tabling of regulations / Definition of "sitting day."

116. (1) The Governor in Council may make regulations

- (a) regulating the handling, secure storage, display and advertising of restricted weapons, firearms and ammunition by persons operating museums described in subsection 105(1) or carrying on businesses described in paragraph 105(1)(a) or subparagraph 105(2)(b)(i) and providing authority for police officers and police constables and members of any other class of persons designated for the purposes of a province by the Attorney General of that province to enter any place at which the museum is located or where any such business is carried on, at any time during ordinary business hours, for the purpose of inspecting the secure storage facilities therein and the manner in which restricted weapons, firearms and ammunition are handled and displayed in the course of the business;
- (a.1) regulating the handling and secure storage of prohibited weapons or components or parts thereof referred to in paragraph 105(1)(b) by persons carrying on businesses described in that paragraph, and providing authority for police officers and police constables and members of any other class of persons designated for a province by the Attorney General of that province to enter any place where any such business is carried on, at any time during ordinary business hours, for the purpose of inspecting the secure storage facilities therein and the manner in which such prohibited weapons and components or parts thereof are handled in the course of the business;
- (b) regulating the handling, secure storage and display of weapons by operators of and persons employed in museums approved for the purposes of this Part by the Commissioner or the Attorney General of the province in which they are situated;
- (c) regulating the mail-order sale of restricted weapons, firearms and ammunition by persons carrying on businesses described in paragraph 105(1)(a) or subparagraph 105(2)(b)(i);
- (d) providing for the secure handling, shipping, storage and transportation of fire-



arms and ammunition, and prohibited weapons and components or parts thereof referred to in paragraph 105(1)(b), by persons engaged in businesses that include the transportation of goods;

- (e) prescribing the fees to be paid to Her Majesty in right of Canada on application for certificates mentioned in section 106 or 107 or for permits mentioned in subsection 110(5);
- (f) prescribing classes of firearms that shall be deemed to be relics for the purposes of this Part;
- (g) respecting the storage, display, handling and transportation of firearms;
- (h) authorizing the destruction, at such times as are specified in the regulations, of such records and inventories that are required by the provisions of this Part to be maintained as are designated in the regulations; and
- (i) prescribing anything that is, by any provision of this Part, required to be prescribed by the regulations.

(2) The Minister of Justice shall lay or cause to be laid before each House of Parliament, at least thirty sitting days before its effective date, every regulation that is proposed to be made under subsection (1) and every appropriate committee as determined by the rules of each House of Parliament may conduct enquiries or public hearings with respect to the proposed regulation and report its findings to the appropriate House.

(3) For the purposes of this section, “sitting day” means, in respect of either House of Parliament, a day on which that House sits. 1976-77, c. 53, s. 3; 1991, c. 28, s. 11; 1991, c. 40, ss. 28, 41.

#### CROSS-REFERENCES

The terms “restricted weapon”, “firearm”, “firearms acquisition certificate” and “Commissioner” are defined in s. 84. “Attorney General” is defined in s. 2. Publication of regulations is governed by the Statutory Instruments Act, R.S.C. 1985, c. S-22.

#### ANNOTATIONS

Subsec. (1)(i) gives the Governor in Council power to make regulations designating a weapon as a prohibited weapon pursuant to para. (e) of the definition “prohibited weapon” in s. 84(1): *Re Repa and The Queen* (1982), 68 C.C.C. (2d) 231, [1982] 5 W.W.R. 76 (Man. Q.B.), affd [1983] 3 W.W.R. 479, 20 Man. R. (2d) 304 (C.A.).

#### REPORT TO PARLIAMENT.

117. The Commissioner shall, within five months after the end of each year end at such other times as the Solicitor General of Canada may, in writing, request, submit to the Solicitor General a report, in such form and setting forth such information as the Solicitor General may direct, with regard to the administration of the provisions of this Part respecting firearms acquisition certificates, registration certificates and permits and the information contained in the registry maintained pursuant to section 114, and the Solicitor General shall cause each report to be laid before Parliament on any of the first fifteen days on which Parliament is sitting after the Solicitor General receives it. 1976-77, c. 53, s. 3; 1991, c. 40, s. 29.

#### CROSS-REFERENCES

The terms “registration certificate”, “permit”, “firearms acquisition certificate” and “Commissioner” are defined in s. 84.

**NOTE:** Part III (ss. 84 to 117) replaced 1995, c. 39, s. 139 (to come into force by order

of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

PART III / FIREARMS AND OTHER WEAPONS  
Interpretation

DEFINITIONS / "Ammunition" / "Antique firearm" / "Authorization" / "Automatic firearm" / "Cartridge magazine" / "Chief firearms officer" / "Cross-bow" / "Export" / "Firearms officer" / "Handgun" / "Imitation firearm" / "Import" / "Licence" / "Prescribed" / "Prohibited ammunition" / "Prohibited device" / "Prohibited firearm" / "Prohibited weapon" / "Prohibition order" / "Registrar" / "Registration certificate" / "Replica firearm" / "Restricted firearm" / "Restricted weapon" / "Superior court" / "Transfer" / Barrel length / Certain weapons deemed not to be firearms / Exception / antique firearms / Meaning of "holder".

84. (1) In this Part and subsections 491(1), 515(4.1) and (4.11) and 810(3.1) and (3.11),

*"ammunition" means a cartridge containing a projectile designed to be discharged from a firearm and, without restricting the generality of the foregoing, includes a caseless cartridge and a shot shell;*

*"antique firearm" means*

- (a) *any firearm manufactured before 1898 that was not designed to discharge rim-fire or centre-fire ammunition and that has not been redesigned to discharge such ammunition, or*
- (b) *any firearm that is prescribed to be an antique firearm;*

*"authorization" means an authorization issued under the Firearms Act;*

*"automatic firearm" means a firearm that is capable of, or assembled or designed and manufactured with the capability of, discharging projectiles in rapid succession during one pressure of the trigger;*

*"cartridge magazine" means a device or container from which ammunition may be fed into the firing chamber of a firearm;*

*"chief firearms officer" means a chief firearms officer as defined in subsection 2(1) of the Firearms Act;*

*"cross-bow" means a device with a bow and a bowstring mounted on a stock that is designed to propel an arrow, a bolt, a quarrel or any similar projectile on a trajectory guided by a barrel or groove and that is capable of causing serious bodily injury or death to a person;*

*"export" means export from Canada and, for greater certainty, includes the exportation of goods from Canada that are imported into Canada and shipped in transit through Canada;*

*"firearms officer" means a firearms officer as defined in subsection 2(1) of the Firearms Act;*

*"handgun" means a firearm that is designed, altered or intended to be aimed and fired by the action of one hand, whether or not it has been redesigned or subsequently altered to be aimed and fired by the action of both hands;*

*"imitation firearm" means any thing that imitates a firearm, and includes a replica firearm;*

*"import" means import into Canada and, for greater certainty, includes the importation of goods into Canada that are shipped in transit through Canada and exported from Canada;*

*"licence" means a licence issued under the Firearms Act;*

*"prescribed" means prescribed by the regulations;*

*“prohibited ammunition” means ammunition, or a projectile of any kind, that is prescribed to be prohibited ammunition;*

*“prohibited device” means*

- (a) any component or part of a weapon, or any accessory for use with a weapon, that is prescribed to be a prohibited device,*
- (b) a handgun barrel that is equal to or less than 105 mm in length, but does not include any such handgun barrel that is prescribed, where the handgun barrel is for use in international sporting competitions governed by the rules of the International Shooting Union,*
- (c) a device or contrivance designed or intended to muffle or stop the sound or report of a firearm,*
- (d) a cartridge magazine that is prescribed to be a prohibited device, or*
- (e) a replica firearm;*

*“prohibited firearm” means*

- (a) a handgun that*
  - (i) has a barrel equal to or less than 105 mm in length, or*
  - (ii) is designed or adapted to discharge a 25 or 32 calibre cartridge,*

*but does not include any such handgun that is prescribed, where the handgun is for use in international sporting competitions governed by the rules of the International Shooting Union,*

- (b) a firearm that is adapted from a rifle or shotgun, whether by sawing, cutting or any other alteration, and that, as so adapted,*
  - (i) is less than 660 mm in length, or*
  - (ii) is 660 mm or greater in length and has a barrel less than 457 mm in length,*
- (c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger, or*
- (d) any firearm that is prescribed to be a prohibited firearm;*

*“prohibited weapon” means*

- (a) a knife that has a blade that opens automatically by gravity or centrifugal force or by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, or*
- (b) any weapon, other than a firearm, that is prescribed to be a prohibited weapon;*

*“prohibition order” means an order made under this Act or any other Act of Parliament prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things;*

*“Registrar” means the Registrar of Firearms appointed under section 82 of the Firearms Act;*

*“registration certificate” means a registration certificate issued under the Firearms Act;*

*“replica firearm” means any device that is designed or intended to exactly resemble, or to resemble with near precision, a firearm, and that itself is not a firearm, but does not include any such device that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm;*

*“restricted firearm” means*

- (a) a handgun that is not a prohibited firearm,*
- (b) a firearm that*
  - (i) is not a prohibited firearm,*
  - (ii) has a barrel less than 470 mm in length, and*
  - (iii) is capable of discharging centre-fire ammunition in a semi-automatic manner,*



- (c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or
- (d) a firearm of any other kind that is prescribed to be a restricted firearm;

*“restricted weapon” means any weapon, other than a firearm, that is prescribed to be a restricted weapon;*

*“superior court” means*

- (a) in Ontario, the Ontario Court (General Division), sitting in the region, district or county or group of counties where the relevant adjudication was made,
- (b) in Quebec, the Superior Court,
- (c) in New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench,
- (d) in Nova Scotia, British Columbia and a territory, the Supreme Court, and
- (e) in Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court;

*“transfer” means sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver.*

- (2) For the purposes of this Part, the length of a barrel of a firearm is
  - (a) in the case of a revolver, the distance from the muzzle of the barrel to the breach end immediately in front of the cylinder, and
  - (b) in any other case, the distance from the muzzle of the barrel to and including the chamber,

*but does not include the length of any component, part or accessory including any component, part or accessory designed or intended to suppress the muzzle flash or reduce recoil.*

(3) For the purposes of sections 91 to 95, 99 to 101, 103 to 107 and 117.03 of this Act and the provisions of the Firearms Act, the following weapons are deemed not to be firearms:

- (a) any antique firearm;
- (b) any device that is
  - (i) designed exclusively for signalling, for notifying of distress, for firing blank cartridges or for firing stud cartridges, explosive-driven rivets or other industrial projectiles, and
  - (ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed;
- (c) any shooting device that is
  - (i) designed exclusively for the slaughtering of domestic animals, the tranquilizing of animals or the discharging of projectiles with lines attached to them, and
  - (ii) intended by the person in possession of it to be used exclusively for the purpose for which it is designed; and
- (d) any other barrelled weapon, where it is proved that the weapon is not designed or adapted to discharge
  - (i) a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second, or
  - (ii) a shot, bullet or other projectile that is designed or adapted to attain a velocity exceeding 152.4 m per second.

(3.1) Notwithstanding subsection (3), an antique firearm is a firearm for the purposes of regulations made under paragraph 117(h) of the Firearms Act and subsection 86(2) of this Act.

- (4) For the purposes of this Part, a person is the holder of
  - (a) an authorization or a licence if the authorization or licence has been issued to the person and the person continues to hold it; and
  - (b) a registration certificate for a firearm if
    - (i) the registration certificate has been issued to the person and the person continues to hold it, or

*(ii) the person possesses the registration certificate with the permission of its lawful holder.*

### Use Offences

**USING FIREARM IN COMMISSION OF OFFENCE / Using imitation firearm in commission of offence / Punishment / Sentences to be served consecutively.**

**85. (1) Every person commits an offence who uses a firearm**

- (a) while committing an indictable offence, other than an offence under section 220 (criminal negligence causing death), 236 (manslaughter), 239 (attempted murder), 244 (causing bodily harm with intent – firearm), 272 (sexual assault with a weapon), 273 (aggravated sexual assault), 279 (kidnapping), 279.1 (hostage-taking), 344 (robbery) or 346 (extortion),**
- (b) while attempting to commit an indictable offence, or**
- (c) during flight after committing or attempting to commit an indictable offence,**

**whether or not the person causes or means to cause bodily harm to any person as a result of using the firearm.**

**(2) Every person commits an offence who uses an imitation firearm**

- (a) while committing an indictable offence,**
- (b) while attempting to commit an indictable offence, or**
- (c) during flight after committing or attempting to commit an indictable offence,**

**whether or not the person causes or means to cause bodily harm to any person as a result of using the imitation firearm.**

**(3) Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable**

- (a) in the case of a first offence, except as provided in paragraph (b), to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of one year;**
- (b) in the case of a first offence committed by a person who, before January 1, 1978, was convicted of an indictable offence, or an attempt to commit an indictable offence, in the course of which or during flight after the commission or attempted commission of which the person used a firearm, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of three years; and**
- (c) in the case of a second or subsequent offence, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of three years.**

**(4) A sentence imposed on a person for an offence under subsection (1) or (2) shall be served consecutively to any other punishment imposed on the person for an offence arising out of the same event or series of events and to any other sentence to which the person is subject at the time the sentence is imposed on the person for an offence under subsection (1) or (2).**

### CROSS-REFERENCES

“Firearm” is defined in s. 84(1).

A person convicted of this offence is subject to the mandatory prohibition order prescribed by s. 100(1) for possession of firearms, ammunition and explosives.

An accused charged with this offence may elect his mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515.

Note provision for forfeiture of weapons used in commission of an offence in s. 491.

## SYNOPSIS

This offence was created by Parliament for the purpose of imposing an additional punishment upon those accused who use firearms or imitation firearms while committing or fleeing from the commission of indictable offences (or the attempt to do either). *It is important to note that s. 85(1)(a) does not apply in respect of certain indictable offences which already impose an additional penalty for the use of a firearm during the commission of the offence.* It is not necessary that the accused intend to harm anyone with the firearm nor that it be proven to be loaded at the time it is used. There were several early challenges to the constitutional validity of the preceding s. 85 alleging violations of ss. 11(h) and 7 of the Charter. These efforts were unsuccessful but may need to be re-assessed as the case law continues to evolve, setting out the constitutionally permissible minimum level of intention in the criminal law.

Apart from murder, this is the only section of the Criminal Code which carries a *minimum mandatory* period of imprisonment upon a *first conviction of one year*, and upon a *second (or subsequent) conviction of three years*. The provision of a higher minimum for a second (or subsequent) offence may be invoked if it is proven that the accused was convicted before this section was passed for an offence involving the same conduct. Subsection (4) requires that the sentence for this offence must be consecutive to any other sentence imposed in connection with the same events.

## ANNOTATIONS

**Underlying offences which may found liability** – An accused may be convicted of attempted robbery, specified as an attempt to commit the offence under s. 343(d), and the offence under this section. Further, conviction of both offences does not violate the principles of fundamental justice as guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms: *Krug v. The Queen* (1985), 21 C.C.C. (3d) 193, 48 C.R. (3d) 97, 21 D.L.R. (4th) 161 (S.C.C.) (7:0).

An accused cannot be convicted of the offence under this section where the “indictable offence” referred to in subsec. (1) by its definition in the Code required the use of a firearm as a constituent element of the offence, for example, pointing a firearm under s. 86(1): *R. v. Langevin* (1979), 47 C.C.C. (2d) 138, 10 C.R. (3d) 193 (Ont. C.A.); *Krug v. The Queen*, *supra*.

The accused may be convicted of the offence under this section and discharging a firearm with intent to wound contrary to s. 244: *R. v. Pineault*; *R. v. Berube* (1979), 55 C.C.C. (2d) 328, 12 C.R. (3d) 129 (Que. C.A.). *Contra*: *R. v. Lavoie* (1980), 51 C.C.C. (2d) 356, 29 N.B.R. (2d) 215 (C.A.).

An accused may also be convicted of this offence and the offence of possession of a weapon for a purpose dangerous to the public peace contrary to s. 87 where the evidence showed that the accused discharged the firearm: *R. v. Yurkiv* (1980), 18 C.R. (3d) 287 (Ont. C.A.).

An accused may be convicted of this offence and aggravated assault contrary to s. 268: *R. v. Switzer* (1987), 32 C.C.C. (3d) 303, 56 C.R. (3d) 107, 75 A.R. 167 (C.A.); *R. v. Osbourne* (1994), 94 C.C.C. (3d) 435, 21 O.R. (3d) 97, 74 O.A.C. 315 (C.A.).

**Requirement of conviction for underlying offence** – To render the accused guilty of the offence under this section, there must be a distinct conviction for the underlying indictable offence and not merely a finding of fact that the accused had committed an indictable offence in the course of which he used a firearm. Further, the court charging the offence under this section should clearly indicate the offence during which the accused allegedly used the firearm: *R. v. Pringle* (1989), 48 C.C.C. (3d) 449, 70 C.R. (3d) 305 (S.C.C.) (5:0).

This section may be resorted to only where there is a conviction for the underlying offence and the use of the firearm was in the actual commission or attempted commission of the underlying offence. Thus, the accused could not be convicted of using a firearm while a party to a robbery where, although a firearm was used to compel a third per-



son to commit the robbery, this third person did not actually use the firearm to commit the robbery: *R. v. Ingraham* (1991), 66 C.C.C. (3d) 27, 46 O.A.C. 216 (C.A.).

**Proof of “use” of firearm** – A person may be convicted of this offence although he does not use the firearm himself but is merely a party to the offence by virtue of s. 21: *McGuigan v. The Queen* (1982), 66 C.C.C. (2d) 97, 40 N.R. 499 (S.C.C.).

Use of a firearm under this section requires more than merely being in possession of, or armed with, a weapon and thus it would seem that the offence described in s. 87 of possession of a weapon for a purpose dangerous to the public peace cannot constitute the underlying indictable offence: *R. v. Chang* (1989), 50 C.C.C. (3d) 413 (B.C.C.A.).

A separate offence contrary to this section is committed by the accused each time he uses a firearm in the commission of a separate indictable offence notwithstanding the indictable offences take place within a short time of each other and involve the same firearm: *R. v. Woods et al.* (1982), 65 C.C.C. (2d) 554 (Ont. C.A.).

**Meaning of “firearm”** – To constitute a firearm within the meaning of this section, whatever is used on the scene of the crime must be proven by the Crown as capable either at the outset or through adaptation or assembly of being loaded and fired so as to have the potential for causing serious bodily harm during the commission of the offence or during the flight after the commission of that main offence. An operable but unloaded revolver or air pistol is a firearm because it is capable, during the commission of the offence when loaded and fired, of causing bodily injury. There is no requirement that the Crown prove that the accused was in possession of ammunition. If, however, the weapon is inoperable, then it is a firearm if, given the nature of the repairs or modifications required and the availability of parts on the scene, whatever was used could, during the commission of the offence, have been adapted by an ordinary person or by the accused, if possessing special skills, so as to be capable of firing and of causing serious injury: *R. v. Covin and Covin* (1983), 8 C.C.C. (3d) 240, 3 D.L.R. (4th) 558, [1983] 1 S.C.R. 725 (5:0).

Thus, a pistol which lacked the magazine was a firearm for the purposes of this section, although without the magazine the safety disconnecter was also engaged. The Crown is not required to prove that the accused at the time of the offence was in possession of ammunition and any of the paraphernalia, including the magazine, by which the ammunition is loaded into the weapon: *R. v. Watkins and Graber* (1987), 33 C.C.C. (3d) 465 (B.C.C.A.).

**Imposition of sentence** – It was held in *R. v. MacLean* (1979), 49 C.C.C. (2d) 552, 12 C.R. (3d) 1 (N.S.S.C. App. Div.) and *R. v. Goforth* (1986), 24 C.C.C. (3d) 573 (B.C.C.A.); *R. v. Cochrane* (1994), 88 C.C.C. (3d) 570, 67 W.A.C. 315 (B.C.C.A.); *R. v. Herrell* (1994), 88 C.C.C. (3d) 412, 69 O.A.C. 394 (C.A.), that in view of the language of subsec.(2) where the accused is convicted of several offences under subsec. (1) the sentences imposed for those offences must not only be consecutive to the indictable offence but consecutive to each other. The Court in *R. v. MacLean* did not appear to consider the further question whether where all convictions for the offence under subsec. (1) occur after the commission of the last offence the three-year minimum rather than the one-year minimum applies to all but the first conviction under this section. In *R. v. Boucher*, [1986] 1 S.C.R. 750 (5:0) the court in a brief judgment indicated that it essentially agreed with the interpretation of this section by the court of appeal in *R. v. MacLean*, *supra*. It was held in *R. v. Cheetham*, (1980), 53 C.C.C. (2d) 109, 17 C.R. (3d) 1 (Ont. C.A.). that to constitute a “second or subsequent offence” within the meaning of subsec. (1)(d) the second offence must have been committed after a previous conviction for an offence referred to in that subsection, and *R. v. Cheetham*, *supra*, was followed in *R. v. Oswald* (1981), 57 C.C.C. (2d) 484 (B.C.C.A.).

Subsection (1)(d) applies even where the accused did not actually use the firearm himself in the prior non-s. 85 offence and was merely a party to its use: *R. v. Nicholson*

(1981), 64 C.C.C. (2d) 116, 24 C.R. (3d) 284, [1981] 2 S.C.R. 600, [1982] 1 W.W.R. 385 (S.C.C.) (7:0).

At least where the underlying offence is robbery, this section does not infringe s. 12 of the Charter although it could result in the imposition of a number of consecutive sentences for offences arising out of the same series of events: *R. v. Brown*, [1994] 3 S.C.R. 749, 93 C.C.C. (3d) 97, 34 C.R. (4th) 24.

Notwithstanding the wording of subsec. (2), the sentence for the offence under this section cannot be made consecutive to a life sentence: *R. v. Cochrane* (1994), 88 C.C.C. (3d) 570, 67 W.A.C. 315 (B.C.C.A.).

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CARELESS USE OF FIREARM, ETC. / Contravention of storage regulations, etc. / Punishment.

86. (1) Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

(2) Every person commits an offence who contravenes a regulation made under paragraph 117(h) of the Firearms Act respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons.

(3) Every person who commits an offence under subsection (1) or (2)

(a) is guilty of an indictable offence and liable to imprisonment

(i) in the case of a first offence, for a term not exceeding two years, and

(ii) in the case of a second or subsequent offence, for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

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POINTING A FIREARM / Punishment.

87. (1) Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

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Possession Offences

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POSSESSION OF WEAPON FOR DANGEROUS PURPOSE / Punishment.

88. (1) Every person commits an offence who carries or possesses a weapon, an imitation of a weapon, a prohibited device or any ammunition or prohibited ammunition for a purpose dangerous to the public peace or for the purpose of committing an offence.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or

(b) is guilty of an offence punishable on summary conviction.

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CARRYING WEAPON WHILE ATTENDING PUBLIC MEETING / Punishment.

89. (1) Every person commits an offence who, without lawful excuse, carries a weapon, a prohibited device or any ammunition or prohibited ammunition while the person is attending or is on the way to attend a public meeting.

(2) Every person who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.

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CARRYING CONCEALED WEAPON / Punishment.

90. (1) Every person commits an offence who carries a weapon, a prohibited device or any prohibited ammunition concealed, unless the person is authorized under the Firearms Act to carry it concealed.

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

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UNAUTHORIZED POSSESSION OF FIREARM / Unauthorized possession of prohibited weapon or restricted weapon / Punishment / Exceptions / Borrowed firearm for sustenance.

91. (1) Subject to subsections (4) and (5) and section 98, every person commits an offence who possesses a firearm, unless the person is the holder of

- (a) a licence under which the person may possess it; and
- (b) a registration certificate for the firearm.

(2) Subject to subsection (4) and section 98, every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless the person is the holder of a licence under which the person may possess it.

(3) Every person who commits an offence under subsection (1) or (2)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

(4) Subsections (1) and (2) do not apply to

- (a) a person who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or
- (b) a person who comes into possession of a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,
  - (i) lawfully disposes of it, or
  - (ii) obtains a licence under which the person may possess it and, in the case of a firearm, a registration certificate for the firearm.

(5) Subsection (1) does not apply to a person who possesses a firearm that is neither a prohibited firearm nor a restricted firearm and who is not the holder of a registration certificate for the firearm if the person

- (a) has borrowed the firearm;
- (b) is the holder of a licence under which the person may possess it; and
- (c) is in possession of the firearm to hunt or trap in order to sustain the person or the person's family.

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POSSESSION OF FIREARM KNOWING ITS POSSESSION IS UNAUTHORIZED / Possession of prohibited weapon, device or ammunition knowing its possession is



unauthorized / Punishment / Exceptions / Borrowed firearm for sustenance / Evidence for previous conviction.

92. (1) *Subject to subsections (4) and (5) and section 98, every person commits an offence who possesses a firearm knowing that the person is not the holder of*

- (a) *a licence under which the person may possess it; and*
- (b) *a registration certificate for the firearm.*

(2) *Subject to subsection (4) and section 98, every person commits an offence who possesses a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition knowing that person is not the holder of a licence under which the person may possess it.*

(3) *Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable*

- (a) *in the case of a first offence, to imprisonment for a term not exceeding ten years;*
- (b) *in the case of a second offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; and*
- (c) *in the case of a third or subsequent offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of two years less a day.*

(4) *Subsections (1) and (2) do not apply to*

- (a) *a person who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or*
- (b) *a person who comes into possession of a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,*
  - (i) *lawfully disposes of it, or*
  - (ii) *obtains a licence under which the person may possess it and, in the case of a firearm, a registration certificate for the firearm.*

(5) *Subsection (1) does not apply to a person who possesses a firearm that is neither a prohibited firearm nor a restricted firearm and who is not the holder of a registration certificate for the firearm if the person*

- (a) *has borrowed the firearm;*
- (b) *is the holder of a licence under which the person may possess it; and*
- (c) *is in possession of the firearm to hunt or trap in order to sustain the person or the person's family.*

(6) *Where a person is charged with an offence under subsection (1), evidence that the person was convicted of an offence under subsection 112(1) of the Firearms Act is admissible at any stage of the proceedings and may be taken into consideration for the purpose of proving that the person knew that the person was not the holder of a registration certificate for the firearm to which the offence relates.*

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**POSSESSION AT UNAUTHORIZED PLACE / Punishment / Exception.**

93. (1) *Subject to subsection (3) and section 98, every person commits an offence who, being the holder of an authorization or a licence under which the person may possess a firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition, possesses the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition at a place that is*

- (a) *indicated on the authorization or licence as being a place where the person may not possess it;*

- (b) *other than a place indicated on the authorization or licence as being a place where the person may possess it; or*
  - (c) *other than a place where it may be possessed under the Firearms Act.*
- (2) *Every person who commits an offence under subsection (1)*
- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
  - (b) *is guilty of an offence punishable on summary conviction.*
- (3) *Subsection (1) does not apply to a person who possesses a replica firearm.*

**UNAUTHORIZED POSSESSION IN MOTOR VEHICLE / Punishment / Exception / Idem / Borrowed firearm for sustenance.**

94. (1) *Subject to subsections (3) to (5) and section 98, every person commits an offence who is an occupant of a motor vehicle in which the person knows there is a firearm, a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition, unless*

- (a) *in the case of a firearm,*
    - (i) *the person or any other occupant of the motor vehicle is the holder of*
      - (A) *an authorization or a licence under which the person or other occupant may possess the firearm and, in the case of a prohibited firearm or a restricted firearm, transport the prohibited firearm or restricted firearm, and*
      - (B) *a registration certificate for the firearm,*
    - (ii) *the person had reasonable grounds to believe that any other occupant of the motor vehicle was the holder of*
      - (A) *an authorization or a licence under which that other occupant may possess the firearm and, in the case of a prohibited firearm or a restricted firearm, transport the prohibited firearm or restricted firearm, and*
      - (B) *a registration certificate for the firearm, or*
    - (iii) *the person had reasonable grounds to believe that any other occupant of the motor vehicle was a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament; and*
  - (b) *in the case of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,*
    - (i) *the person or any other occupant of the motor vehicle is the holder of an authorization or a licence under which the person or other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or*
    - (ii) *the person had reasonable grounds to believe that any other occupant of the motor vehicle was*
      - (A) *the holder of an authorization or a licence under which the other occupant may transport the prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or*
      - (B) *a person who could not be convicted of an offence under this Act by reason of sections 117.07 to 117.1 or any other Act of Parliament.*
- (2) *Every person who commits an offence under subsection (1)*
- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or*
  - (b) *is guilty of an offence punishable on summary conviction.*

(3) *Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.*

(4) Subsection (1) does not apply to an occupant of a motor vehicle where the occupant or any other occupant of the motor vehicle is a person who came into possession of the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition by the operation of law.

(5) Subsection (1) does not apply to an occupant of a motor vehicle where the occupant or any other occupant of the motor vehicle is a person who possesses a firearm that is neither a prohibited firearm nor a restricted firearm and who is not the holder of a registration certificate for the firearm if the person

- (a) has borrowed the firearm;
- (b) is the holder of a licence under which the person may possess it; and
- (c) is in possession of the firearm to hunt or trap in order to sustain the person or the person's family.

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POSSESSION OF PROHIBITED OR RESTRICTED FIREARM WITH AMMUNITION /  
Punishment / Exception.

95. (1) Subject to subsection (3) and section 98, every person commits an offence who, in any place, possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of

- (a) an authorization or a licence under which the person may possess the firearm in that place; and
- (b) the registration certificate for the firearm.

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

(3) Subsection (1) does not apply to a person who is using the firearm under the direct and immediate supervision of another person who is lawfully entitled to possess it and is using the firearm in a manner in which that other person may lawfully use it.

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POSSESSION OF WEAPON OBTAINED BY COMMISSION OF OFFENCE /  
Punishment / Exception.

96. (1) Subject to subsection (3), every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person knows was obtained by the commission in Canada of an offence or by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence.

(2) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

(3) Subsection (1) does not apply to a person who comes into possession of anything referred to in that subsection by the operation of law and who lawfully disposes of it within a reasonable period after acquiring possession of it.

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SALE OF CROSS-BOW TO PERSON WITHOUT LICENCE / Punishment / Exception.

97. (1) Every person commits an offence who at any time sells, barter or gives a cross-bow to another person, unless the other person produces for inspection by the person at that time a



*licence that the person has no reasonable grounds to believe is invalid or was issued to anyone other than the other person.*

(2) *Every person who commits an offence under subsection (1)*

*(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or*

*(b) is guilty of an offence punishable on summary conviction.*

(3) *Subsection (1) does not apply to a person who lends a cross-bow to another person while that other person is under the direct and immediate supervision of a person who may lawfully possess it.*

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TRANSITIONAL — LICENCES / Transitional — licences / Transitional — registration certificates.

98. (1) *Every person who, immediately before the coming into force of any of subsections 91(1), 92(1), 93(1), 94(1) and 95(1), possessed a firearm without a firearm acquisition certificate because*

*(a) the person possessed the firearm before January 1, 1979, or*

*(b) the firearm acquisition certificate under which the person had acquired the firearm had expired,*

*shall be deemed for the purposes of that subsection to be, until January 1, 2001 or such other earlier date as is prescribed, the holder of a licence under which the person may possess the firearm.*

(2) *Every person who, immediately before the coming into force of any of subsections 91(1), 92(1), 93(1), 94(1) and 95(1), possessed a firearm and was the holder of a firearm acquisition certificate shall be deemed for the purposes of that subsection to be, until January 1, 2001 or such other earlier date as is prescribed, the holder of a licence under which the person may possess the firearm.*

(3) *Every person who, at any particular time between the coming into force of subsection 91(1), 92(1) or 94(1) and the later of January 1, 1998 and such other date as is prescribed, possesses a firearm that, as of that particular time, is not a prohibited firearm or a restricted firearm shall be deemed for the purposes of that subsection to be, until January 1, 2003 or such other earlier date as is prescribed, the holder of a registration certificate for that firearm.*

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### Trafficking Offences

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#### WEAPONS TRAFFICKING / Punishment.

99. (1) *Every person commits an offence who*

*(a) manufactures or transfers, whether or not for consideration, or*

*(b) offers to do anything referred to in paragraph (a) in respect of*

*a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition knowing that the person is not authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament.*

(2) *Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year.*

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#### POSSESSION FOR PURPOSE OF WEAPONS TRAFFICKING / Punishment.

100. (1) *Every person commits an offence who possesses a firearm, a prohibited weapon, a*

*restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of*

- (a) *transferring it, whether or not for consideration, or*
- (b) *offering to transfer it,*

*knowing that the person is not authorized to transfer it under the Firearms Act or any other Act of Parliament or any regulations made under any Act of Parliament.*

(2) *Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year.*

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**TRANSFER WITHOUT AUTHORITY / Punishment.**

101. (1) *Every person commits an offence who transfers a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition to any person otherwise than under the authority of the Firearms Act or any other Act of Parliament or any regulations made under an Act of Parliament.*

(2) *Every person who commits an offence under subsection (1)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
- (b) *is guilty of an offence punishable on summary conviction.*

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**Assembling Offence**

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**MAKING AUTOMATIC FIREARM / Punishment.**

102. (1) *Every person commits an offence who, without lawful excuse, alters a firearm so that it is capable of, or manufactures or assembles any firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger.*

(2) *Every person who commits an offence under subsection (1)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or*
- (b) *is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.*

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**Export and Import Offences**

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**IMPORTING OR EXPORTING KNOWING IT IS UNAUTHORIZED / Punishment / Attorney General of Canada may act.**

103. (1) *Every person commits an offence who imports or exports*

- (a) *a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or*
- (b) *any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,*

*knowing that the person is not authorized to do so under the Firearms Act or any other Act of Parliament or any regulations made under an Act of Parliament.*

(2) *Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year.*

(3) *Any proceedings in respect of an offence under subsection (1) may be commenced at the instance of the Government of Canada and conducted by or on behalf of that government.*

UNAUTHORIZED IMPORTING OR EXPORTING / Punishment / Attorney General of Canada may act.

104. (1) *Every person commits an offence who imports or exports*

- (a) *a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition, or*
- (b) *any component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,*

*otherwise than under the authority of the Firearms Act or any other Act of Parliament or any regulations made under an Act of Parliament.*

(2) *Every person who commits an offence under subsection (1)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
- (b) *is guilty of an offence punishable on summary conviction.*

(3) *Any proceedings in respect of an offence under subsection (1) may be commenced at the instance of the Government of Canada and conducted by or on behalf of that government.*

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Offences relating to Lost, Destroyed or Defaced Weapons, etc.

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LOSING OR FINDING / Punishment.

105. (1) *Every person commits an offence who*

- (a) *having lost a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate, or having had it stolen from the person's possession, does not with reasonable despatch report the loss to a peace officer, to a firearms officer or a chief firearms officer; or*
- (b) *on finding a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition that the person has reasonable grounds to believe has been lost or abandoned, does not with reasonable despatch deliver it to a peace officer, a firearms officer or a chief firearms officer or report the finding to a peace officer, a firearms officer or a chief firearms officer.*

(2) *Every person who commits an offence under subsection (1)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
- (b) *is guilty of an offence punishable on summary conviction.*

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DESTROYING / Punishment.

106. (1) *Every person commits an offence who*

- (a) *after destroying any firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition, or*
- (b) *on becoming aware of the destruction of any firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition that was in the person's possession before its destruction,*

*does not with reasonable despatch report the destruction to a peace officer, firearms officer or chief firearms officer.*

(2) *Every person who commits an offence under subsection (1)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or*
- (b) *is guilty of an offence punishable on summary conviction.*



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**FALSE STATEMENTS / Punishment / Definition of "report" or "statement".**

107. (1) Every person commits an offence who knowingly makes, before a peace officer, firearms officer or chief firearms officer, a false report or statement concerning the loss, theft or destruction of a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition, an authorization, a licence or a registration certificate.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

(3) In this section, "report" or "statement" means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not.

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**TAMPERING WITH SERIAL NUMBER / Punishment / Exception / Evidence.**

108. (1) Every person commits an offence who, without lawful excuse, the proof of which lies on the person,

(a) alters, defaces or removes a serial number on a firearm; or

(b) possesses a firearm knowing that the serial number on it has been altered, defaced or removed.

(2) Every person who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or

(b) is guilty of an offence punishable on summary conviction.

(3) No person is guilty of an offence under paragraph (1)(b) by reason only of possessing a firearm the serial number on which has been altered, defaced or removed, where that serial number has been replaced and a registration certificate in respect of the firearm has been issued setting out a new serial number for the firearm.

(4) In proceedings for an offence under subsection (1), evidence that a person possesses a firearm the serial number on which has been wholly or partially obliterated otherwise than through normal use over time is, in the absence of evidence to the contrary, proof that the person possesses the firearm knowing that the serial number on it has been altered, defaced or removed.

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**Prohibition Orders**

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**MANDATORY PROHIBITION ORDER / Duration of prohibition order — first offence / Duration of prohibition order — subsequent offences / Definition of "release from imprisonment" / Application of ss. 113 to 117.**

109. (1) Where a person is convicted, or discharged under section 736, of

(a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

(b) an offence under subsection 85(1) (using firearm in commission of offence), subsection 85(2) (using imitation firearm in commission of offence), 95(1) (possession of prohibited or restricted firearm with ammunition), 99(1) (weapons trafficking), 100(1) (possession for purpose of weapons trafficking), 102(1) (making automatic firearm), 103(1) (importing or exporting knowing it is unauthorized) or section 264 (criminal harassment),

(c) an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the Food and Drugs Act or subsection 4(1) or (2) or 5(1) of the Narcotic Control Act, or

**NOTE:** Subsection (1)(c) replaced 1995, c. 39, s. 188(a) (to come into force on the later

of the day on which ss. 6 and 7 of Bill C-7 (An Act respecting the control of certain drugs ...) comes into force and the day on which subsec. (1)(c) as enacted by 1995, c. 39, s. 139 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (c) *an offence relating to the contravention of subsection 6(1) or (2) or 7(1) or (2) of the Controlled Drugs and Substances Act, or*
- (d) *an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance and, at the time of the offence, the person was prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing,*

*the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2) or (3), as the case may be.*

**NOTE:** Subsection (1), as enacted by 1995, c. 39, s. 139, amended 1995, c. 39, s. 190(d) by replacing the reference to s. 736 with a reference to s. 730 (to come into force if s. 109(1), as enacted by 1995, c. 39, s. 139 comes into force after the day on which s. 730 of the Criminal Code, as enacted by 1995, c. 22, s. 6, comes into force).

(2) *An order made under subsection (1) shall, in the case of a first conviction for or discharge from the offence to which the order relates, prohibit the person from possessing*

- (a) *any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance during the period that*
  - (i) *begins on the day on which the order is made, and*
  - (ii) *ends not earlier than ten years after the person's release from imprisonment after conviction for the offence or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence; and*
- (b) *any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.*

(3) *An order made under subsection (1) shall, in any case other than a case described in subsection (2), prohibit the person from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life.*

(4) *In subparagraph (2)(a)(ii), "release from imprisonment" means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.*

(5) *Sections 113 to 117 apply in respect of every order made under subsection (1).*

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DISCRETIONARY PROHIBITION ORDER / Duration of prohibition order / Reasons / Definition of "release from imprisonment" / Application of ss. 113 to 117.

110. (1) *Where a person is convicted, or discharged under section 736, of*

- (a) *an offence, other than an offence referred to in any of paragraphs 109(1)(a), (b) and (c), in the commission of which violence against a person was used, threatened or attempted, or*
- (b) *an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and, at the time of the offence, the person was not prohibited by any order made under this Act or any other Act of Parliament from possessing any such thing.*

*the court that sentences the person or directs that the person be discharged, as the case may be, shall, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court decides that it is so desirable, the court shall so order.*

**NOTE:** Subsection (1), as enacted by 1995, c. 39, s. 139, amended 1995, c. 39, s. 190(e) by replacing the reference to s. 736 with a reference to s. 730 (to come into force if subsec. (1), as enacted by 1995, c. 39, s. 139 comes into force after the day on which s. 730 of the Criminal Code, as enacted by 1995, c. 22, s. 6, comes into force).

(2) *An order made under subsection (1) against a person begins on the day on which the order is made and ends not later than ten years after the person's release from imprisonment after conviction for the offence to which the order relates or, if the person is not then imprisoned or subject to imprisonment, after the person's conviction for or discharge from the offence.*

(3) *Where the court does not make an order under subsection (1), or where the court does make such an order but does not prohibit the possession of everything referred to in that subsection, the court shall include in the record a statement of the court's reasons for not doing so.*

(4) *In subsection (2), "release from imprisonment" means release from confinement by reason of expiration of sentence, commencement of statutory release or grant of parole.*

(5) *Sections 113 to 117 apply in respect of every order made under subsection (1).*

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APPLICATION FOR PROHIBITION ORDER / Date for hearing and notice / Hearing of Application / Where hearing may proceed ex parte / Prohibition order / Reasons / Application of ss. 113 to 117 / Appeal by person or Attorney General / Appeal by Attorney General / Application of Part XXVII to appeals / Definition of "provincial court judge".

111. (1) *A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order prohibiting a person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or of any other person that the person against whom the order is sought should possess any such thing.*

(2) *On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.*

(3) *Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.*

(4) *A provincial court judge may proceed ex parte to hear and determine an application made under subsection (1) in the absence of the person against whom the order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.*

(5) *Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order prohibiting the person from possessing any firearm,*



cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for such period, not exceeding five years, as is specified in the order, beginning on the day on which the order is made.

(6) Where a provincial court judge does not make an order under subsection (1), or where a provincial court judge does make such an order but does not prohibit the possession of everything referred to in that subsection, the provincial court judge shall include in the record a statement of the court's reasons.

(7) Sections 113 to 117 apply in respect of every order made under subsection (5).

(8) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.

(9) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.

(10) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (8) or (9), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.

(11) In this section and sections 112, 117.011 and 117.012, "provincial court judge" means a provincial court judge having jurisdiction in the territorial division where the person against whom the application for an order was brought resides.

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#### REVOCATION OF PROHIBITION ORDER UNDER S. 111(5).

112. A provincial court judge may, on application by the person against whom an order is made under subsection 111(5), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.

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#### LIFTING OF PROHIBITION ORDER FOR SUSTENANCE OR EMPLOYMENT / Factors / Effect of order / When order can be made / Meaning of "competent authority".

113. (1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that

- (a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
- (b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,

the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

(2) A competent authority may make an order under subsection (1) only after taking the following factors into account:

- (a) the criminal record, if any, of the person;
- (b) the nature and circumstances of the offence, if any, in respect of which the prohibition order was or will be made; and
- (c) the safety of the person and of other persons.

(3) Where an order is made under subsection (1),

- (a) an authorization, a licence or a registration certificate may not be denied to the person in respect of whom the order was made solely on the basis of a prohibition order against the

*person or the commission of an offence in respect of which a prohibition order was made against the person; and*

- (b) *an authorization and a licence may, for the duration of the order, be issued to the person in respect of whom the order was made only for sustenance or employment purposes and, where the order sets out terms and conditions, only in accordance with those terms and conditions, but, for greater certainty, the authorization or licence may also be subject to terms and conditions set by the chief firearms officer that are not inconsistent with the purpose for which it is issued and any terms and conditions set out in the order.*

(4) *For greater certainty, an order under subsection (1) may be made during proceedings for an order under subsection 109(1), 110(1), 111(5), 117.05(4) or 515(2), paragraph 737(2)(d) or subsection 810(3).*

**NOTE:** Subsection (4), as enacted by 1995, c. 39, s. 139, amended 1995, c. 39, s. 190(f) by replacing the reference to s. 737(2)(d) with a reference to s. 732.1(3)(d) (to come into force if subsec. (4), as enacted by 1995, c. 39, s. 139 comes into force after the day on which s. 732.1 of the Criminal Code, as enacted by 1995, c. 22, s. 6, comes into force).

(5) *In this section, "competent authority" means the competent authority that made or has jurisdiction to make the prohibition order.*

#### REQUIREMENT TO SURRENDER.

114. *A competent authority that makes a prohibition order against a person may, in the order, require the person to surrender to a peace officer, a firearms officer or a chief firearms officer*

- (a) *any thing the possession of which is prohibited by the order that is in the possession of the person on the commencement of the order, and*  
 (b) *every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order,*

*and where the competent authority does so, it shall specify in the order a reasonable period for surrendering such things and documents and during which section 117.01 does not apply to that person.*

#### FORFEITURE / Disposal.

115. (1) *Unless a prohibition order against a person specifies otherwise, every thing the possession of which is prohibited by the order that, on the commencement of the order, is in the possession of the person is forfeited to Her Majesty.*

(2) *Every thing forfeited to Her Majesty under subsection (1) shall be disposed of or otherwise dealt with as the Attorney General directs.*

#### AUTHORIZATIONS REVOKED OR AMENDED.

116. *Every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by a prohibition order and issued to a person against whom the prohibition order is made is, on the commencement of the prohibition order, revoked, or amended, as the case may be, to the extent of the prohibitions in the order.*

#### RETURN TO OWNER.

117. *Where the competent authority that makes a prohibition order or that would have had jurisdiction to make the order is, on application for an order under this section, satisfied that a person, other than the person against whom a prohibition order was or will be made,*

- (a) *is the owner of any thing that is or may be forfeited to Her Majesty under subsection 115(1) and is lawfully entitled to possess it, and*

- (b) *in the case of a prohibition order under subsection 109(1) or 110(1), had no reasonable grounds to believe that the thing would or might be used in the commission of the offence in respect of which the prohibition order was made,*

*the competent authority shall order that the thing be returned to the owner or the proceeds of any sale of the thing be paid to that owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.*

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POSSESSION CONTRARY TO ORDER / Failure to surrender authorization, etc. / Punishment / Exception.

117.01. (1) *Subject to subsection (4), every person commits an offence who possesses a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance while the person is prohibited from doing so by any order made under this Act or any other Act of Parliament.*

(2) *Every person commits an offence who wilfully fails to surrender to a peace officer, a firearms officer or a chief firearms officer any authorization, licence or registration certificate held by the person when the person is required to do so by any order made under this Act or any other Act of Parliament.*

(3) *Every person who commits an offence under subsection (1) or (2)*

- (a) *is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or*
- (b) *is guilty of an offence punishable on summary conviction.*

(4) *Subsection (1) does not apply to a person who possessed a firearm in accordance with an authorization or licence issued to the person as the result of an order made under subsection 113(1).*

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Limitations on Access

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APPLICATION FOR ORDER / Date for hearing and notice / Hearing of application / Where hearing may proceed ex parte / Order / Terms and conditions / Appeal by person or Attorney General / Appeal by Attorney General / Application of Part XXVII to appeals.

117.011. (1) *A peace officer, firearms officer or chief firearms officer may apply to a provincial court judge for an order under this section where the peace officer, firearms officer or chief firearms officer believes on reasonable grounds that*

- (a) *the person against whom the order is sought cohabits with, or is an associate of, another person who is prohibited by any order made under this Act or any other Act of Parliament from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things; and*
- (b) *the other person would or might have access to any such thing that is in the possession of the person against whom the order is sought.*

(2) *On receipt of an application made under subsection (1), the provincial court judge shall fix a date for the hearing of the application and direct that notice of the hearing be given, in such manner as the provincial court judge may specify, to the person against whom the order is sought.*

(3) *Subject to subsection (4), at the hearing of an application made under subsection (1), the provincial court judge shall hear all relevant evidence presented by or on behalf of the applicant and the person against whom the order is sought.*

(4) *A provincial court judge may proceed ex parte to hear and determine an application made*



*under subsection (1) in the absence of the person against whom the order is sought in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.*

*(5) Where, at the conclusion of a hearing of an application made under subsection (1), the provincial court judge is satisfied that the circumstances referred to in that subsection exist, the provincial court judge shall make an order in respect of the person against whom the order was sought imposing such terms and conditions on the person's use and possession of anything referred to in subsection (1) as the provincial court judge considers appropriate.*

*(6) In determining terms and conditions under subsection (5), the provincial court judge shall impose terms and conditions that are the least intrusive as possible, bearing in mind the purpose of the order.*

*(7) Where a provincial court judge makes an order under subsection (5), the person to whom the order relates, or the Attorney General, may appeal to the superior court against the order.*

*(8) Where a provincial court judge does not make an order under subsection (5), the Attorney General may appeal to the superior court against the decision not to make an order.*

*(9) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838, apply in respect of an appeal made under subsection (7) or (8), with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.*

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#### REVOCATION OF ORDER UNDER S. 117.011.

*117.012. A provincial court judge may, on application by the person against whom an order is made under subsection 117.011(5), revoke the order if satisfied that the circumstances for which it was made have ceased to exist.*

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#### Search and Seizure

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##### SEARCH AND SEIZURE WITHOUT WARRANT WHERE OFFENCE COMMITTED / Disposition of seized things.

*117.02. (1) Where a peace officer believes on reasonable grounds*

- (a) that a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence, or*
- (b) that an offence is being committed, or has been committed, under any provision of this Act that involves, or the subject-matter of which is, a firearm, an imitation firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance,*

*and evidence of the offence is likely to be found on a person, in a vehicle or in any place or premises other than a dwelling-house, the peace officer may, where the conditions for obtaining a warrant exist but, by reason of exigent circumstances, it would not be practicable to obtain a warrant, search, without warrant, the person, vehicle, place or premises, and seize any thing by means of or in relation to which that peace officer believes on reasonable grounds the offence is being committed or has been committed.*

*(2) Any thing seized pursuant to subsection (1) shall be dealt with in accordance with sections 490 and 491.*

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##### SEIZURE ON FAILURE TO PRODUCE AUTHORIZATION / Return of seized thing on production of authorization / Forfeiture of seized thing.

*117.03. (1) Notwithstanding section 117.02, a peace officer who finds*

- (a) a person in possession of a firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and a registration certificate for the firearm, or
- (b) a person in possession of a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess it,

may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.

(2) Where a person from whom any thing is seized pursuant to subsection (1) claims the thing within fourteen days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,

- (a) an authorization or a licence under which the person is lawfully entitled to possess it, and
- (b) in the case of a firearm, a registration certificate for the firearm,

the thing shall forthwith be returned to that person.

(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as and when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity to establish that the person is lawfully entitled to possess it, declare it to be forfeited to Her Majesty, to be disposed of or otherwise dealt with as the Attorney General directs.

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APPLICATION FOR WARRANT TO SEARCH AND SEIZE / Search and seizure without warrant / Return to justice / Authorizations, etc., revoked.

117.04. (1) Where, pursuant to an application made by a peace officer with respect to any person, a justice is satisfied that there are reasonable grounds to believe that it is not desirable in the interests of the safety of the person, or of any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the justice may issue a warrant authorizing a peace officer to search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

(2) Where, with respect to any person, a peace officer is satisfied that there are reasonable grounds to believe that it is not desirable, in the interests of the safety of the person or any other person, for the person to possess any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, the peace officer may, where the grounds for obtaining a warrant under subsection (1) exist but, by reason of a possible danger to the safety of that person or any other person, it would not be practicable to obtain a warrant, search for and seize any such thing, and any authorization, licence or registration certificate relating to any such thing, that is held by or in the possession of the person.

(3) A peace officer who executes a warrant referred to in subsection (1) or who conducts a search without a warrant under subsection (2) shall forthwith make a return to the justice who issued the warrant or, if no warrant was issued, to a justice who might otherwise have issued a warrant, showing

- (a) in the case of an execution of a warrant, the things or documents, if any, seized and the date of execution of the warrant; and
- (b) in the case of a search conducted without a warrant, the grounds on which it was con-

*cluded that the peace officer was entitled to conduct the search, and the things or documents, if any, seized.*

*(4) Where a peace officer who seizes any thing under subsection (1) or (2) is unable at the time of the seizure to seize an authorization or a licence under which the person from whom the thing was seized may possess the thing and, in the case of a seized firearm, a registration certificate for the firearm, every authorization, licence and registration certificate held by the person is, as at the time of the seizure, revoked.*

APPLICATION FOR DISPOSITION / Ex parte hearing / Hearing of application / Forfeiture and prohibition order on finding / Reasons / Application of ss. 113 to 117 / Appeal by person / Appeal by Attorney General / Application of part XXVII to appeals.

*117.05. (1) Where any thing or document has been seized under subsection 117.04(1) or (2), the justice who issued the warrant authorizing the seizure or, if no warrant was issued, a justice who might otherwise have issued a warrant, shall, on application for an order for the disposition of the thing or document so seized made by a peace officer within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be, fix a date for the hearing of the application and direct that notice of the hearing be given to such persons or in such manner as the justice may specify.*

*(2) A justice may proceed ex parte to hear and determine an application made under subsection (1) in the absence of the person from whom the thing or document was seized in the same circumstances as those in which a summary conviction court may, under Part XXVII, proceed with a trial in the absence of the defendant.*

*(3) At the hearing of an application made under subsection (1), the justice shall hear all relevant evidence, including evidence respecting the value of the thing in respect of which the application was made.*

*(4) Where, following the hearing of an application made under subsection (1), the justice finds that it is not desirable in the interests of the safety of the person from whom the thing was seized or of any other person that the person should possess any weapon, prohibited device, ammunition, prohibited ammunition and explosive substance, or any such thing, the justice shall*

- (a) order that any thing seized be forfeited to Her Majesty or be otherwise disposed of; and*
- (b) where the justice is satisfied that the circumstances warrant such an action, order that the possession by that person of any weapon, prohibited device, ammunition, prohibited ammunition and explosive substance, or of any such thing, be prohibited during any period, not exceeding five years, that is specified in the order, beginning on the making of the order.*

*(5) Where a justice does not make an order under subsection (4), or where a justice does make such an order but does not prohibit the possession of all of the things referred to in that subsection, the justice shall include in the record a statement of the justice's reasons.*

*(6) Sections 113 to 117 apply in respect of every order made under subsection (4).*

*(7) Where a justice makes an order under subsection (4) in respect of a person, or in respect of any thing that was seized from a person, the person may appeal to the superior court against the order.*

*(8) Where a justice does not make a finding as described in subsection (4) following the hearing of an application under subsection (1), or makes the finding but does not make an order to the effect described in paragraph (4)(b), the Attorney General may appeal to the superior court against the failure to make the finding or to make an order to the effect so described.*

*(9) The provisions of Part XXVII, except sections 785 to 812, 816 to 819 and 829 to 838,*



*apply in respect of an appeal made under subsection (7) or (8) with such modifications as the circumstances require and as if each reference in that Part to the appeal court were a reference to the superior court.*

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WHERE NO FINDING OR APPLICATION / Restoration of authorizations.

117.06. (1) *Any thing or document seized pursuant to subsection 117.04(1) or (2) shall be returned to the person from whom it was seized if*

- (a) no application is made under subsection 117.05(1) within thirty days after the date of execution of the warrant or of the seizure without a warrant, as the case may be; or*
- (b) an application is made under subsection 117.05(1) within the period referred to in paragraph (a), and the justice does not make a finding as described in subsection 117.05(4).*

*(2) Where, pursuant to subsection (1), any thing is returned to the person from whom it was seized and an authorization, a licence or a registration certificate, as the case may be, is revoked pursuant to subsection 117.04(4), the justice referred to in paragraph (1)(b) may order that the revocation be reversed and that the authorization, licence or registration certificate be restored.*

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Exempted Persons

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PUBLIC OFFICERS / Definition of “public officer”.

117.07. (1) *Notwithstanding any other provision of this Act, but subject to section 117.1, no public officer is guilty of an offence under this Act or the Firearms Act by reason only that the public officer*

- (a) possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance in the course of or for the purpose of the public officer’s duties or employment;*
- (b) manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition in the course of the public officer’s duties or employment;*
- (c) exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition in the course of the public officer’s duties or employment;*
- (d) exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm in the course of the public officer’s duties or employment;*
- (e) in the course of the public officer’s duties or employment, alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger;*
- (f) fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance that occurs in the course of the public officer’s duties or employment or the destruction of any such thing in the course of the public officer’s duties or employment; or*
- (g) alters a serial number on a firearm in the course of the public officer’s duties or employment.*

*(2) In this section, “public officer” means*

- (a) a peace officer;*
- (b) a member of the Canadian Forces or of the armed forces of a state other than Canada who is attached or seconded to any of the Canadian forces;*

- (c) *an operator of a museum established by the Chief of the Defence Staff or a person employed in any such museum;*
- (d) *a member of a cadet organization under the control and supervision of the Canadian Forces;*
- (e) *a person training to become a police officer or a peace officer under the control and supervision of*
  - (i) *a police force, or*
  - (ii) *a police academy or similar institution designated by the Attorney General of Canada or the lieutenant governor in council of a province;*
- (f) *a member of a visiting force, within the meaning of section 2 of the Visiting Forces Act, who is authorized under paragraph 14(a) of that Act to possess and carry explosives, ammunition and firearms;*
- (g) *a person, or member of a class of persons, employed in the public service of Canada or by the government of a province or municipality who is prescribed to be a public officer; or*
- (h) *a chief firearms officer and any firearms officer.*

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**INDIVIDUALS ACTING FOR POLICE FORCE, CANADIAN FORCES AND VISITING FORCES.**

**117.08.** *Notwithstanding any other provision of this Act, but subject to section 117.1, no individual is guilty of an offence under this Act or the Firearms Act by reason only that the individual*

- (a) *possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any prohibited ammunition or an explosive substance,*
- (b) *manufactures or transfers, or offers to manufacture or transfer, a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition,*
- (c) *exports or imports a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition,*
- (d) *exports or imports a component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm,*
- (e) *alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger,*
- (f) *fails to report the loss, theft or finding of any firearm, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or the destruction of any such thing, or*
- (g) *alters a serial number on a firearm,*

*if the individual does so on behalf of, and under the authority of, a police force, the Canadian Forces, a visiting force, within the meaning of section 2 of the Visiting Forces Act, or a department of the Government of Canada or of a province.*

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**EMPLOYEES OF BUSINESS WITH LICENCE /** *Employees of business with licence / Employees of carriers / Employees of museums handling functioning imitation antique firearm / Employees of museums handling firearms generally / Public safety / Conditions.*

**117.09. (1)** *Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is the holder of a licence to possess and acquire restricted firearms and who is employed by a business as defined in subsection 2(1) of the Firearms Act that itself is the holder of a licence that authorizes the business to carry out specified activities in relation to prohibited firearms, prohibited weapons, prohibited devices or prohibited ammunition is guilty of an*

offence under this Act or the Firearms Act by reason only that the individual, in the course of the individual's duties or employment in relation to those specified activities,

- (a) possesses a prohibited firearm, a prohibited weapon, a prohibited device or any prohibited ammunition;
- (b) manufactures or transfers, or offers to manufacture or transfer, a prohibited weapon, a prohibited device or any prohibited ammunition;
- (c) alters a firearm so that it is capable of, or manufactures or assembles any firearm with intent to produce a firearm that is capable of, discharging projectiles in rapid succession during one pressure of the trigger; or
- (d) alters a serial number on a firearm.

(2) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a business as defined in subsection 2(1) of the Firearms Act that itself is the holder of a licence is guilty of an offence under this Act or the Firearms Act by reason only that the individual, in the course of the individual's duties or employment, possesses, manufactures or transfers, or offers to manufacture or transfer, a partially manufactured barrelled weapon that, in its unfinished state, is not a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person.

(3) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a carrier, as defined in subsection 2(1) of the Firearms Act, is guilty of an offence under this Act or that Act by reason only that the individual, in the course of the individual's duties or employment, possesses any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or prohibited ammunition or transfers, or offers to transfer any such thing.

(4) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the Firearms Act that itself is the holder of a licence is guilty of an offence under this Act or the Firearms Act by reason only that the individual, in the course of the individual's duties or employment, possesses or transfers a firearm that is designed or intended to exactly resemble, or to resemble with near precision, an antique firearm if the individual has been trained to handle and use such a firearm.

(5) Notwithstanding any other provision of this Act, but subject to section 117.1, no individual who is employed by a museum as defined in subsection 2(1) of the Firearms Act that itself is the holder of a licence is guilty of an offence under this Act or the Firearms Act by reason only that the individual possesses or transfers a firearm in the course of the individual's duties or employment if the individual is designated, by name, by a provincial minister within the meaning of subsection 2(1) of the Firearms Act.

(6) A provincial minister shall not designate an individual for the purpose of subsection (4) where it is not desirable, in the interests of the safety of any person, to designate the individual.

(7) A provincial minister may attach to a designation referred to in subsection (4) any reasonable condition that the provincial minister considers desirable in the particular circumstances and in the interests of the safety of any person.

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#### RESTRICTION.

117.1. Sections 117.07 to 117.09 do not apply if the public officer or the individual is subject to a prohibition order and acts contrary to that order or to an authorization or a licence issued under the authority of an order made under subsection 113(1).



General

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**ONUS ON THE ACCUSED.**

*117.11. Where, in any proceedings for an offence under any of sections 89, 90, 91, 93, 97, 101, 104 and 105, any question arises as to whether a person is the holder of an authorization, a licence or a registration certificate, the onus is on the accused to prove that the person is the holder of the authorization, licence or registration certificate.*

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**AUTHORIZATIONS, ETC., AS EVIDENCE / Certified copies.**

*117.12. (1) In any proceedings under this Act or any other Act of Parliament, a document purporting to be an authorization, a licence or a registration certificate is evidence of the statements contained therein.*

*(2) In any proceedings under this Act or any other Act of Parliament, a copy of any authorization, licence or registration certificate is, if certified as a true copy by the Registrar or a chief firearms officer, admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the authorization, licence or registration certificate would have had if it had been proved in the ordinary way.*

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**CERTIFICATE OF ANALYST / Attendance of analyst / Notice of intention to produce certificate / Proof of service / Attendance for examination.**

*117.13. (1) A certificate purporting to be signed by an analyst stating that the analyst has analyzed any weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or any part or component of such a thing, and stating the results of the analysis is evidence in any proceedings in relation to any of those things under this Act or under section 19 of the Export and Import Permits Act in relation to subsection 15(2) of that Act without proof of the signature or official character of the person appearing to have signed the certificate.*

*(2) The party against whom a certificate of an analyst is produce may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.*

*(3) No certificate of an analyst may be admitted in evidence unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.*

*(4) For the purposes of this Act, service of a certificate of an analyst may be proved by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served it.*

*(5) Notwithstanding subsection (4), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service.*

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**AMNESTY PERIOD / Purposes of amnesty period / Reliance on amnesty period / Proceedings are a nullity.**

*117.14. (1) The Governor in Council may, by order, declare for any purpose referred to in subsection (2) any period as an amnesty period with respect to any weapon, prohibited device, prohibited ammunition, explosive substance or component or part designed exclusively for use in the manufacture of or assembly into an automatic firearm.*

*(2) An order made under subsection (1) may declare an amnesty period for the purpose of*  
*(a) permitting any person in possession of any thing to which the order relates to do anything provided in the order, including, without restricting the generality of the foregoing, deliv-*

*ering the thing to a peace officer, a firearms officer or a chief firearms officer, registering it, destroying it or otherwise disposing of it; or*

- (b) *permitting alterations to be made to any prohibited firearm, prohibited weapon, prohibited device or prohibited ammunition to which the order relates so that it no longer qualifies as a prohibited firearm, a prohibited weapon, a prohibited device or prohibited ammunition, as the case may be.*

(3) *No person who, during an amnesty period declared by an order made under subsection (1) and for a purpose described in the order, does anything provided for in the order, is, by reason only of the fact that the person did that thing, guilty of an offence under this Part.*

(4) *Any proceedings taken under this Part against any person for anything done by the person in reliance of this section are a nullity.*

#### REGULATIONS / Restriction.

117.15. (1) *Subject to subsection (2), the Governor in Council may make regulations prescribing anything that by this Part is to be or may be prescribed.*

(2) *In making regulations, the Governor in Council may not prescribe any thing to be a prohibited firearm, a restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or prohibited ammunition if, in the opinion of the Governor in Council, the thing to be prescribed is reasonable for use in Canada for hunting or sporting purposes.*

## Part IV / OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE

### Interpretation

DEFINITIONS / “Evidence” or “statement” / “Government” / “Judicial proceeding” / “Office” / “Official” / “Witness”.

#### 118. In this Part

“evidence” or “statement” means an assertion of fact, opinion, belief or knowledge, whether material or not and whether admissible or not;

“government” means

- (a) the Government of Canada,
- (b) the government of a province, or
- (c) Her Majesty in right of Canada or a province;

“judicial proceeding” means a proceeding

- (a) in or under the authority of a court of justice,
  - (b) before the Senate or House of Commons or a committee of the Senate or House of Commons, or before a legislative council, legislative assembly or house of assembly or a committee thereof that is authorized by law to administer an oath,
  - (c) before a court, judge, justice, provincial court judge or coroner,
  - (d) before an arbitrator or umpire, or a person or body of persons authorized by law to make an inquiry and take evidence therein under oath, or
  - (e) before a tribunal by which a legal right or legal liability may be established,
- whether or not the proceeding is invalid for want of jurisdiction or for any other reason;

“office” includes

- (a) an office or appointment under the government,

- (b) a civil or military commission, and
- (c) a position or an employment in a public department;

"official" means a person who

- (a) holds an office, or
- (b) is appointed to discharge a public duty;

"witness" means a person who gives evidence orally under oath or by affidavit in a judicial proceeding, whether or not he is competent to be a witness, and includes a child of tender years who gives evidence but does not give it under oath, because, in the opinion of the person presiding, the child does not understand the nature of an oath. R.S., c. C-34, s. 107; R.S.C. 1985, c. 27 (1st Supp.), s. 15.

#### CROSS-REFERENCES

In addition to the definitions set out in this section, applicable to offences created by this Part, reference should also be made to s. 2 and in particular the definitions of "justice", "provincial court judge", "peace officer", "public department", "public officer" and "Attorney General".

#### ANNOTATIONS

"evidence" – This definition, which has appeared in slightly different forms since the 1982 Code, was intended to avoid the difficulty at common law that, to prove perjury, it was necessary to show that the statement was material in the sense that, unless it related to the exact issue which was under consideration then the offence was not made out: *Drew v. The King* (1902), 6 C.C.C. 241 (Que. K.B., App. Side), affd 6 C.C.C. 424, 33 S.C.R. 228.

"judicial proceeding" – While it had been held in several earlier cases, notably *R. v. Kohel* (1926), 46 C.C.C. 279, [1926] 3 W.W.R. 478 (Sask. K.B.); *R. v. Rulofson* (1908), 14 C.C.C. 253 (B.C.S.C.) and *R. v. Allen* (1924), 43 C.C.C. 118, [1925] 1 D.L.R. 57 (Man. K.B.), that a civil examination for discovery is not a judicial proceeding where the official who administered the oath was not present during the examination, the Saskatchewan Court of Appeal has now held to the contrary in *R. v. Foster and Walton-Ball* (1982), 69 C.C.C. (2d) 484, [1982] 5 W.W.R. 363, and overruled *R. v. Kohel*. The absence of the official, in this case the deputy local registrar, was held not to invalidate the proceedings.

Properly interpreted, the relevant provision of the provincial Securities Act authorized the Registrar to require a person to submit to an examination under oath before him and, accordingly, such proceedings fell within para. (d) of this definition: *Re M.C. Shumtacher* (1961), 131 C.C.C. 259, [1962] S.C.R. 38, 31 D.L.R. (2d) 2 (Judson J. in chambers).

Although they were not entitled to make a final decision, persons, appointed under the provincial Securities Act to conduct an investigation and question witnesses under oath, were authorized by law to make an "inquiry" within the meaning of para. (d) and, accordingly, the proceeding was a judicial proceeding: *R. v. Thomson* (1974), 2 O.R. (2d) 644 (Co. Ct.).

"office" – This definition does not apply to an office under a municipal government so as to determine liability for the offence, contrary to s. 123, of offering a benefit to a municipal official [defined in s. 123(3), *inter alia*, as a person who holds an office under a municipal government]. The court, therefore, properly applied the dictionary definition of "office" as, *inter alia*, "A position to which certain duties are attached, esp. a place of trust, authority, or service under constituted authority.": *Belzberg v. The Queen* (1961), 131 C.C.C. 281, [1962] S.C.R. 254, 37 W.W.R. 97, 36 C.R. 368 (5:0).

"official" – The expression "means" used in this definition is of an explanatory and restrictive nature and in contradistinction to the expression "includes", used in the definition of "office", *supra*, which is of an extensive nature. It follows that, the definition in



this subsection being governed by the definition of “office”, an official is a person who holds an office either within the meaning in para. (a), (b) or (c) of that definition, or within the usual meaning of the word office, which can be ascertained by reference to dictionaries, meaning in part, a “position of duty, trust, or authority, esp., in the public service, or in some corporation, society or the like” or a “position to which certain duties are attached, esp. a place of trust, authority, or service under constituted authority.” An elected member of a municipal council was, therefore, an official holding an office within the meaning of para. (a) and was also within the definition in para. (b). As regards the latter, while the term “appointed” is often used in contrast to the word “elected”, Parliament could not have intended any such distinction: *R. v. Sheets* (1971), 1 C.C.C. (2d) 508, [1971] S.C.R. 614, 16 D.L.R. (3d) 221, 15 C.R.N.S. 232 (9:0).

A member of the Legislative Council of Quebec appointed by the Lieutenant-Governor in the name of The Queen is an official within the meaning of para. (ii): *Martineau v. The Queen*, [1966] 4 C.C.C. 327, [1966] S.C.R. 103, 48 C.R. 209 (5:0).

“witness” – The reference to a “child of tender years” in this definition is apparently a reference to former s. 16 of the Canada Evidence Act, which provided for the taking of the unsworn evidence of such a child. Section 16 has now been amended to provide for the taking of unsworn evidence of a “person under fourteen years of age or a person whose mental capacity is challenged”, who does not understand the nature of an oath or a solemn affirmation, but is able to communicate the evidence and who promises to tell the truth.

Section 14(2) of the Canada Evidence Act provides that evidence by a person, who makes a solemn affirmation in accordance with s. 14(1), has the same effect as if taken under oath and by s. 15(2), a person, who makes a solemn affirmation under s. 14(1), is liable to indictment and punishment for perjury in all respects as if he had been sworn. The form of the solemn affirmation is prescribed by s. 14(1).

While s. 13 of the Canada Evidence Act authorizes the administering of an oath, neither the Criminal Code nor the Canada Evidence Act prescribe a form of oath and no particular form was prescribed at common law. The essential element of an oath is that it be in a form which binds the conscience of the witness as a solemn appeal to the witness’ deity: *R. v. Lee Tuck and Lung Tung* (1912), 19 C.C.C. 471, 5 D.L.R. 629, 2 W.W.R. 605 (Alta. S.C.).

A witness who takes a certain form of oath, without objection, in the form generally administered to persons of his faith, agreeing that it binds his conscience, cannot thereafter be heard to say that he was not sworn: *Shajoo Ram v. The King* (No. 2) (1915), 25 C.C.C. 69, 51 S.C.R. 392, 26 D.L.R. 267 (5:0).

## Corruption and Disobedience

### BRIBERY OF JUDICIAL OFFICERS, ETC. / Consent of Attorney General.

#### 119. (1) Every one who

- (a) being the holder of a judicial office, or being a member of Parliament or of the legislature of a province, corruptly
  - (i) accepts or obtains,
  - (ii) agrees to accept, or
  - (iii) attempts to obtain,
 any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity, or
- (b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment in respect of anything

done or omitted or to be done or omitted by him in his official capacity for himself or another person,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.  
R.S., c. C-34, s. 108.

#### CROSS-REFERENCES

The term "office" is defined in s. 118. The term "corruptly" is not defined in this Part but has been considered by the courts in relation to the secret commission offence in s. 426 where it was held not to mean wickedly or dishonestly but to refer to an act done *mala fides*, designed wholly or partially for the purpose of bringing about the effect forbidden by the section: *R. v. Brown* (1956), 116 C.C.C. 287 (Ont. C.A.).

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2. Conviction for this offence may, in some circumstances, result in loss of the office by virtue of s. 748(1) and other disabilities as prescribed by s. 748(2).

Where the accused is the holder of a judicial office, the consent in writing of the Attorney General of Canada is required (subsec. (2)) and the offence may only be tried by a superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. [Note, attempt and conspiracy to commit the offence by the holder of a judicial office would not fall within the exclusive jurisdiction of the superior court.] It would also seem that, by virtue of s. 522, only a judge of a superior court can release on bail in such circumstances.

In all other cases, the accused has an election as to mode of trial under s. 536(2) and release pending trial is dealt with under s. 515.

#### SYNOPSIS

Sections 119 to 130 deal generally with corruption and disobedience of court orders. Section 119 creates offences which apply both to the person who *accepts a bribe* and to the person who *offers a bribe*. The *offer*, the *acceptance*, the *agreement to accept* or the *attempt to obtain* make out the full offence. It is an element of both offences that the offer, acceptance or solicitation must be done *corruptly* and there must be an attempt to influence the office-holder in his or her official capacity.

The seriousness of this offence is recognized by the maximum sentence of 14 years imprisonment.

Subsection (2) requires the consent of the federal Attorney General before a prosecution can be launched against a judge.

#### ANNOTATIONS

The corrupt act of a Member of Parliament does not have to be in connection with his legislative duties, it may be in connection with his participation in an administrative act of government: *R. v. Bruneau*, [1964] 1 C.C.C. 97, 42 C.R. 93 (Ont. C.A.).

In *Arseneau v. The Queen* (1979), 45 C.C.C. (2d) 321, [1979] 2 S.C.R. 136 (7:2) the majority of the Court rejected the proposition that a member of the Legislature who is also a minister of the Crown is to be taken not to be acting in his official capacity as a member in respect of acts and decisions which he makes in the administration of his ministry. In the absence of evidence to the contrary it must be accepted that it was as a member that he was appointed a minister it being the generally accepted practice that a minister participate in the process of obtaining legislative authority for implementing his policies and approving expenditures. Thus his capacity as a member cannot be so severed from his functions as a minister as to make it an offence under this section to bribe him as a member but no offence to bribe the same person in his capacity as minister.

On a charge under this section the use to be made of the money received is irrelevant.

Thus, it is no defence that the Member used the money for non-reimbursable expenses he incurred as a Member of Parliament: *R. v. Yanakis* (1981), 64 C.C.C. (2d) 374 (Que. C.A.).

## **BRIBERY OF OFFICERS.**

### **120. Every one who**

- (a) being a justice, police commissioner, peace officer, public officer or officer of a juvenile court, or being employed in the administration of criminal law, corruptly
  - (i) accepts or obtains,
  - (ii) agrees to accept, or
  - (iii) attempts to obtain,
 for himself or any other person any money, valuable consideration, office, place or employment with intent
  - (iv) to interfere with the administration of justice,
  - (v) to procure or facilitate the commission of an offence, or
  - (vi) to protect from detection or punishment a person who has committed or who intends to commit an offence, or
- (b) gives or offers, corruptly, to a person mentioned in paragraph (a) any money, valuable consideration, office, place or employment with intent that the person should do anything mentioned in subparagraph (a)(iv), (v) or (vi),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 109.

## **CROSS-REFERENCES**

The terms “justice”, “peace officer” and “public officer” are defined in s. 2. The term “office” is defined in part in s. 118; see notes of that term under that section. The term “juvenile court” would appear to refer to an officer of the “juvenile court” as defined in s. 2 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 (now repealed). The Young Offenders Act now only contains definitions of “youth court” and “youth worker”. The term “corruptly” is not defined in this Part but has been considered by the courts in relation to the secret commission offence in s. 426 where it was held not to mean wickedly or dishonestly, but to refer to an act done *mala fides* designed wholly or partially for the purpose of bringing about the effect forbidden by the section: *R. v. Brown* (1956), 116 C.C.C. 287 (Ont. C.A.).

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and falls within the definition of “enterprise crime offence” in s. 462.3 for the purposes of Part XII.2. Conviction for this offence may, in some circumstances, result in loss of the office by virtue of s. 748(1) and other disabilities as prescribed by s. 748(2).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is governed by s. 515.

## **SYNOPSIS**

This section parallels s. 119 in many ways, creating offences both relating to the *person offering* the bribe and the *person who accepts* or agrees to accept it. The group of public officers is different from those captured by s. 119, with this section targeting *police officers*, justices and others involved in the *administration of the criminal law*. Again, as with s. 119, the offer or acceptance must be done *corruptly*. The maximum punishment for this offence is 14 years imprisonment.

The acts need not involve the officers in their public capacity. However, the *intent* must be to interfere with justice, making it easier for another person to commit an offence or to protect an offender from detection or punishment. There is no need to obtain the consent of the Attorney General to prosecute under this section.



## ANNOTATIONS

**"administration of justice"** – It was held, considering the predecessor of this section, that the "administration of justice" is not limited to apprehended proceedings in respect of crimes in the strict sense but extends to proceedings in respect of provincial offences. Further it was immaterial whether the police officer actually intended to institute a prosecution; it sufficed if the accused was apprehensive of a prosecution and gave the bribe to prevent it: *Kalick v. The King* (1920), 35 C.C.C. 159, 61 S.C.R. 175 (5:1).

The term "the administration of justice" in this section refers to events leading up to the imposition of sentence and does not cover the administrative structure that governs convicts after they have been sentenced: *R. v. Smalbrugge* (1984), 19 C.C.C. (3d) 283 (B.C. Co. Ct.).

**"an offence"** – "Offence" in para. (a)(vi) includes the contravention of a valid provincial statute: *R. v. Sommerville*, [1963] 3 C.C.C. 240, 40 C.R. 384 (Sask. C.A.).

**mens rea** – The offence contrary to para. (b) is a specific intent offence for which drunkenness is a defence. Further, evidence of good character adduced by the accused may not only serve to support the accused's credibility but must be considered from the standpoint of whether the accused as a person of good character was likely to have committed this offence unless he was so drunk as to lack the capacity to form the requisite intent: *R. v. Dees* (1978), 40 C.C.C. (2d) 58 (Ont. C.A.).

## FRAUDS ON THE GOVERNMENT / Contractor subscribing to election fund / Punishment.

### 121. (1) Every one commits an offence who

#### (a) directly or indirectly

- (i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or
- (ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person, a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
- (iii) the transaction of business with or any matter of business relating to the government, or
- (iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;
- (b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies on him;
- (c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him;
- (d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

- (i) anything mentioned in subparagraph (a)(iii) or (iv), or
  - (ii) the appointment of any person, including himself, to an office;
  - (e) gives, offers or agrees to give or offer to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with
    - (i) anything mentioned in subparagraph (a)(iii) or (iv), or
    - (ii) the appointment of any person, including himself, to an office; or
  - (f) having made a tender to obtain a contract with the government
    - (i) gives, offers or agrees to give or offer to another person who has made a tender or to a member of his family, or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or
    - (ii) demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender.
- (2) Every one commits an offence who, in order to obtain or retain a contract with the government, or as a term of any such contract, whether express or implied, directly or indirectly subscribes or gives, or agrees to subscribe or give, to any person any valuable consideration
- (a) for the purpose of promoting the election of a candidate or a class or party of candidates to Parliament or the legislature of a province; or
  - (b) with intent to influence or affect in any way the result of an election conducted for the purpose of electing persons to serve in Parliament or the legislature of a province.
- (3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 110.

#### CROSS-REFERENCES

The terms “official” and “government” are defined in s. 118. The term “office” is defined, in part, in s. 118; see notes of that term under that section. The term “person” is defined in s. 2. With respect to the offences set out in subsec. (1)(f), also see “bid-rigging” offence in s. 47 of the Competition Act, R.S.C. 1985, c. C-34.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and falls within the definition of “enterprise crime offence” in s. 462.3 for the purposes of Part XII.2. Conviction for this offence bars the accused from contracting with Her Majesty or from receiving any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty, by virtue of s. 748(3), unless the capacity is restored by the Governor in Council under s. 748(4).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

#### SYNOPSIS

Section 121 creates a number of offences relating to *frauds upon government* and is aimed, in part, at what is known as *influence peddling*. As with ss. 119 and 120, offences are created to catch both the government officials (or a family member of such officials) and the person offering the bribe.

Section 121(1)(a), which deals specifically with influence peddling, catches a wide range of activities, including offers of *loans or benefits offered for the purpose of obtaining an advantage* in government business or benefits which the government may confer. There is no requirement that the official be actually able to be of assistance to bring about the result sought to be obtained. As with most offences created by this section, it

is broad enough to encompass situations in which the intended recipient of the benefit is a *family member* of the government official.

Section 121(1)(b) creates an offence applicable to the *person who confers* an advantage or benefit upon an employee or an official of the government, by a *person who has any kind of dealings with the government*. The person offering the benefit must do so with the *intention* of conferring a benefit, however, no offence is committed where he has the *consent in writing* of the head of the branch of government, with which he deals, to do so. The accused must prove the existence of such consent.

Section 121(1)(c) creates a companion offence to the previous paragraph, and is aimed at the *employee* or official who *receives the reward* or benefit. The broad scope of this paragraph extends to benefits to *family members* of the accused official. As with the previous paragraph, the defence of consent by senior officials is provided and the onus is on the accused to demonstrate their consent.

Section 121(1)(d) and (e) create companion offences aimed at the *person demanding and the person accepting a reward* and the person offering the reward for the same purposes as in subsec. (1)(a) or to obtain the *appointment of any person to an office*. This offence requires the *intention* on the part of the person agreeing to accept the benefit of influencing, or pretending to do so, a minister or other employee of the government. The offence requires more than merely seeking access to governmental officials; the gravamen of the offence is attempting to *influence decisions*.

Section 121(1)(f) is aimed at the attempted *influencing of government tendering processes*. This paragraph creates offences for both sides of this type of corrupt deal-making. The key aspect of this offence is to offer or accept, the reward, advantage and so on, for the *purpose* of having *competing tenders withdrawn* from consideration.

Subsection (2) deals with attempts to curtail improper ties between those who have or seek to obtain government contracts and those who seek (or who wish to retain) elected office in the federal or provincial legislatures. The subsection is aimed at the intention to promote one or more candidate or to influence such elections to attain or retain government contracts. This offence prohibits *valuable consideration* being given, or promised, for such purpose directly or indirectly. The maximum punishment for the breach of this subsection is, by virtue of subsec. (3), five years imprisonment.

## ANNOTATIONS

**Subsec. (1)** – In *R. v. Giguere et al.* (1983), 8 C.C.C. (3d) 1, 37 C.R. (3d) 1, [1983] 2 S.C.R. 448 (4:1) it was held by three of the five judges (including Wilson, J., dissenting) that “influence” as used in this section refers to actually affecting a decision such as awarding a contract. However, co-operation and assistance are not so limited and would include opening doors or arranging meetings as the first step in an effort by another to secure a government contract. While the mere arranging of a meeting, for example, is not itself a crime it becomes so when a benefit is given, offered or demanded for the arranging of the meeting respecting the matters listed in this subsection and the person who receives or demands it is an official or one having or pretending to have influence in the relevant sense. A person having influence in the government in this sense is one who could affect, for example, a decision by the government to award a contract and similarly a person who pretends to have influence is a person who pretends he could affect such a government decision.

**Subsec. (1)(a)** – The application of this subsection is not confined to a person who holds office or has responsibility for the administration of law or justice but is also aimed at a person who exercises legislative functions and thus the offence may be committed by an appointed member of the Legislative Council of Quebec. The gist of the offence is influence peddling and the section is aimed at the improper use, actual or pretended, of the real or pretended influence that the official enjoys. It is not necessary to prove that the prohibited conduct was committed by the person in his official capacity: *Martineau v. The Queen*, [1966] 4 C.C.C. 327, [1966] S.C.R. 103.



**Subsec. (1)(b)** – It was held in *R. v. Cooper* (1977), 34 C.C.C. (2d) 18, 37 C.R.N.S. (S.C.C.) that the offence is not one of strict liability, but is one requiring proof of *mens rea* of the intention to confer a benefit with respect to dealings with the Government. It was also held (4:3) that the jury was not misdirected by the Judge directing them that the offence was committed if the funds were conferred “directly or indirectly” in relation to the dealings.

In *R. v. Achtem* (1979), 52 C.C.C. (2d) 240, 13 C.R. (3d) 199, 11 Alta. L.R. (2d) 151 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, it was held that the accused had dealings with the “government” where his dealings were with the Alberta Housing Corporation, a corporation created by provincial statute whose board of directors was appointed by the Executive Council and consisted of Deputy-Ministers and performed the functions designated by the Lieutenant-Governor in Council. Where, as in this case, the statute does not specifically provide whether or not the corporation is a Crown corporation the test is the nature and degree of control exercised by the Crown over it.

**Subsec. (1)(c)** – The offence under this subsection is committed even where the accused has received only the true value of services rendered outside his working hours where the compensation was received from a person who has dealings with the Government and the accused did not have the consent of his department head: *Dore v. A.-G. Can.* (1974), 15 C.C.C. (2d) 542, [1975] 1 S.C.R. 756, reheard in part 17 C.C.C. (2d) 359, [1975] 1 S.C.R. at p. 784.

A government employee receives an “advantage” or “benefit” within the meaning of this paragraph when the employee receives something of value which, in all of the circumstances, the trier of fact concludes constitutes a profit to the employee (or a family member) derived, in part at least, because the employee is a government employee or because of the nature of the work done by the employee for the government. Thus, this would include not only arrangements involving a *quid pro quo* but also where the employee gets something because he is a government employee, even though the giver expects nothing in return and the employee has done nothing to earn the thing given. In making the determination of whether or not there has been an advantage or benefit, an objective assessment of all the relevant evidence must be made and not exclusively by reference to the employee’s subjective state of mind. Once the prosecution has proved receipt of a benefit or advantage, there is no need for proof of any intent by the employee to exercise some undue influence in favour of the person giving the benefit. It is sufficient that there is proof that the employee decided to accept the thing offered with knowledge of the relevant circumstances: *R. v. Greenwood* (1991), 67 C.C.C. (3d) 435, 5 O.R. (3d) 71 (C.A.).

The fact that this paragraph does not set out the mental element required for proof of the offence or that the section is extremely broad does not render it so vague as to be unconstitutional and infringe the principles of fundamental justice as guaranteed by s. 7 of the Charter. However, the placing of the burden on the accused to prove the existence of written consent from the head of the department violates the guarantee to the presumption of innocence in s. 11(d) of the Charter. Accordingly, the words “the proof of which lies on him” must be deleted: *R. v. Fisher* (1994), 88 C.C.C. (3d) 103, 28 C.R. (4th) 63, 17 O.R. (3d) 295 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vii, 119 D.L.R. (4th) vi, 25 C.R.R. (2d) 188n.

**Subsec. (1)(d)** – This subsection is limited to persons who have, or pretend to have, a significant nexus with government. This means someone who could or pretends he could affect, for example, a decision by government to award a contract. It is not directed at persons who are merely able to arrange a meeting with government officials: *R. v. Giguere et al.* (1983), 8 C.C.C. (2d) 1, 37 C.R. (3d) 1, [1983] 2 S.C.R. 448.

In light of the wide definition of “person” in s. 2 an unincorporated political association such as the Nova Scotia Liberal Association may constitute a “person”, within the

meaning of this paragraph: *R. v. Barrow* (1987), 38 C.C.C. (3d) 193, [1987] 2 S.C.R. 694.

### **BREACH OF TRUST BY PUBLIC OFFICER.**

**122. Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person. R.S., c. C-34, s. 111.**

#### **CROSS-REFERENCES**

The term "official" is defined in s. 118. The term "office" is defined, in part, in s. 118; see notes of that term under that section. Breach of trust by a trustee is an offence under s. 336. The secret commission offence is found in s. 426.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

#### **ANNOTATIONS**

**Breach of trust** – In *R. v. Campbell*, [1967] 3 C.C.C. 250, 50 C.R. 270 (Ont. C.A.); affirmed 2 C.R.N.S. 403 (S.C.C.), it was held that breach of trust under this section is not to be confused with any necessity of breach of a trust in respect to trust property, as it merely relates to an abuse of public trust.

This offence requires proof that the accused is an official, that the impugned acts were committed in the general context of the execution of his duties and that the acts constituted a fraud or a breach of trust. Where the allegation is that the acts constituted a breach of trust, while it is not necessary to prove corruption, it must be shown that the accused did an act or failed to do an act contrary to the duty imposed upon him by statute, regulation, his contract of employment or directive in connection with his office and that the act gave him some personal benefit either directly or indirectly. This benefit could be payment of money or merely the hope of a promotion or a desire to please a superior. The criminal law should not be used as a sanction to punish mere technical breaches of conduct or acts of administrative indiscipline or administrative fault. What the law prohibits is some act done in furtherance of personal ends, the use of one's office in a public service for the promotion of private ends or to obtain directly or indirectly some benefit: *R. v. Perreault* (1992), 75 C.C.C. (3d) 445, 48 Q.A.C. 303 (C.A.).

The accused, the town's mayor, was properly convicted upon evidence that he misled a constituent as to the value of the constituent's land and endeavoured to procure it for himself for personal profit. The work of a public servant must be a real service in which no concealed pecuniary self-interest should bias the judgment of the officer and in which the substantial truth of every transaction should be made to appear: *R. v. McKitka* (1982), 66 C.C.C. (2d) 164, 35 B.C.L.R. 116 (C.A.), citing *R. v. Arnoldi* (1892), 23 O.R. 201 (H.C.J.).

**"Official"** / *also see note under s. 118* – Despite s. 123 an elected municipal official is an official holding office under this section: *R. v. Sheets* (1971), 1 C.C.C. (2d) 508, 16 D.L.R. (3d) 221 (S.C.C.) (9:0).

### **MUNICIPAL CORRUPTION / Influencing municipal official / Definition of "municipal official".**

#### **123. (1) Every one who**

(a) gives, offers or agrees to give or offer to a municipal official, or

(b) being a municipal official, demands, accepts or offers or agrees to accept from any person, a loan, reward, advantage or benefit of any kind as consideration for the official

(c) to abstain from voting at a meeting of the municipal council or a committee thereof,

(d) to vote in favour of or against a measure, motion or resolution,

(e) to aid in procuring or preventing the adoption of a measure, motion or resolution, or

(f) to perform or fail to perform an official act,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

**(2) Every one who**

(a) by suppression of the truth, in the case of a person who is under a duty to disclose the truth,

(b) by threats or deceit, or

(c) by any unlawful means,

influences or attempts to influence a municipal official to do anything mentioned in paragraphs (1)(c) to (f) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

**(3) In this section, “municipal official” means a member of a municipal council or a person who holds an office under a municipal government. R.S., c. C-34, s. 112; R.S.C. 1985, c. 27 (1st Supp.), s. 16.**

#### CROSS-REFERENCES

A municipal official may also be convicted of the offence under s. 122. Bribery, etc., of other officials is dealt with in ss. 119 and 120.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

#### SYNOPSIS

This section is aimed at *municipal officials* who seek out or accept *benefits to be influenced* and those who offer such benefits. The section contains its own expanded definitions of the class of person included within the term “municipal official”. The prohibited activities are limited to efforts at influencing such officials in the performance of *job related responsibilities*, including voting for a resolution, or doing (or not doing) an official act. Also, it is an offence to enlist the assistance of an official (or for the official to offer) to influence others to vote for or against any resolution.

Subsection (2) is aimed at the party seeking to influence officials in those actions outlined above (*i.e.*, voting for or against a resolution, or doing or not doing an official act) by a variety of means, including using threats, unlawful means or by the suppression of the truth by those who have a duty to tell the truth. This indictable offence has a maximum punishment of five years imprisonment.

#### ANNOTATIONS

In *Belzberg v. The Queen* (1961), 131 C.C.C. 281, 36 C.R. 368 (S.C.C.), it was held that the chief building inspector in Calgary held office under a municipal government and that, if he had complied with the requests made to him, he would have failed to perform an official act. Note that the word “office” in subsec. (3) was interpreted by reference to dictionaries and that it was held that the definition in s. 118 does not apply to this section.



**SELLING OR PURCHASING OFFICE.****124. Every one who**

- (a) purports to sell or agrees to sell an appointment to or a resignation from an office, or a consent to any such appointment or resignation, or receives or agrees to receive a reward or profit from the purported sale thereof, or
  - (b) purports to purchase or gives a reward or profit for the purported purchase of any such appointment, resignation or consent, or agrees or promises to do so,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 113.

**CROSS-REFERENCES**

The term "office" is defined, in part, in s. 118; see notes with respect to that term under that section. Similar offences, relating to attempting to influence appointments to offices, are dealt with in s. 125.

Conviction for this offence bars the accused from contracting with Her Majesty or from receiving any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty, by virtue of s. 748(3), unless the capacity is restored by the Governor in Council under s. 748(4).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**SYNOPSIS**

This section creates the offence of *agreeing to sell or purchase a public office*, to arrange the resignation from such office or to arrange the appointment of a person to such office. No sale need take place; the agreement to carry out one side of transaction of the proposed buying, selling, purchasing, etc., establishes the criminal liability. This indictable offence carries a five year maximum punishment.

**INFLUENCING OR NEGOTIATING APPOINTMENTS OR DEALING IN OFFICES.****125. Every one who**

- (a) receives, agrees to receive, gives or procures to be given, directly or indirectly, a reward, advantage or benefit of any kind as consideration for cooperation, assistance or exercise of influence to secure the appointment of any person to an office,
  - (b) solicits, recommends or negotiates in any manner with respect to an appointment to or resignation from an office, in expectation of a direct or indirect reward, advantage or benefit, or
  - (c) keeps without lawful authority, the proof of which lies on him, a place for transacting or negotiating any business relating to
    - (i) the filling of vacancies in offices,
    - (ii) the sale or purchase of offices, or
    - (iii) appointments to or resignations from offices,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 114.

**CROSS-REFERENCES**

The term "office" is defined, in part, in s. 118; see notes with respect to that term under that section. Similar offences, relating to purchasing or sale of offices, are dealt with in s. 125.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**SYNOPSIS**

Section 125 prohibits attempts to influence or negotiate appointments to, or resignations from, office. Paragraphs (a) and (b) create criminal liability for a person who agrees to receive any benefit and the person who offers such benefit, respectively. The expansive language includes *indirect benefits of any kind*.

Paragraph (c) prohibits keeping a place for the purpose of business relating to the resignation from or appointments to offices or sales or purchases of offices. This paragraph permits the *defence of lawful authority* but the accused has the burden of proof of establishing it. This indictable offence has a maximum punishment of five years imprisonment.

**ANNOTATIONS**

Proof of corrupt intent is not an element of this offence: *R. v. Auger* (1942), 78 C.C.C. 136 (Que. Ct. Sess.). *Contra: R. v. Melnyk* (1938), 71 C.C.C. 362, [1939] 1 D.L.R. 270 (Alta. S.C.).

**DISOBEYING A STATUTE / Attorney General of Canada may act.**

**126. (1)** Every one who, without lawful excuse, contravenes an Act of Parliament by wilfully doing anything that it forbids or by wilfully omitting to do anything that it requires to be done is, unless a punishment is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**(2)** Any proceedings in respect of a contravention of or conspiracy to contravene an Act mentioned in subsection (1), other than this Act, may be instituted at the instance of the Government of Canada and conducted by or on behalf of that Government. **R.S., c. C-34, s. 115; 1974-75-76, c. 93, s. 4.**

**CROSS-REFERENCES**

Conspiracy is defined in s. 465.

The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**SYNOPSIS**

This section creates the offence of contravening any federal Act by *wilfully doing* any act prohibited thereby or *wilfully failing to do* any act required to be done by that Act. Such acts or omissions are punishable by a term of imprisonment not exceeding two years, *if the Act does not create its own punishment*. Up to two years is the minimum punishment created by the Criminal Code for indictable offences.

The section permits the defence of lawful excuse but, unlike many other sections in this Part of the Criminal Code, the onus of proving the lawful excuse is not shifted to the accused.

For offences covered by subsec. (1), other than those created by the Criminal Code, the *federal government may commence prosecution* for the offence, or conspiracy to commit the offence.

**ANNOTATIONS**

**Subsec. (1)** – An accused’s mistaken belief as to his legal obligations as imposed by the Act of Parliament does not constitute a lawful excuse within the meaning of this subsection: *R. v. Parrot* (1979), 51 C.C.C. (2d) 539, 27 O.R. (2d) 333 (C.A.), leave to appeal to S.C.C. refused *loc. cit.* C.C.C.

**Subsec. (2)** – This subsection is *intra vires* Parliament: *R. v. Parrot*, *supra*. [Also see notes under definition of “Attorney General” in s. 2.]

### DISOBEYING ORDER OF COURT / Attorney General of Canada may act.

127. (1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Where the order referred to in subsection (1) was made in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, any proceedings in respect of a contravention of or conspiracy to contravene that order may be instituted and conducted in like manner. R.S., c. C-34, s. 116; 1974-75-76, c. 93, s. 5.

### CROSS-REFERENCES

The term “Act” is defined in s. 2. Conspiracy is defined in s. 465.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

### SYNOPSIS

The indictable offence created by this section is *disobeying an order of a court* or other person or body established by legislation to give orders *if there is no other penalty* specified for such disobedience. Orders to pay money are specifically excluded from the operation of the section. The maximum punishment for this offence is two years imprisonment.

As with s. 126, the federal government may prosecute if the order disobeyed was made by proceedings commenced by and prosecuted by (or on behalf of) the federal government.

### ANNOTATIONS

The words “lawful order” apply to an order of a Court either criminal or civil in nature, such as an order enjoining one party to a matrimonial dispute from molesting the other. Further, the inherent power of the Court to punish for contempt is not a mode of proceeding expressly provided by law within the meaning of the exception so as to bar a conviction under subsec. (1): *R. v. Clement* (1981), 61 C.C.C. (2d) 449, 23 C.R. (3d) 193, [1981] 2 S.C.R. 468 (7:0).

### MISCONDUCT OF OFFICERS EXECUTING PROCESS.

128. Every peace officer or coroner who, being entrusted with the execution of a process, wilfully

(a) misconducts himself in the execution of the process, or

(b) makes a false return to the process,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 117.

### CROSS-REFERENCES

The term “peace officer” is defined in s. 2. The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). Section 29 imposes certain duties on anyone executing a process. The use of force in enforcement of the law is principally dealt with under s. 25. Personating a peace officer is an offence under s. 130.



The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

### SYNOPSIS

Section 128 is limited in its application to offences committed by *peace officers* or *coroners* in connection with their duties to *execute process*. It is a criminal offence for such persons to *wilfully* engage in *misconduct* in the execution of this process or to make a *false return* to the process. Section 128 creates an indictable offence punishable by a maximum sentence of two years imprisonment.

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### OFFENCES RELATING TO PUBLIC OR PEACE OFFICER.

#### 129. Every one who

- (a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,
- (b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he is required to do so, or
- (c) resists or wilfully obstructs any person in the lawful execution of a process against lands or goods or in making a lawful distress or seizure,

is guilty of

- (d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or
- (e) an offence punishable on summary conviction. R.S., c. C-34, s. 118; 1972, c. 13, s. 7.

### CROSS-REFERENCES

The terms “peace officer” and “public officer” are defined in s. 2. The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.) where, however, reference was made to *Rice v. Connolly*, [1966] 2 Q.B. 414 (C.A.), a case of wilfully obstructing a constable in the execution of his duty. In that case, “wilful” was held to mean not only intentional but “something which is done without lawful excuse”.

Offence of assaulting a peace officer in execution of duty, see s. 270 and see also, notes under that section for further discussion of meaning of “execution of his duty”. The offence of attempting to obstruct justice is in s. 139, of public mischief in s. 140 and escape offences in ss. 144 to 147. Misconduct by a peace officer in executing process is an offence under s. 128. Section 29 imposes certain duties on anyone executing a process. The use of force in enforcement of the law is principally dealt with under s. 25 and see notes under that section. Sections 494 and 495 deal specifically with warrantless arrest powers. Additional duties are imposed and powers given under other provisions of the Code, especially in Parts I and II, respecting breach of the peace and more serious disorders. Personating a peace officer is an offence under s. 130.

Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offences in this section is, in certain circumstances, liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

## SYNOPSIS

This section creates an offence of *wilfully obstructing* or resisting a peace or public officer, or a person assisting that officer in the execution of his duties.

As a precondition to conviction under para. (a), it must be shown that the *purpose* of the accused's actions was to *obstruct the officer* and that the officer was *engaged in the execution of his duties*.

Paragraphs (a) and (c) require proof that the accused either *resisted* or *wilfully obstructed* the carrying out of these duties. Section 129(b) dictates that the accused receive *reasonable notice* that the accused's *assistance* is required to arrest a person or to preserve the peace and the accused has *no reasonable excuse* for refusing to assist.

These offences are punishable by summary conviction proceedings or by way of indictment. In the latter case, the maximum punishment is two years imprisonment.

## ANNOTATIONS

**Conduct amounting to obstruction of peace officer** – Although the accused, a bicyclist, committed no provincial offence by refusing to identify himself to a police officer who had found him committing the summary conviction offence of going through a red light contrary to the Motor-vehicle Act (B.C.), since the officer had no power to arrest the accused under s. 495(2) (applicable to provincial offences by virtue of the Summary Convictions Act (B.C.) except if arrest was necessary to, *inter alia*, “establish the identity of the person”, the officer by requesting the accused to identify himself was carrying out the duty of enforcing the law and when the accused refused to accede to the officer's request he was obstructing the officer in the performance of his duties: *R. v. Moore* (1978), 43 C.C.C. (2d) 83, 90 D.L.R. (3d) 112, [1979] 1 S.C.R. 195 (5:2).

However, no charge lay under this section where the accused refused to identify herself in circumstances where the officer had no evidence that she had committed any offence: *R. v. Guthrie* (1982), 69 C.C.C. (2d) 216, 28 C.R. (3d) 395 (Alta. C.A.).

A person is not guilty of obstructing a peace officer merely by doing nothing, unless there is a legal duty to act arising at common law or by statute. The refusal of a motorist to hand over a radar detecting device could not constitute obstruction. The police officer had the right to arrest the accused if necessary to search him, but the refusal did not amount to obstruction. Willful obstruction of a police officer requires either some positive act, such as concealment of evidence, or an omission to do something which one is legally obliged to do: *R. v. Lavin* (1992), 76 C.C.C. (3d) 279, 16 C.R. (4th) 112, [1992] R.J.Q. 1843 (C.A.).

An accused could not be convicted of this offence for failing to comply with the order of a police officer to comply with a municipal by-law where the by-law was later held to be *ultra vires*. Moreover, even if the by-law were valid, since the applicable provincial legislation provided other means of enforcement such as ticketing the offender, and since the accused did not interfere with that procedure, the accused could not be charged with this offence merely for disobeying the officer's order: *R. v. Sharma* (1993), 79 C.C.C. (3d) 142, 100 D.L.R. (4th) 167, 19 C.R. (4th) 329, [1993] 1 S.C.R. 650.

In *R. v. Long*, [1970] 1 C.C.C. 313, 8 C.R.N.S. 298 (B.C.C.A.), it was held that the exercise of the right of the prisoner or someone speaking for him to know the reason for arrest does not *per se* amount to obstruction.

Any privilege which a person placed under arrest may have to resist that arrest where he is not informed of the reason for the arrest does not extend to a friend of the person and will not constitute a defence to a charge of obstructing a police officer where the friend interferes with the arrest: *R. v. Saunders* (1977), 34 C.C.C. (2d) 243, 38 C.R.N.S. 33 (N.S.C.A.).

In *R. v. Westlie* (1971), 2 C.C.C. (2d) 315, [1971] 2 W.W.R. 417 (B.C.C.A.) the accused was convicted of wilfully obstructing a peace officer where on several occasions he stopped people in the “skid row” area of the city and pointed out to those people that the officer, who was in plain clothes for the purpose of detecting and arresting beggars,

was a police officer. The members of the Court in three separate opinions were of the view that the officer was in the execution of his duty at the time and that the accused's conduct constituted a wilful obstruction of that duty in that it completely frustrated him in the duty in which he was engaged.

It is the purpose of the wilful obstruction, not its result, that goes to the offence and accordingly the fact that the assault did not prevent the peace officer from executing his duty is not a defence: *R. v. Tortolano, Kelly and Cadwell* (1975), 28 C.C.C. (2d) 562 (Ont. C.A.), overruling *R. v. Bakin* (1973), 14 C.C.C. (2d) 541 (Ont. Co. Ct.).

Section 254(3) places a duty on a motorist to remain in the presence of the officer until he has completed the duties imposed on the officer by the section. Thus, an accused may be convicted of the offence contrary to this section where he flees the scene before the officer has had an opportunity to make a demand that he provide breath samples for analysis in the breathalyzer: *R. v. Quist* (1981), 61 C.C.C. (2d) 207, 11 Sask. R. 28 (C.A.).

However, in *R. v. Gall* (1984), 28 M.V.R. 91, 35 Sask. R. 138 (Q.B.) the accused was acquitted of the offence under this section where he took flight after he had registered a "fail" on the roadside screening device and *after* the officer had given him the breathalyzer demand. The accused's identity was known and the officer had completed his duties under the section. The accused should have been charged with failing or refusing to comply with the breathalyzer demand.

**Conduct amounting to resisting** – A charge of resisting an officer in the execution of his duty will lie under this section where the accused resists an officer to whom he has been delivered by other officers even when the accused is arrested for a summary conviction offence and is ultimately acquitted of that charge. Although s. 495(1)(b) of the Code limits the power of arrest to where an officer "finds [the accused] committing" the offence the validity of the arrest is to be determined in relation to the circumstances which were apparent to the officer at the time the arrest was made. In any event an officer who receives an accused into custody from other officers is in the execution of his duty pursuant to s. 31(2) of the Code: *R. v. Biron* (1975), 23 C.C.C. (2d) 513, 30 C.R.N.S. 109 (S.C.C.) (5:3).

**Execution of his duty / also see notes under s. 270** – An officer would be in the execution of his duty in forcibly entering private premises where he believes on reasonable and probable grounds that he is confronted with an emergency situation involving the preservation of life of a person in the dwelling-house, or the prevention of serious injury to that person, and if a proper announcement is made prior to entry: *R. v. Custer* (1984), 12 C.C.C. (3d) 372, [1984] 4 W.W.R. 133 (Sask. C.A.).

There is an implied authority for a person to proceed from the gate to the front door of a house and police officers on premises by invitation may, as well, have a reasonable time to leave following revocation of an invitation to enter. Thereafter, however, in the absence of common law or statutory authority, the officer is no longer in the execution of his duty if he remains on the premises. A mere failure to keep the peace does not of itself empower the police to enter private premises: *R. v. Thomas* (1991), 67 C.C.C. (3d) 81, 91 Nfld. & P.E.I.R. 341 (Nfld. C.A.), affd 78 C.C.C. (3d) 575n (S.C.C.). *R. v. Evans* (1996), 29 W.C.B. (2d) 276 (S.C.C.).

An officer is not in the execution of his duty where he is seeking to enforce a law which has been repealed even though he honestly and reasonably believes that the law exists: *R. v. Houle* (1985), 24 C.C.C. (3d) 57, 48 C.R. (3d) 284, [1986] 2 W.W.R. 328 (Alta. C.A.).

A peace officer need not be involved in the investigation of a specific crime, with an identifiable suspect, in order to be "in execution of his duty". The officer will be engaged "in execution of his duty" if, at any given time while on duty, a peace officer's activities fall within the duties and responsibilities of a peace officer described by statute or common law. However, something more than merely being "on duty" or "at work" is



required before a peace officer will be "in the execution of his duty". Further, while the accused cannot be convicted unless he knew that the officer was engaged in the execution of a duty, the accused need not know the specifics of that duty in detail: *R. v. Noel* (1995), 101 C.C.C. (3d) 183, 104 W.A.C. 191 (B.C.C.A.).

**Failing to assist officer / para. (b)** – It is no defence to a charge under para. (b) that the person whom the officer sought to arrest was the accused's son. The assistance contemplated by para. (b) may be either verbal or physical depending on the circumstances but if the verbal assistance is obviously ineffectual then it is incumbent on the person to whom the request has been made to offer such physical assistance as may be required: *R. v. Foster* (1981), 65 C.C.C. (2d) 388, 27 C.R. (3d) 187 (Alta Q.B.).

**Obstructing execution of process / para. (c)** – It is no defence to a charge under this section arising out of the obstructing of a sheriff attempting to levy a distress pursuant to a warrant valid on its face, that the warrant may have been a nullity due to some procedural irregularity: *R. v. Fritz* (1979), 58 C.C.C. (2d) 285 (B.C.C.A.).

## PERSONATING PEACE OFFICER.

### 130. Every one who

- (a) falsely represents himself to be a peace officer or a public officer, or
  - (b) not being a peace officer or public officer, uses a badge or article of uniform or equipment in a manner that is likely to cause persons to believe that he is a peace officer or a public officer, as the case may be,
- is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 119.

### CROSS-REFERENCES

The terms "peace officer" and "public officer" are defined in s. 2. The offence of obstructing a peace officer is in s. 129 and see notes under that section. Misconduct by a peace officer in executing process is an offence under s. 128. Other personation offences are dealt with in ss. 403 to 405.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

### SYNOPSIS

The final section in this group of offences creates the summary conviction offence of *personating a peace officer*. The offence may be committed by a person either by actually *representing himself as a peace officer* or public officer, or by using a *badge or other equipment* which is likely to cause others to believe that he is such an officer.

### ANNOTATIONS

*Mens rea* is an essential element of this offence and where a municipality-licensed bailiff mistakenly believes that he is a peace officer, he must be acquitted of impersonation: *R. v. Wallace*, *R. v. Hall*, *R. v. Leach* (1959), 125 C.C.C. 72 (Ont. Mag. Ct.).

The offence under para. (a) of this section requires proof of a misrepresentation as a peace officer or public officer as defined in s. 2, which implicitly means a person vested with powers within Canada. Thus, it would not be an offence under para. (a) for the accused to falsely represent that he was a United States Sheriff's officer: *R. v. Saleman* (1984), 19 C.C.C. (3d) 526 (Ont. Co. Ct.).

## Misleading Justice

### PERJURY / Idem / Application.

**131. (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.**

**(2) Subsection (1) applies whether or not a statement referred to in that subsection is made in a judicial proceeding.**

**(3) Subsection (1) does not apply to a statement referred to in that subsection that is made by a person who is not specially permitted, authorized or required by law to make that statement. R.S., c. C-34, s. 120; R.S.C. 1985, c. 27 (1st Supp.), s. 17.**

### CROSS-REFERENCES

The terms “statement”, and “judicial proceeding” are defined in s. 118. As to oath and solemn affirmation, see the notes concerning “witness” under s. 118 and ss. 13 to 16 of the Canada Evidence Act. Perjury is created an indictable offence by s. 132, which also prescribes the punishment. The requirement for corroboration is set out in s. 133. The related offence for cases excepted by the proviso in subsec. (3) is found in s. 134. The offence of giving contradictory evidence is in s. 136. The offence of fabricating evidence is in s. 137 and offences relating to affidavits in s. 138. The offence of attempting to obstruct justice is in s. 139. Note that s. 13 of the Canadian Charter of Rights, which otherwise protects against the use of prior testimony, does not apply to prosecutions for the offences of perjury and giving contradictory evidence. Section 5 of the Canada Evidence Act, which also protects against use of prior testimony, does not apply in a prosecution for perjury in the giving of that evidence.

Section 585 provides that no count charging perjury is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the statement was made, or the subject of the inquiry, or the words used, or that it does not expressly negative the words used. However, s. 587(1)(a) provides for the furnishing of particulars in perjury cases.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

### SYNOPSIS

This section spells out the parameters of the offence of *perjury*. It requires proof of several discrete elements, including that the *statement* made must be *false* and that the *accused knew that it was false*. There must also be an *intent to mislead*. The false statement may have been made *under oath or solemn affirmation*, orally, by affidavit or solemn declaration. Section 131 has been amended to encompass the contents of two earlier sections: one related to perjury committed in judicial proceedings, and the other to extra-judicial proceedings. Section 131(2) removes this distinction by stating that the offence may be committed regardless of whether the false statement was made in a judicial proceeding. Another element of the offence is that the person before whom the statement is sworn, affirmed or declared must be authorized to receive such statements, and includes persons such as a judge at trial, a commissioner for the taking of oaths and a notary public.

Subsection (3) excludes liability under this section if the person making the false statement was not specially authorized or required by law to make a statement.

### ANNOTATIONS

**Relationship to other offences** – It would appear that the effect of the amendments to this section and former s. 122 are to create a single offence of perjury which may be committed either by making false statements in a judicial proceeding (former s. 120) or in

extrajudicial proceedings (former s. 122). This would overcome the problems encountered in cases such as *R. v. Wilson* (1977), 33 C.C.C. (2d) 383, [1977] 2 W.W.R. 520 (Alta. C.A.) and *R. v. Hewson* (1977), 35 C.C.C. (2d) 407 (Ont. C.A.), where the accused who swore a false affidavit was held to have been improperly charged with the former s. 122 offence since the affidavit, being intended for use in judicial proceedings, civil or criminal, the offence, if any, was perjury as defined by the former s. 120.

**Elements of offence generally** – In *R. v. Calder* (1960), 129 C.C.C. 202, [1960] S.C.R. 892 (9:0), Cartwright J. summarized the elements of this offence as requiring proof beyond a reasonable doubt that the evidence specified in the indictment was false in fact, that the accused when he gave it knew that it was false, and that he gave it with intent to mislead the court. Judson J. pointed out that where the most that can be found against the accused is that evidence he gave was in error then this affords no basis for the inference of the requisite knowledge and intent.

Mere carelessness or even recklessness in giving testimony on collateral matters, without any intent to mislead and give false evidence, does not amount to the offence of perjury: *Besner v. The Queen* (1975), 33 C.R.N.S. 122 (Que. C.A.).

Where the accused had given a complete statement to the police which he confirmed and then gave evidence at the preliminary inquiry that he knew to be false when he testified that he did not remember either being beaten or seeing at that time the two men who were charged with assaulting him, the argument that he could not be said to have had any intent to mislead the Court when there was no other evidence before it against which his failure of recollection could be measured was rejected. It was held that those non-recollections were “evidence” as defined under this Part of the Criminal Code, and the fact that a Court could or would not be misled does not alone preclude a finding that the accused intended to mislead it, for in the absence of other evidence as to the accused’s intention the inference could properly be drawn that in so doing what he did he intended to mislead the Court: *Wolf v. The Queen* (1974), 17 C.C.C. (2d) 425, 27 C.R.N.S. 150 (S.C.C.) (9:0).

For there to be perjury, there has to be more than a deliberate false statement. The statement must also have been made with intent to mislead. In an exceptional case, an accused may be able to show that while he deliberately lied, he did not do so with intent to mislead: *R. v. Hebert* (1989), 49 C.C.C. (3d) 59, [1989] 1 S.C.R. 233, 22 Q.A.C. 101.

In assessing whether or not perjury has occurred, the trier of fact must have all of the evidence of the accused bearing on the impugned testimony. However, an outright confession to prior perjury in testimony given several weeks earlier in the same proceeding cannot qualify as an explanatory statement to show that there was no intent to mislead: *R. v. Zazulak* (1993), 84 C.C.C. (3d) 303, [1993] 8 W.W.R. 614, 12 Alta. L.R. (3d) 125 (C.A.), affd [1994] 25 S.C.R. 5n, 88 C.C.C. (3d) 415n, [1994] 5 W.W.R. 457.

**Proof that testimony false** – In *Farris v. The Queen*, [1965] 3 C.C.C. 245, [1965] 2 O.R. 396 (Ont. C.A.), it was held that it is no defence if the accused’s statement is literally true if he well knew and intended that the statement should be taken in another sense.

**Proof of record** – Proof of the record of proceedings in a civil action was made by exemplification, relying on s. 23 of the Canada Evidence Act. While s. 28 of the Canada Evidence Act requires at least 7 days notice where a “copy” of the record is produced, that requirement does not apply to exemplifications, being a “certified transcript under the great seal or under the seal of a particular court”: *R. v. Kobold* (1927), 48 C.C.C. 290, [1927] 3 W.W.R. 294, 37 Man. L.R. 37 (C.A.). In *R. v. Tatomir* (1989), 51 C.C.C. (3d) 321, 69 Alta. L.R. (2d) 305 (C.A.), the court considered the admissibility of a certified copy of a driving prohibition to prove an offence under s. 259. The court held that, at common law, judicial documents could be proved by the production of the original record or an exemplification under the seal of the court to which the record belongs without notice.



**Requirement of oath or solemn affirmation** – A witness who takes a certain form of oath, without objection, in the form generally administered to persons of his faith, agreeing that it binds his conscience, cannot thereafter be heard to say that he was not sworn: *Shajoo Ram v. The King* (No. 2) (1915), 25 C.C.C. 69, 51 S.C.R. 392, 26 D.L.R. 267 (5:0).

There is no statutory requirement as to the method of proof of the fact of a witness being sworn and thus, evidence of the court reporter and the instructing police officer that they both heard the oath being administered to the accused was sufficient proof of the administration of the oath. That the proof might have been made by other or different means, such as by the official record of the court or the testimony of the official who administered the oath, did not render the evidence of these witnesses inadmissible: *R. v. Pfahler*, [1963] 2 C.C.C. 289 (Ont. C.A.).

**Effect of s. 5 of Canada Evidence Act** – Where the accused had testified on a trial under the protection of s. 5 of the Canada Evidence Act that certain statements he had made at an earlier inquest and preliminary inquiry were false, his trial evidence could not later be used on prosecution for perjury in respect of his testimony at the inquest and preliminary inquiry. The provision in s. 5 applies only to perjury in the giving of “that evidence”, i.e., the evidence which it is alleged is false: *R. v. Kruchkovski* (1925), 43 C.C.C. 299, [1925] 2 D.L.R. 167, [1925] 1 W.W.R. 426 (Sask. C.A.).

**Double jeopardy / also see notes under s. 613** – As long as it does not amount to a retrial of the original offence and particularly where the Crown is able to rely upon his subsequent contrary testimony an acquitted accused may be tried for his prior perjured denial of his commission of the original offence: *R. v. Gushue* (1976), 32 C.C.C. (2d) 189, 35 C.R.N.S. 304 (Ont. C.A.), affd 50 C.C.C. (2d) 417, 30 N.R. 204 (S.C.C.) (7:0) holding that this principle applies to a prosecution under s. 124 [now s. 136] as well. Also see *Grdic v. The Queen* (1985), 19 C.C.C. (3d) 289, 46 C.R. (3d) 1 (S.C.C.), noted under s. 613, *infra*.

**Permitted, authorized or required by law (subsec. (3)) / also see notes under s. 134** – An affidavit which the legislator has not permitted, authorized or required, in short, an affidavit which has no legal meaning or scope is exempted from the perjury offence: *R. v. Boisjoly* (1971), 5 C.C.C. (2d) 309, [1972] S.C.R. 42, 23 D.L.R. (3d) 190 (5:0). [Considering former s. 122 of R.S.C. 1970, c. C-34 which made it an offence for a person being permitted, authorized or required by law to make a statement by affidavit, knowing it to be a false statement.]

## PUNISHMENT.

**132. Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, but if a person commits perjury to procure the conviction of another person for an offence punishable by death, the person who commits perjury is liable to a maximum term of imprisonment for life.** R.S., c. C-34, s. 121; R.S.C. 1985, c. 27 (1st Supp.), s. 17.

## CROSS-REFERENCES

The offence of perjury is defined in s. 131. The requirement for corroboration is set out in s. 133. As to related offences, see notes under s. 131. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

## SYNOPSIS

Section 132 states the punishment for the indictable offence of perjury. In any case in which the perjury is committed to convict another for an offence punishable by death (as

is still possible for a few offences under the National Defence Act), the accused may be imprisoned for life. In any other perjury case, the maximum sentence is 14 years.

## CORROBORATION.

**133. No person shall be convicted of an offence under section 132 on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused.** R.S., c. C-34, s. 122; R.S.C. 1985, c. 27 (1st Supp.), s. 17.

## CROSS-REFERENCES

The offence of perjury is defined in s. 131 and punishment is set out in s. 132. For related offences, see notes under s. 131.

## SYNOPSIS

This section deals with an evidentiary requirement in a perjury prosecution. Before an accused may be convicted of perjury, there must be *corroboration of a material particular* if there is only one witness to the offence giving evidence.

## ANNOTATIONS

**Application to party to offence** – Although this section also applies to the offence of subornation of perjury as laid down under s. 21, where the charge is inciting [now counselling] to commit perjury that was not in fact committed this section does not apply to the proof of the lesser s. 464 offence: *R. v. Kyling* (1970), 2 C.C.C. (2d) 79, 15 D.L.R. (3d) 351 (S.C.C.) (5:0).

**Evidence amounting to corroboration** – While corroboration may be required on a charge of suborning perjury, it is only the perjury that requires corroboration not the accused's participation in the perjury and his knowledge of the falsity of the witness' evidence: *R. v. Doz* (1984), 12 C.C.C. (3d) 200, 52 A.R. 321 (C.A.).

There is a conflict in the authorities as to what element of the offence must be corroborated. Thus, it was held in *R. v. Nash* (1914), 23 C.C.C. 38, 17 D.L.R. 725, 7 Alta. L.R. 449 (C.A.), that it was sufficient to show corroboration of the element of the offence that the testimony was false. *R. v. Pattyson* (1973), 12 C.C.C. (2d) 174, [1973] 5 W.W.R. 203 (Sask. C.A.), seems to be to the same effect. However, in *Boisjoly v. The Queen* (1970), 11 C.R.N.S. 265 (Que. C.A.), it was held that there must be corroboration of the accused's knowledge of the falsity of the evidence.

While corroboration is required of a material particular it need not be with respect to a contested issue: *R. v. Van Straten* (1994), 89 C.C.C. (3d) 470, 149 A.R. 259, 63 W.A.C. 259 (C.A.).

In *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 161, [1990] 2 S.C.R. 3, [1990] 4 W.W.R. 577, 77 C.R. (3d) 327 (5:0), the court considered the effect of now repealed s. 586, which provided that no person shall be convicted on the unsworn evidence of a child "unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused". The wording is thus almost identical to this section. It was there held that the requirement that the corroborating evidence implicate the accused requires only that the evidence confirm, in some material particular, the story of the witness giving the evidence which required corroboration. The confirming evidence need not also itself implicate the accused.

However, in *R. v. Thind* (1991), 64 C.C.C. (3d) 301 (B.C.C.A.) the court refused to apply *R. v. B. (G.)*, *supra*, and held that, to be capable of corroboration under this section, the evidence from the other witness must be in contradiction to what has been sworn to by the accused in the previous proceeding. The requirement of more than one witness must be as to the falsity of the statement alleged to be perjured and it is not sufficient that the evidence simply confirms the reliability or trustworthiness of the other

prosecution witness. Similarly: *R. v. Evans* (1995), 101 C.C.C. (3d) 369, 93 W.A.C. 186, 102 Man. R. (2d) 186 (C.A.).

On the trial of two accused on a charge of perjury arising out of testimony given at a judicial inquiry a statement given by one accused to the police several months before the inquiry is capable of constituting corroboration against his co-accused if it was made in furtherance of a conspiracy to hide the truth with respect to a matter dealt with at the inquiry even if it was not made in furtherance of a conspiracy to testify falsely at the inquiry: *R. v. Zappia and Luppino* (1975), 27 C.C.C. (2d) 448 (Ont. C.A.).

**Corroboration not required** – As indicated above, corroboration is not required on a charge contrary to s. 464, counselling perjury which is not in fact committed: *R. v. Kyling*, *supra*. Nor is it required on a charge of conspiracy to commit perjury: *R. v. Ferguson and Petrie*, [1969] 1 C.C.C. 353 (B.C.C.A.).

In *R. v. Bouchard* (1982), 66 C.C.C. (2d) 338, 26 C.R. (3d) 178 (Man. C.A.) the Court was divided as to whether corroboration was required where the perjury charge was proved by the accused's own confession to a police officer that he had lied at the original trial. O'Sullivan, J.A., was of the view that this section nevertheless required corroboration. Matas, J.A., allowed the accused's appeal on another ground and therefore did not consider the point. Monnin, J.A., dissenting, was of the view that this section had no application in such circumstances.

The falsity of a statement by an accused as to his criminal record may be proved by production of a certificate of a fingerprint examiner as authorized by s. 667. Proof in such a manner must be considered an exception to the corroboration requirements of this section: *R. v. Predy* (1983), 17 C.C.C. (3d) 379 (Alta. C.A.).

#### IDEM / Application.

**134. (1) Subject to subsection (2), every one who, not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, makes such a statement, by affidavit, solemn declaration or deposition or orally before a person who is authorized by law to permit it to be made before him, knowing that the statement is false, is guilty of an offence punishable on summary conviction.**

**(2) Subsection (1) does not apply to a statement referred to in that subsection that is made in the course of a criminal investigation. 1974-75-76, c. 93, s. 6; R.S.C. 1985, c. 27 (1st Supp.), s. 17.**

#### CROSS-REFERENCES

The term "statement" is defined in s. 118. As to oath and solemn affirmation, see the notes concerning "witness" under s. 118 and ss. 13 to 16 of the Canada Evidence Act. This section covers most of the circumstances excepted from the perjury offence by s. 131(3). Other related offences are as follows: The offence of giving contradictory evidence is in s. 136. The offence of fabricating evidence is in s. 137 and other offences relating to affidavits in s. 138. The offence of attempting to obstruct justice is in s. 139. Note that subsec. (2), while exempting from liability statements made in the course of a criminal investigation, would not protect against conduct amounting to public mischief under s. 140. The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Section 585 provides that no count charging the making of a false statement is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the statement was made, or the subject of the inquiry, or the words used, or that it does not expressly negative the words used. However, s. 587(1)(a) provides for the furnishing of particulars in such cases.

#### SYNOPSIS

This section creates an offence covering the conduct excepted from the main offence of



perjury by s. 131(3). This summary conviction offence prohibits the making of false statements before a person authorized to receive statements when the *accused was not specially required* or authorized to make the statement under oath or affirmation. Like s. 131, this section applies to false statements made under oath or solemn affirmation orally, by affidavit or solemn declaration. While there is a requirement that the accused know that the statement is false, there is no requirement of an intent to mislead.

This section also contains an exception which is found in subsec. (2) which removes from its ambit statements made during a criminal investigation.

#### ANNOTATIONS

**Permitted, authorized or required by law** – An affidavit which the legislator has not permitted, authorized or required, in short, an affidavit which has no legal meaning or scope is one which is not permitted, authorized or required by law: *R. v. Boisjoly* (1971), 5 C.C.C. (2d) 309, [1972] S.C.R. 42, 23 D.L.R. (3d) 190 (5:0). [Considering former s. 122 of R.S.C. 1970, c. C-34, which made it an offence for a person being permitted, authorized or required by law to make a statement by affidavit, knowing it to be a false statement.]

There being no law which specifically required or authorized the use of an affidavit on a bail review hearing, until that affidavit was actually filed or used at the bail review, it had no legal significance and was thus not one permitted, authorized or required by law: *R. v. Hewson* (1977), 35 C.C.C. (2d) 407 (Ont. C.A.) (considering former s. 122).

**Authorized by law to permit it to be made** – Where the patent of the commissioner before whom the affidavits were sworn was limited to work in connection with a particular law firm and that firm had nothing whatever to do with the proceedings in which those affidavits were sworn then the commissioner had no authorization to take the oath of the accused and the offence is not made out: *R. v. Edwards* (1974), 20 C.C.C. (2d) 112, 5 O.R. (2d) 599 (C.A.) [considering former s. 122 of R.S.C. 1970, c. C-34 which contained a similar phrase].

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#### 135. [*Repealed*. R.S.C. 1985, c. 27 (1st Supp.), s. 17.]

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#### WITNESS GIVING CONTRADICTIONARY EVIDENCE / Definition of "evidence" / Proof of former trial / Consent required.

136. (1) Every one who, being a witness in a judicial proceeding, gives evidence with respect to any matter of fact or knowledge and who subsequently, in a judicial proceeding, gives evidence that is contrary to his previous evidence is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, whether or not the prior or later evidence or either is true, but no person shall be convicted under this section unless the court, judge or provincial court judge, as the case may be, is satisfied beyond a reasonable doubt that the accused, in giving evidence in either of the judicial proceedings, intended to mislead.

(2) Notwithstanding the definition "evidence" in section 118, "evidence", for the purposes of this section, does not include evidence that is not material.

(2.1) Where a person is charged with an offence under this section, a certificate specifying with reasonable particularity the proceeding in which that person is alleged to have given the evidence in respect of which the offence is charged, is evidence that it was given in a judicial proceeding, without proof of the signature or official character of the person by whom the certificate purports to be signed if it purports to be signed by the clerk of the court or other official having the custody of the record of that proceeding or by his lawful deputy.

**(3) No proceedings shall be instituted under this section without the consent of the Attorney General. R.S., c. C-34, s. 124; R.S.C. 1985, c. 27 (1st Supp.), s. 18.**

#### CROSS-REFERENCES

The terms “witness”, and “judicial proceeding” are defined in s. 118. “Attorney General” is defined in s. 2. Note that s. 13 of the Canadian Charter of Rights, which otherwise protects against the use of prior testimony, does not apply to prosecutions for the offences of perjury and giving contradictory evidence. Section 5 of the Canada Evidence Act, which also protects against use of prior testimony, does not apply in a prosecution for perjury in the giving of that evidence. Thus, statements made under the protection of s. 5 could not be used in a prosecution under this section. Related offences are found in: s. 131, perjury; s. 134, false statements under oath; s. 137, fabricating evidence; s. 138, offences relating to affidavits; s. 139, attempting to obstruct justice; s. 140, public mischief.

Section 585 provides that no count charging the making of a false statement is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the statement was made, or the subject of the inquiry, or the words used, or that it does not expressly negative the words used. However, s. 587(1)(a) provides for the furnishing of particulars in such cases. These provisions may apply to the charging of the offence under this section. Section 583(h) provides that a count is not insufficient by reason only that it does not state that the consent has been obtained. As to proof of that consent, see notes under that section.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

#### SYNOPSIS

Section 136 is limited to *witnesses* who give *evidence* in a *judicial proceeding* and then give *contradictory evidence* in a judicial proceeding. The issue on which the impugned evidence is given may be either about facts or knowledge. It is not necessary to prove which of the contradictory statements is false. However, it is an element of the offence that the accused *intended to mislead* by giving the evidence in either of the judicial proceedings. The seriousness of this indictable offence is reflected in its maximum penalty of 14 years.

Subsection (2) narrows the *definition of evidence* which would otherwise apply in this Part (see s. 118) by excluding *evidence* which is *not material*.

The proof of this offence is facilitated by subsec. (2.1) which permits the use of a certificate signed by a court clerk or other court official who has control of the record. The certificate can be used as proof that the evidence was given in a judicial proceeding, and the signature of the official character of the person signing need not be proved.

The availability of this section is further limited by a prerequisite under subsec. (3) that the Attorney General consent to all prosecutions under this section.

#### ANNOTATIONS

**Elements of offence** – Motive and intention are two separate matters and once the intention to mislead is established, even though it may have been for the highest motive, the offence, except for raising the successful defence of duress, is established: *R. v. Falkenberg* (1973), 13 C.C.C. (2d) 562 (Ont. Co. Ct.), revd on other grounds 16 C.C.C. (2d) 525 (C.A.), *infra*.

**Double jeopardy** / *Also see notes under ss. 131 and 613* – As long as it does not amount to a retrial of the original offence an acquitted accused may be tried under this section for his prior perjured denial of his commission of the original offence: *Gushue v. The Queen* (1979), 50 C.C.C. (2d) 417, [1980] 1 S.C.R. 798 (7:0).

**Consent of Attorney General** / *Also see notes under s. 583(1)(h)* – A count for an offence for which the statutory consent of the Attorney-General to institute proceedings has been obtained cannot be amended if the amended count alleges another offence: *R.*

*v. Falkenberg* (1974), 16 C.C.C. (2d) 525, 25 C.R.N.S. 374 (Ont. C.A.), quashing his conviction in 13 C.C.C. (2d) 562, *supra*.

### FABRICATING EVIDENCE.

**137. Every one who, with intent to mislead, fabricates anything with intent that it shall be used as evidence in a judicial proceeding, existing or proposed, by any means other than perjury or incitement to perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 125.**

### CROSS-REFERENCES

The term "judicial proceeding" is defined in s. 118. Perjury is defined by s. 131. "Incite" is within the definition of "counsel" in s. 22(3). By s. 22(1), a person is party to the offence counselled.

Related offences are found in s. 131, perjury; s. 134, false statements under oath; s. 136, giving contradictory evidence; s. 138, offences relating to affidavits; s. 139, attempting to obstruct justice; s. 140, public mischief.

Section 585 provides that no count charging the fabricating of evidence is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the statement was made, or the subject of the inquiry, or the evidence fabricated, or that it does not expressly negative the words used. However, s. 587(1)(a) provides for the furnishing of particulars in such cases.

Note that s. 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21 provides, in effect, that a document, such as one produced under subsec. (2.1), is admissible in evidence and the fact is deemed to be established in the absence of evidence to the contrary.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

### ANNOTATIONS

An accused could not be convicted of this offence, by reason of her having signed notes alleging that she had been kidnapped by a certain person, since the notes would not be admissible in evidence at the trial of the person alleged to have committed the kidnapping: *R. v. Boyko* (1945), 83 C.C.C. 295, [1945] 2 D.L.R. 568, [1945] 1 W.W.R. 521 (Sask. C.A.).

### OFFENCES RELATING TO AFFIDAVITS.

#### **138. Every one who**

- (a) signs a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared before him when the writing was not so sworn or declared or when he knows that he has no authority to administer the oath or declaration,
  - (b) uses or offers for use any writing purporting to be an affidavit or statutory declaration that he knows was not sworn or declared, as the case may be, by the affiant or declarant or before a person authorized in that behalf, or
  - (c) signs as affiant or declarant a writing that purports to be an affidavit or statutory declaration and to have been sworn or declared by him, as the case may be, when the writing was not so sworn or declared,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 126.**

### CROSS-REFERENCES

Section 15 of the Canada Evidence Act provides for the form of solemn affirmation in the case of an affidavit or deposition. No particular form of oath is prescribed by law and see notes under "witness" in s. 118. A form of statutory declaration under the Canada Evidence Act is prescribed by s. 41 of that Act, but reference may also be made to the various provincial Evidence Acts.



Related offences are found in s. 131, perjury; s. 134, false statements under oath; s. 136, giving contradictory evidence; s. 137, fabricating evidence; s. 139, attempting to obstruct justice; s. 140, public mischief.

Section 585 provides that no count charging the making of a false oath is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the oath was taken, or the subject of the inquiry. However, s. 587(1)(a) provides for the furnishing of particulars in such cases.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

## SYNOPSIS

This section creates offences relating to what may be referred to generally as “phoney affidavits” and it prohibits the use of such documents. It prohibits the accused, who may be either the affiant or the supposed witness, from signing a document saying that it is an affidavit or statutory declaration when the document was not so sworn or declared *or* if the accused *knows* that he is without authority to administer the oath or declaration. It also prohibits the use or offer for use of such documents if the person offering the document *knows* that the writing was not properly sworn or declared. It is not necessary to prove that the contents of such writings is false, only that it is not what it appears to be, namely a properly sworn or declared document.

The maximum punishment for this indictable offence is two years.

## ANNOTATIONS

**Para. (a)** – The offence contrary to this paragraph requires proof of *mens rea* and the accused’s mistaken belief as to the formalities requisite to constitute the ceremony of swearing and justify his completing the jurat is a defence to the charge: *R. v. Chow* (1978), 41 C.C.C. (2d) 143, [1978] 3 W.W.R. 767 (Sask. C.A.).

**Para. (b)** – The word “uses” in this paragraph simply means “employs for a purpose” and the offence contrary to this paragraph does not require proof that the use of the affidavit had as its purpose the misleading of justice. A use intended to bring about a result, which would adversely affect another’s legal position was clearly within this paragraph. Finally, making use of a photocopy of the sham affidavit was using the original within the meaning of this paragraph: *R. v. Stevenson and McLean* (1980), 57 C.C.C. 526, 19 C.R. (3d) 74 (Ont. C.A.).

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## OBSTRUCTING JUSTICE / *Idem* / *Idem*.

**139. (1)** Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,

(a) by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or

(b) where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

is guilty of

(c) an indictable offence and is liable to imprisonment for a term not exceeding two years, or

(d) an offence punishable on summary conviction.

**(2)** Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

**(3)** Without restricting the generality of subsection (2), every one shall be deemed

**wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,**

- (a) dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
- (b) influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or
- (c) accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror. R.S., c. C-34, s. 127; R.S., c. 2 (2nd Supp.), s. 3; 1972, c. 13, s. 8.

#### CROSS-REFERENCES

The term "judicial proceeding" is defined in s. 118. Several provisions of the Criminal Code refer to sureties, see ss. 515, 679, 810, 816, 817. The responsibilities of sureties and procedure for rendering the accused into custody by his sureties are dealt with in ss. 762 to 773. The term "wilfully" does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). Section 649, which prohibits disclosure of jury proceedings, provides an exemption for the purposes of an investigation of an alleged offence under subsec. (2) of this section in relation to a juror, and for giving evidence in relation to such offence.

Related offences are as follows: s. 129, obstructing peace officer; s. 130, personation of peace officer; s. 131, perjury; s. 136, giving contradictory evidence; s. 137, fabricating evidence; s. 140, public mischief; s. 141, compounding indictable offence; s. 143, advertising reward and immunity. Also, see notes respecting contempt of court under ss. 9 and 10.

Where the prosecution elects to proceed by way of summary conviction on the charge contrary to subsec. (1) then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the Crown proceeds by way of indictment then the accused has an election as to mode of trial under s. 536(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

An accused charged with the offence under subsec. (2) has an election as to mode of trial under s. 536(2) and release pending trial is governed by s. 515.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

#### SYNOPSIS

Section 139 spells out the elements of the offence of *attempting to obstruct justice*.

The first group of offences relates to *sureties* and is found in subsec. (1). It prohibits anyone from indemnifying a surety (or agreeing to do so) for any loss arising from acting as surety ("signing bail") and also prohibits a surety from accepting or agreeing to accept an offer of a fee for so acting. The requisite *intention* is that the accused *wilfully* attempted to *obstruct, pervert or defeat the course of justice* in a judicial proceeding. This offence can be prosecuted by way of summary conviction or by way of indictment, and, in the latter case, is punishable by two years imprisonment.

Subsection (2) creates the offence of attempting to obstruct, pervert or defeat the course of justice in a manner apart from those described in s. 139(1). The actions of the accused must be proven to be *wilful*. The maximum sentence for this indictable offence is 10 years.

Section 139(3) provides a number of examples of how the offence created by subsec. (2) may be committed in the context of a *judicial proceeding*, either existing or proposed. This section is merely *illustrative not exhaustive*.

## ANNOTATIONS

**Course of justice** – In *R. v. Hoggarth* (1957), 119 C.C.C. 234, 25 C.R. 174 (B.C.C.A.), a conviction for attempting to obstruct the course of justice was quashed. The court did not undertake to define “the course of justice” but held that, as no investigation of a possible crime was under way at the time nor had any charge been laid, there was nothing in the circumstances surrounding the making of the false statement in question that fell within that term.

The expression “the course of justice” in subsec. (2) includes judicial proceedings existing or proposed but is not limited to such proceedings. The offence under this subsection also includes attempts by a person to obstruct, prevent or defeat a prosecution which he contemplates may take place, notwithstanding that no decision to prosecute has been made: *R. v. Spezzano* (1977), 34 C.C.C. (2d) 87, 76 D.L.R. (3d) 160 (Ont. C.A.).

The term “the course of justice” includes the investigatory stage. The term is, as well, applicable to disciplinary proceedings of the law society. The course of justice includes all the judicial proceedings defined in s. 118. Any decision-making body would come within the phrase “the course of justice” if it was a body which judged; its authority to do so was derived from a statute; and the body, by the terms of its empowering statute, was required to act in a judicial manner: *R. v. Wijesinha*, [1995] 3 S.C.R. 422, 100 C.C.C. (3d) 410, 42 C.R. (4th) 1.

**Mens rea of offence** – In *R. v. Savinkoff*, [1963] 3 C.C.C. 163, 39 C.R. 306 (B.C.C.A.), the accused was charged under this section with attempting to persuade other persons to make statements connected with other offences. There was no proof that the accused knew the statements he was suggesting were false. It was held (2:1) that *mens rea* was a necessary element requiring proof of the knowledge of the falsity of the statement.

It is no defence that the accused believed that the evidence that he sought to suppress was false evidence: *R. v. Walker* (1972), 7 C.C.C. (2d) 270, 17 C.R.N.S. 374 (Ont. Prov. Ct.).

However, where the accused approached a witness who had testified against his friend and told the witness he should tell the truth, he was acquitted. The court found that his purpose was to protest an injustice, not to obstruct justice: *R. v. Belliveau* (1978), 42 C.C.C. (2d) 243, 21 N.B.R. (2d) 361 (S.C. App. Div.).

**Attempts in any manner (subsec. (2))** – In *R. v. Balsdon*, [1968] 2 C.C.C. 164, [1967] 2 O.R. 653 (Ont. Co. Ct.), it was held, following the two doctrines *nemo tenetur seipsum accusare* – no man can be compelled to incriminate himself – and *nemo tenetur prodere seipsum* – no one is bound to betray himself, that, although attempts at service of warrants of committal following convictions for summary conviction offences is a part of the course of justice, deliberate misidentification of himself by the accused to police officers endeavouring to serve him is not obstruction of justice.

In *R. v. Spezzano*, *supra*, the court, without passing on the correctness of *R. v. Balsdon*, *supra*, distinguished it on the basis that whatever protection the common law right to remain silent confers on a person, it will not protect him when he not only denies his identity but gives the police a false name in order to protect himself. The court, however, pointed out that it is not every false statement to the police, such as a false denial of guilt, which will be capable of supporting a charge under this provision.

It would seem that subsec. (2) is wide enough to include a threat by an accused to cause bodily harm to the complainant who was present in court, notwithstanding at the time of the threat the accused had been convicted and sentenced for the offence which the complainant had initially reported: *R. v. Vermette* (1983), 6 C.C.C. (3d) 97, [1983] 4 W.W.R. 707 (Alta. C.A.), *affd* on other grounds 32 C.C.C. (3d) 519, 57 C.R. (3d) 340, [1987] 1 S.C.R. 577.

A charge under this subsection could be made out if the accused approached a police officer with a request that certain charges not be laid in exchange for a payment to the



officer, even if the officer did not in fact attempt to obstruct justice: *Rousseau v. The Queen* (1985), 21 C.C.C. (3d) 1, 21 D.L.R. (4th) 148, [1985] 2 S.C.R. 38 (7:0).

Any attempt to pay compensation in any form to a witness that has, as its purpose, a direct tendency to influence a witness not to give evidence in a judicial proceeding, irrespective of the motive for doing so, is a corrupt attempt to obstruct justice. Similarly, an attempt to pay compensation to the complainant in order to influence the proceeding by, for example, persuading the Crown to withdraw the charge is capable of amounting to an offence. The offence would not, however, cover a *bona fide* negotiation for the withholding, withdrawal or reduction of a given charge that is conducted with a law officer of the Crown. Nor would honestly approaching a witness who has made a false or mistaken statement and by reasoned arguments supported by material facts, trying to dissuade him from giving perjured or erroneous testimony constitute an offence: *R. v. Kotch* (1990), 61 C.C.C. (3d) 132 (Alta. C.A.). [Also, note s. 141(2).]

Subsection (2) of this section, although framed in the language of an attempt, in fact creates a substantive offence, the gist of which is the doing of an act which has a tendency to prevent or obstruct the course of justice and which is done for that purpose: *R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused [1984] 2 S.C.R. viii, 56 N.R. 239n. It is not necessary to establish that the tendency materialized. Thus, an accused who sent a letter from jail requesting his brother to intimidate a witness could be convicted of this offence although the letter was intercepted by the jail authorities and never reached the brother. The acts of the accused went beyond an intention or even expression of an intention: *R. v. Graham* (1985), 20 C.C.C. (3d) 210 (Ont. C.A.), affd 38 C.C.C. (3d) 574 (S.C.C.) (5:0).

An attempt to dissuade someone from reporting an incident to the police may amount to an obstruction of justice: *R. v. Whalen* (1974), 17 C.C.C. (2d) 217 (Ont. Co. Ct.).

A lawyer is under a duty not to mislead the court and may be convicted of this offence where he participates in the client's deception by arranging for the client's friend to attend in court to answer a charge against the client, who had previously given the friend's name to the police as his own upon arrest: *R. v. Doz* (1984), 12 C.C.C. (3d) 200, 52 A.R. 321 (C.A.).

The offence of attempting to obstruct justice requires the specific intention to obstruct justice. Thus, in the case of a charge based on an attempt by the accused to obtain a false affidavit from a client, the accused's honest belief that the affidavit was true would constitute a defence: *R. v. Charbonneau* (1992), 74 C.C.C. (3d) 49, 46 Q.A.C. 1 (C.A.).

The gravamen of the offence under subsec. (2) is the wilful attempt to obstruct justice and it does not matter that the attempt was not only unsuccessful but could not have succeeded. Thus, it was no defence that the accused attempted to procure a witness to give false evidence on an issue which in law was irrelevant: *R. v. Hearn* (1989), 48 C.C.C. (3d) 376, 75 Nfld. & P.E.I.R. 13 (Nfld. C.A.), affd 53 C.C.C. (3d) 352n, [1989] 2 S.C.R. 1180, 80 Nfld. & P.E.I.R. 199.

**Witness at preliminary inquiry** – Where the procedure under s. 545 has been resorted to by the justice presiding at a preliminary inquiry then a charge will not lie under this section for the same conduct – the witness' refusal to be sworn and testify. However, if the justice did not act under s. 545 or if the conduct were repeated after an initial resort to s. 545, then a charge under this section or of contempt of court would lie: *R. v. Mercer* (1988), 43 C.C.C. (3d) 347, 65 C.R. (3d) 275, 89 A.R. 24 (C.A.).

**Procedure and evidence** – Statements by the accused police officers, which were part of a plan to cover up the commission of a criminal offence by one of them, were part of the *actus reus* of the offence under this section and need not be proved voluntary on a *voir dire*: *R. v. Hanneson* (1989), 49 C.C.C. (3d) 467, 71 C.R. (3d) 249, 34 O.A.C. 352 (C.A.).

The words "attempts in any manner" in subsec. (2) include perjury as a means of committing this offence notwithstanding that by charging the accused with this offence

rather than the offence under s. 131 the requirement of corroboration (s. 133) is avoided. Under this section, corroboration is not required either at law or as a matter of practice, although the conduct involves an allegation of perjury: *R. v. Simon* (1979), 45 C.C.C. (2d) 510 (Ont. C.A.); *R. v. Moore* (1980), 52 C.C.C. (2d) 202, [1980] 4 W.W.R. 511 (B.C.C.A.).

#### **PUBLIC MISCHIEF / Punishment.**

**140. (1) Every one commits public mischief who, with intent to mislead, causes a peace officer to enter on or continue an investigation by**

- (a) making a false statement that accuses some other person of having committed an offence;
- (b) doing anything intended to cause some other person to be suspected of having committed an offence that the other person has not committed, or to divert suspicion from himself;
- (c) reporting that an offence has been committed when it has not been committed; or
- (d) reporting or in any other way making it known or causing it to be made known that he or some other person has died when he or that other person has not died.

**(2) Every one who commits public mischief**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 128; 1972, c. 13, s. 8; R.S.C. 1985, c. 27 (1st Supp.), s. 19.

#### **CROSS-REFERENCES**

The term “statement” is defined in s. 118. The term “peace officer” is defined in s. 2. Section 585 provides that no count charging the making of a false statement is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the statement was made, or the subject of the inquiry, or the words used, or that it does not expressly negative the truth of the words used. However, s. 587(1)(a) provides for the furnishing of particulars in such cases.

Related offences are as follows: s. 129, obstructing peace officer; s. 130, personation of peace officer; s. 137, fabricating evidence; s. 139, attempting to obstruct justice; s. 141, compounding indictable offence; s. 143, advertising reward and immunity; s. 403, personation. This offence is to be contrasted to the property offences also referred to as mischief, in s. 430.

Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the Crown proceeds by way of indictment then the accused has an election as to mode of trial under s. 536(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### **SYNOPSIS**

This section creates the offence of *public mischief* which involves causing peace officers to *begin*, or to *continue* an investigation with the *intention of misleading them*. The ways in which the offence may be committed are specified in subsec. (1). Among these are *falsely accusing another* of committing a criminal offence or *falsely reporting that an offence has occurred*. When public mischief is committed by either of these methods, the false report by the accused is the *actus reus* of the offence.

This offence is punishable by summary conviction or by way of indictment. If prosecuted by way of indictment, the maximum punishment is five years.

## ANNOTATIONS

**Meaning of "offence"** – An "offence" referred to in this section is not restricted to only a Criminal Code offence but pertains to any breach of the law whether federal, provincial or otherwise that involves penal sanction: *R. v. Howard* (1972), 7 C.C.C. (2d) 211, 18 C.R.N.S. 395 (Ont. C.A.).

**Attempt to commit offence** – On a charge of public mischief the accused may be convicted of an attempt to commit the offence where because the officer did not believe the accused he did not embark upon an investigation and was not misled: *R. v. Whalen* (1977), 34 C.C.C. (2d) 557 (B.C. Prov. Ct.).

**Evidence** – The statement by the accused to the police reporting the offence is the *actus reus* of the offence contrary to para. (c) and no *voir dire* is required to determine the voluntariness of such a statement: *R. v. Stapleton* (1982), 66 C.C.C. (2d) 231, 26 C.R. (3d) 361, 134 D.L.R. (3d) 239 (Ont. C.A.).

A similar result was reached in considering a statement taken from a young person, it being held that the special conditions for taking of statements as prescribed by s. 56 of the Young Offenders Act were intended to apply only to young persons accused of committing crimes and not to a young person who provided a statement as a victim of the offence. Thus, on a charge under this section based on such a statement, the Crown need not prove compliance with s. 56. As in the case of an adult, the complaint is the *actus reus* of the offence and admissible without proof of voluntariness: *R. v. J.(J.)* (1988), 43 C.C.C. (3d) 257, 65 C.R. (3d) 371 (Ont. C.A.), leave to appeal to S.C.C. refused 101 N.R. 231n.

## COMPOUNDING INDICTABLE OFFENCE / Exception for diversion agreements.

141. (1) Every one who asks for or obtains or agrees to receive or obtain any valuable consideration for himself or any other person by agreeing to compound or conceal an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) No offence is committed under subsection (1) where valuable consideration is received or obtained or is to be received or obtained under an agreement for compensation or restitution or personal services that is

(a) entered into with the consent of the Attorney General; or

(b) made as part of a program, approved by the Attorney General, to divert persons charged with indictable offences from criminal proceedings. R.S., c. C-34, s. 129; R.S.C. 1985, c. 27 (1st Supp.), s. 19.

## CROSS-REFERENCES

The term "Attorney General" is defined in s. 2. An "indictable offence" would include a Crown option offence by virtue of s. 34 of the Interpretation Act, R.S.C. 1985, c. I-21. The term "compound" is not defined but may be taken to refer to the element of the common law offence of compounding a felony being an agreement not to prosecute or inform on a person who has committed an offence. See *R. v. Burgess* (1885), 15 Cox, C.C. 779 (C.A.). The reference to programmes in subsec. (2) presumably refers to restitution orders under s. 726 to 727.8, s. 737(2), a fine option programme under s. 718.1 and alternative measures programmes under s. 4 of the Young Offenders Act.

Related offences are as follows: s. 23, accessory after the fact; s. 137, fabricating evidence; s. 139, attempting to obstruct justice; s. 140, public mischief; s. 142, corruptly taking reward; s. 143, advertising reward and immunity; s. 346, extortion. In addition it should be noted that courts will on occasion stay proceedings as an abuse of process where it is shown that the criminal proceedings were launched to collect a debt or realize on a civil claim, or following a threat to swear out an information to obtain payment of a debt. See *R. v. Leroux* (1928), 50 C.C.C. 52 (Ont. C.A.). Also see notes following s. 579.



The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

### SYNOPSIS

Section 141(1) creates an indictable offence applicable if a person asks for, obtains, or *agrees to accept* any form of *valuable consideration* in exchange for agreeing to compound or *conceal an indictable offence*. The maximum sentence for this offence is two years.

Subsection (2) provides two exceptions to the liability which would otherwise result from subsec. (1). Section 141(2)(a) excludes cases in which the valuable consideration is obtained (or will be so in the future) by virtue of an agreement made with the consent of the Attorney General. Section 141(2)(b) provides an exemption covering agreements made as part of a program for the diversion of persons from indictable criminal proceedings. To come within this paragraph, the diversion program must be approved by the Attorney General.

### ANNOTATIONS

The Crown need not prove that an indictable offence was actually committed, it being sufficient to prove that the accused believed that an indictable offence had been committed: *R. v. H.L.* (1987), 57 C.R. (3d) 136 (Que. Ct. Sess.).

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### CORRUPTLY TAKING REWARD FOR RECOVERY OF GOODS.

**142. Every one who corruptly accepts any valuable consideration, directly or indirectly, under pretence or on account of helping any person to recover anything obtained by the commission of an indictable offence is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 130.**

### CROSS-REFERENCES

An “indictable offence” would include a Crown option offence by virtue of s. 34 of the Interpretation Act, R.S.C. 1985, c. I-21. The term “corruptly” is not defined in this Part but has been considered by the courts in relation to the secret commission offence in s. 426, where it was held not to mean wickedly or dishonestly, but to refer to an act done *mala fides*, designed wholly or partially for the purpose of bringing about the effect forbidden by the section: *R. v. Brown* (1956), 116 C.C.C. 287 (Ont. C.A.).

Related offences are as follows: s. 23, accessory after the fact; s. 137, fabricating evidence; s. 139, attempting to obstruct justice; s. 140, public mischief; s. 141, compounding indictable offence; s. 143, advertising reward and immunity; s. 346, extortion; ss. 354 and 355, possession of property obtained by crime; s. 462.31, laundering proceeds of crime.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

### SYNOPSIS

This section creates the indictable offence of *corruptly accepting valuable consideration* for the *recovery* of goods which were obtained by the commission of an indictable offence. It must be proven that the accused accepted the valuable consideration *corruptly* (directly or indirectly) and its receipt flowed from the pretence of helping or as the result of actually helping recover the goods. The maximum punishment for this offence is five years.

### ANNOTATIONS

In *R. v. Butler* (1975), 26 C.C.C. (2d) 445 (Ont. Co. Ct.), the trial Judge adopted the definition of the word “corruptly” given by Cussen, J., in *R. v. Worthington*, [1921] V.L.R. 660 as “an act done by a man knowing that he is doing what is wrong, and doing

it with an evil object" and found that in the factual circumstances the accused's acceptance of reward for obtaining the return of stolen goods was corrupt.

## ADVERTISING REWARD AND IMMUNITY.

### 143. Every one who

- (a) publicly advertises a reward for the return of anything that has been stolen or lost, and in the advertisement uses words to indicate that no questions will be asked if it is returned,
  - (b) uses words in a public advertisement to indicate that a reward will be given or paid for anything that has been stolen or lost, without interference with or inquiry about the person who produces it,
  - (c) promises or offers in a public advertisement to return to a person who has advanced money by way of loan on, or has bought, anything that has been stolen or lost, the money so advanced or paid, or any other sum of money for the return of that thing, or
  - (d) prints or publishes any advertisement referred to in paragraph (a), (b) or (c),
- is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 131.

### CROSS-REFERENCES

The term "steal" is defined in s. 2 as theft and accordingly see s. 322.

Related offences are as follows: s. 23, accessory after the fact; s. 139, attempting to obstruct justice; s. 140, public mischief; s. 141, compounding indictable offence; s. 142, corruptly taking reward; s. 346, extortion; ss. 354 and 355, possession of property obtained by crime. In addition, it should be noted that courts will, on occasion, stay proceedings as an abuse of process where it is shown that the criminal proceedings were launched to collect a debt or realize on a civil claim, or following a threat to swear out an information to obtain payment of a debt. See *R. v. Leroux* (1928), 50 C.C.C. 52 (Ont. C.A.). Also see notes following s. 579.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515 although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

### SYNOPSIS

This section creates the summary conviction offence of *publicly advertising* for the return of *lost or stolen goods* with a promise of reward and immunity. Paragraph (a) prohibits public advertisements which offer a reward and state that no questions will be asked if the item is returned. Paragraph (b) prohibits similar advertisements if they state that no inquiry will be made of the person who returns the item, nor will there be efforts to interfere with such persons. Finally, para. (c) creates the offence of publicly offering to indemnify anyone who has advanced money on the security of the lost or stolen thing, or who had purported to buy it, in exchange for the return of the item.

Section 143(d) states that it is an offence to publish or print any of the types of advertisements described above.

## Escapes and Rescues

### PRISON BREACH.

### 144. Every one who

- (a) by force or violence breaks a prison with intent to set at liberty himself or any other person confined therein, or
- (b) with intent to escape forcibly breaks out of, or makes any breach in, a cell or other place within a prison in which he is confined,

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 132; 1976-77, c. 53, s. 5.**

#### CROSS-REFERENCES

The term “prison” is defined in s. 2. Section 149 enacts rules for sentencing of a person convicted for an escape committed while undergoing imprisonment. A finding of guilt in relation to this offence will, in certain circumstances, require imposition of an order prohibiting possession of firearms, ammunition or explosive substances under s. 100(1).

The related offence of escaping lawful custody and being unlawfully at large is in s. 145. Other related offences are as follows: s. 146, permitting or assisting escape; s. 147, rescue from lawful custody or officer permitting escape; s. 148, assisting prisoner of war to escape.

Murder of a warden, deputy warden, instructor, keeper, jailer, guard or other officer or permanent employee of a prison, acting in the course of his duties, is first degree murder by virtue of s. 231(4). This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or for a warrant to conduct video surveillance under s. 487.01(5).

The accused has an election as to mode of trial under s. 536(2). Release pending trial is determined by s. 515. However, by virtue of s. 519, the accused would not be released pursuant to any release order until the accused was not required to be detained in custody in respect of any other matter.

#### SYNOPSIS

This section sets out what constitutes prison breach and specifies that it is an indictable offence carrying a maximum sentence of 10 years.

The *actus reus* of the offence in s. 144(a) is the use of force or violence to break out of a prison. The mental element of this offence is the *intention* of the accused to set himself or another free.

The *actus reus* of the offence created in s. 144(b) is the action of *forcibly breaking out* or making a *breach* in a *cell* or any other part of a prison in which the *accused is incarcerated*. It must be shown that the accused did the act with the intention of *escaping*.

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**ESCAPE AND BEING AT LARGE WITHOUT EXCUSE / Failure to attend court / Failure to comply with condition of undertaking or recognizance / Failure to appear or to comply with summons / Failure to appear or to comply with appearance notice or promise to appear / Idem / Where person charged with summary conviction offence / Proof of certain facts by certificate / Attendance and right to cross-examination / Notice of intention to produce.**

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#### **145. (1) Every one who**

**(a) escapes from lawful custody, or**

**(b) is, before the expiration of a term of imprisonment to which he was sentenced, at large in or out of Canada without lawful excuse, the proof of which lies on him,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.**

#### **(2) Every one who,**

**(a) being at large on his undertaking or recognizance given to or entered into before a justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court in accordance with the undertaking or recognizance, or**

**(b) having appeared before a court, justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court as thereafter required by the court, justice or judge,**

**or to surrender himself in accordance with an order of the court, justice or judge, as the case may be, is guilty of an indictable offence and liable to imprisonment for a**



term not exceeding two years or is guilty of an offence punishable on summary conviction.

(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance directed by a justice or judge, and every person who is bound to comply with a direction ordered under subsection 515(12) or 522(2.1), and who fails, without lawful excuse, the proof of which lies on that person, to comply with that condition or direction, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(4) Every one who is served with a summons and who fails, without lawful excuse, the proof of which lies on him, to appear at a time and place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend court in accordance therewith, is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(5) Every person who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on the person, to appear at the time and place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend court in accordance therewith, or to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1), is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence.

(7) [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 20(2).*]

(8) For the purposes only of the *Identification of Criminals Act*, a person charged with or convicted of an offence under this section punishable on summary conviction shall be deemed to be charged with or to have been convicted of an indictable offence.

**NOTE:** Subsection (8) re-enacted by 1992, c. 47, s. 68 (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*Election of Crown under Contraventions Act.*

(8) *For the purposes of subsections (3) to (5), it is a lawful excuse to fail to comply with a condition of an undertaking or recognizance or to fail to appear at a time and place stated in a summons, an appearance notice, a promise to appear or a recognizance for the purposes of the Identification of Criminals Act if before the failure the Attorney General of Canada elects under section 50 of the Contraventions Act that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket.*

(9) In any proceedings under subsection (2), (4) or (5), a certificate of the clerk of the court or a judge of the court before which the accused is alleged to have failed to attend or of the person in charge of the place at which it is alleged the accused failed to attend for the purposes of the *Identification of Criminals Act* stating that,

- (a) in the case of proceedings under subsection (2), the accused gave or entered

into an undertaking or recognizance before a justice or judge and failed to attend court in accordance therewith or, having attended court, failed to attend court thereafter as required by the court, justice or judge or to surrender in accordance with an order of the court, justice or judge, as the case may be,

- (b) in the case of proceedings under subsection (4), a summons was issued to and served on the accused and the accused failed to attend court in accordance therewith or failed to appear at the time and place stated therein for the purposes of the *Identification of Criminals Act*, as the case may be, and
- (c) in the case of proceedings under subsection (5), the accused was named in an appearance notice, a promise to appear or a recognizance entered into before an officer in charge, that was confirmed by a justice under section 508, and the accused failed to appear at the time and place stated therein for the purposes of the *Identification of Criminals Act*, failed to attend court in accordance therewith or, having attended court, failed to attend court thereafter as required by the court, justice or judge, as the case may be,

is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

(10) An accused against whom a certificate described in subsection (9) is produced may, with leave of the court, require the attendance of the person making the certificate for the purposes of cross-examination.

(11) No certificate shall be received in evidence pursuant to subsection (9) unless the party intending to produce it has, before the trial, given to the accused reasonable notice of his intention together with a copy of the certificate. R.S., c. C-34, s. 133; R.S., c. 2 (2nd Supp.), s. 4; 1974-75-76, c. 93, s. 7; R.S.C. 1985, c. 27 (1st Supp.), s. 20; 1994, c. 44, s. 8.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. The terms “undertaking” and “recognizance” principally refer to forms of release authorized by Part XVI. In addition, pending appeal in indictable and summary conviction matters, an accused may be released on an undertaking or recognizance pursuant to ss. 679 and 816. The term “summons” refers to a form of process issued under Part XVI, while the terms “promise to appear” and “appearance notice” refer to process issued by a peace officer. Reference should also be made to the following provisions: ss. 494 and 495, warrantless arrest power; s. 510, issue of warrant for failing to comply with term of summons to appear for purposes of *Identification of Criminals Act*; s. 512, issuing of arrest warrant; s. 524, arrest of accused for misconduct while on a form of release; s. 475, accused absconding during trial; s. 544, accused absconding during preliminary inquiry; s. 598, accused failing to attend for jury trial; Part XXV, procedure for forfeiture of recognizances and for rendering of accused by sureties. Note that by virtue of s. 803(3), where the summary conviction court proceeds to try the accused *ex parte* then no proceedings may be taken under this section arising out of the failure of the accused to appear for trial except with the consent of the Attorney General.

Section 149 enacts rules for sentencing of a person convicted for an escape committed while undergoing imprisonment. By virtue of s. 149(3), escape includes escaping from lawful custody and without lawful excuse, being at large before expiration of a term of imprisonment. A finding of guilt in relation to this offence may, in certain circumstances, give the court a discretion to impose an order prohibiting possession of firearms, ammunition or explosive substances under s. 100(2).

The related offence of prison breach is in s. 145. Other related offences are as follows: s. 146, permitting or assisting escape; s. 147, rescue from lawful custody or officer permitting escape; s. 148, assisting prisoner of war to escape; s. 405, acknowledging bail in name of another person.

Murder of a peace officer, warden, deputy warden, instructor, keeper, jailer, guard or other officer or permanent employee of a prison, acting in the course of his duties, is first degree murder by virtue of s. 231(4). This offence in subsec. (1) may be the basis for an application for an authoriza-

tion to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5).

The offences in this section are all Crown option offences. Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the Crown proceeds by way of indictment then the accused has an election as to mode of trial under s. 536(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496 and 497 or by the officer in charge under s. 498. However, note s. 515(6) which puts the burden of proof on the accused to show why he should be released in certain circumstances, including the case where the accused is charged with an offence under subsecs. (2) to (5) of this section, or is charged with an indictable offence while at large after being released in respect of another indictable offence. Further, by virtue of s. 519, the accused would not be released pursuant to any release order until the accused was not required to be detained in custody in respect of any other matter.

## SYNOPSIS

This section creates the offences of *escaping*, *being unlawfully at large*, and offences relating to *failing to comply* with various forms of process or judicial interim release. It also facilitates the prosecution of charges of failing to comply by authorizing the use of certificates to prove some aspects of these offences.

Subsection (1) deals with escapes and being unlawfully at large. Under s. 145(1)(a), it must be proven that the accused was in *lawful custody* at the time of the escape. Section 145(1)(b) states the elements of the offence of being unlawfully at large inside or outside of Canada before the expiration of the custodial portion of a sentence.

Section 145(2) creates offences pertaining to those who *fail to attend court* as required by the terms of an order of judicial interim release, or to appear subsequently as required by a court, judge or justice after initially appearing in court.

Subsection (3) creates the offence of *failing to comply* with a *condition* in a judicial interim release order.

Subsection (4) creates the offence of *failing to comply* with a requirement in a *summons* to attend court or at the specified place for fingerprinting as required by the Identification of Criminals Act.

Subsection (5) spells out the offence of *failing to comply* with a requirement in a *release order* entered into before the officer in charge of the station that the accused attend court or at the specified place for fingerprinting as required by the Identification of Criminals Act. This subsection only applies if the appearance notice, promise to appear or recognizance has been confirmed by a justice of the peace.

Subsections (2) to (5) permit the accused to rely upon a *lawful excuse*, but the onus is upon the accused to establish such excuse. As with other provisions placing a burden upon the accused, this aspect of the section is likely to be attacked as violating ss. 7 and 11(d) of the Charter. Subsection (6) specifically excludes from what might otherwise be a "lawful excuse" reliance upon a defect in the way in which the substance of the alleged offence is stated in the release documents described in subsec. (5).

The offences created in subsecs. (2) to (5) are punishable by way of summary conviction procedure or by indictment. In the latter event, the maximum punishment is two years.

Section 145(8) provides that for the sole purpose of the Identification of Criminals Act, an accused charged with or convicted of what is a summary conviction offence under this section, shall be deemed to have been charged with or convicted of an indictable offence.

Subsection (9) permits a *certificate* to be used to prove that an accused charged under s. 145(2), (4) or (5) *did fail* to attend court or for fingerprints as required. The certificate is to be provided by the clerk of the court or the person who is in charge of the place in which the accused was to have attended for fingerprints. It is proof of the statements



contained in it without the need to prove the signature or the official character of the person who appears to have signed it.

Section 145(10) permits the cross-examination of the person who made the certificate in subsec. (9) but leave of the court is required. Subsection (11) provides that unless the accused is given notice of the intention to use a certificate along with a copy of it, a certificate made under subsec. (9) cannot be used as evidence.

## ANNOTATIONS

**Subsec. (1) / Meaning of lawful custody** – In *R. v. Piper*, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 534 (Man. C.A.), the accused was found guilty where he had escaped from the penitentiary confines but was still on penitentiary property.

In *R. v. Whitfield*, [1970] 1 C.C.C. 129, 9 C.R.N.S. 59 (S.C.C.), it was held (5:2) that arrest is an undivided act that defies separation into “custodial” or “symbolic” arrest.

An arrest stated to be for one described offence cannot be validated by a later reliance upon another offence for which it might have been, but was not, made: *R. v. Huff* (1979), 50 C.C.C. (2d) 324, 17 A.R. 499 (C.A.).

Where an accused is informed at least of the general nature of the charge for which he was apprehended, his arrest is lawful: *R. v. Boughton* (1975), 23 C.C.C. (2d) 395, [1975] W.W.D. 79 (Alta. S.C. App. Div.).

Notwithstanding the applicable provincial legislation only permits the arrest of a person “found” to be intoxicated in a public place an accused may be convicted of escaping lawful custody provided he was apparently intoxicated when arrested even if the Judge finds as a fact he was not intoxicated: *R. v. Robertson* (1978), 42 C.C.C. 78, [1978] 5 W.W.R. 289 (B.C.C.A.).

A conviction under this section was imposed on an accused who was present in Court when a sentence of incarceration was imposed but then left the Court after a recess when the officer in charge briefly left the room. He was in custody within the meaning of the section as he was present when sentence was pronounced and submitted to arrest by asking permission of the officer to do various things, notwithstanding he was never placed in a prisoner’s dock, handcuffed or otherwise physically placed under arrest: *R. v. Zajner* (1977), 36 C.C.C. (2d) 417 (Ont. C.A.).

An inmate of a transition house who leaves the house with permission of the management but fails to return to prison as required does not commit the offence under para. (a). A person cannot be convicted of escaping custody where his initial physical liberty was legally obtained. In such circumstances his offence, if any, is that created by para. (b): *R. v. Folchito* (1986), 26 C.C.C. (3d) 253, [1986] R.J.Q. 563 (C.A.).

**Unlawfully at large** – An inmate, when released on a temporary pass, could be unlawfully at large immediately if at that moment he decided not to return to the institution when required: *Re MacCaud and The Queen* (1975), 22 C.C.C. (2d) 445 (Ont. H.C.J.).

It is not every breach of a condition of a temporary absence permit which operates to deprive the inmate of a lawful excuse under this subsection, but rather only a wilful breach of a condition which shows an intention by the inmate to withdraw himself from the control, in the sense of the custody, of the correctional authorities even where the permit itself provided that apparent breach of the conditions rendered it null and void and deemed the inmate to be unlawfully at large: *R. v. Seymour* (1980), 52 C.C.C. (2d) 305 (Ont. C.A.).

Secure and open custody imposed pursuant to the Young Offenders Act constitutes a form of imprisonment. Thus an offender who fails to return after expiry of a day pass may be convicted of the offence under para. (b): *R. v. McKay* (1985), 21 C.C.C. (3d) 191 (Man. C.A.); *R. v. B.D. et al.* (1986), 24 C.C.C. (3d) 187, 49 C.R. (3d) 283 (Ont. C.A.). Similarly, *R. v. C.A.* (1986), 25 C.C.C. (3d) 133 (Sask. C.A.).

**Proof of lawful custody** – A calendar of sentence is sufficient proof that the accused is in lawful custody: *R. v. Ouellette* (1978), 39 C.C.C. (2d) 278 (B.C.C.A.).

In *R. v. Adams* (1978), 45 C.C.C. (2d) 459, 6 C.R. (3d) 257 (B.C.C.A.) two of the three members of the Court held that it is not open to an accused to go behind a warrant of committal valid on its face.

**Subsec. (2)** – An accused charged with a summary conviction offence and released on an undertaking to appear in Court complies with that undertaking by appearing either personally or by counsel or agent, as permitted by s. 800(2), and where counsel appears on the Court date the accused may not be charged with the offence under this section: *R. v. Okanee* (1981), 59 C.C.C. (2d) 149, 9 Sask. R. 10 (C.A.).

**Subsec. (3)** – This is a true criminal offence and mere carelessness or failure to take the precautions that a reasonable person would take will not support a conviction. The Crown must prove that the accused had the requisite *mens rea* before any issue of lawful excuse arises: *R. v. Legere* (1995), 95 C.C.C. (3d) 555, 22 O.R. (3d) 89, 77 O.A.C. 265 (C.A.).

It is not a defence that the conviction which gave rise to the undertaking is subsequently set aside. Court orders must be obeyed until set aside or modified regardless of doubts or challenges as to their validity: *R. v. Gaudreault* (unreported, December 21, 1995, Que. C.A.) [096/031/025-28 pp.].

**Subsec. (5)** – *Mens rea* is an element of the offence of failing to appear and accordingly the accused may raise the defence of honest mistake: *R. v. Bender* (1976), 30 C.C.C. (2d) 496, [1976] W.W.D. 84 (B.C.S.C.).

Thus where an accused honestly forgot the date of his Court appearance he has a defence to the charge even if he forgot due to his own negligence: *R. v. Stuart* (1981), 58 C.C.C. (2d) 203 (B.C.S.C.). *Folld*: *R. v. Neal* (1982), 67 C.C.C. (2d) 92, 136 D.L.R. (3d) 86 (Ont. Co. Ct.).

**Subsec. (9)** – A certificate under this subsection may be evidence not only that the accused failed to appear but that, for example, he was named in an appearance notice which was confirmed by a justice: *R. v. Dorigo* (1982), 69 C.C.C. (2d) 141 (B.C.S.C.).

## PERMITTING OR ASSISTING ESCAPE.

### 146. Every one who

- (a) permits a person whom he has in lawful custody to escape, by failing to perform a legal duty,
  - (b) conveys or causes to be conveyed into a prison anything, with intent to facilitate the escape of a person imprisoned therein, or
  - (c) directs or procures, under colour of pretended authority, the discharge of a prisoner who is not entitled to be discharged,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 134.

## CROSS-REFERENCES

The term "prison" is defined in s. 2.

The related offences of escaping lawful custody and being unlawfully at large are in s. 145. Other related offences are as follows: s. 144, prison breach; s. 147, rescue from lawful custody or officer permitting escape; s. 148, assisting prisoner of war to escape.

Murder of a peace officer, warden, deputy warden, instructor, keeper, jailer, guard or other officer or permanent employee of a prison, acting in the course of his duties, is first degree murder by virtue of s. 231(4).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**RESCUE OR PERMITTING ESCAPE.****147. Every one who**

- (a) rescues any person from lawful custody or assists any person in escaping or attempting to escape from lawful custody,
  - (b) being a peace officer, wilfully permits a person in his lawful custody to escape, or
  - (c) being an officer of or an employee in a prison, wilfully permits a person to escape from lawful custody therein,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 135.

**CROSS-REFERENCES**

The terms “prison” and “peace officer” are defined in s. 2.

The related offence of escaping lawful custody and being unlawfully at large is in s. 145. Other related offences are as follows: s. 144, prison breach; s. 146, permitting or assisting escape; s. 148, assisting prisoner of war to escape.

Murder of a peace officer, warden, deputy warden, instructor, keeper, jailer, guard or other officer or permanent employee of a prison, acting in the course of his duties, is first degree murder by virtue of s. 231(4).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**SYNOPSIS**

Section 147 sets out three indictable offences of rescuing a person from lawful custody and prohibits actions of peace officers or prison employees which permit a person to escape.

Section 147(a) creates offences of assisting anyone to *escape* (or attempting to do so) or rescuing anyone from lawful custody.

Section 147(b) applies to peace officers and s. 147(c) to officers or employees of prisons who *wilfully permit* a person to escape from *lawful custody*.

The maximum sentence for these offences is five years.

**ANNOTATIONS**

A prisoner was still “escaping” within the meaning of this section although at the time the accused assisted him, he was in an area of the province which was landlocked and his flight from the authorities could only be transitory: *R. v. Stutt*; *R. v. Claussen* (1979), 52 C.C.C. (2d) 53 (B.C.C.A.).

In the absence of evidence to the contrary a police officer’s testimony that he was transporting the prisoner in custody from police jail cells to Court to set a trial date at the time he escaped was sufficient proof that the prisoner was in lawful custody and the Crown was not required to produce the actual warrant under which the prisoner was being held: *R. v. Stutt*; *R. v. Claussen*, *supra*.

**ASSISTING PRISONER OF WAR TO ESCAPE.****148. Every one who knowingly and wilfully**

- (a) assists a prisoner of war in Canada to escape from a place where he is detained, or
  - (b) assists a prisoner of war, who is permitted to be at large on parole in Canada, to escape from the place where he is at large on parole,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 136.



## CROSS-REFERENCES

Related offences include the following: s. 50, assisting enemy alien; s. 54, assisting deserter; s. 55, assisting deserter from R.C.M.P.

Murder of a peace officer, warden, deputy warden, instructor, keeper, jailer, guard or other officer or permanent employee of a prison, acting in the course of his duties, is first degree murder by virtue of s. 231(4).

A finding of guilt in relation to this offence may, in certain circumstances, give the court a discretion to impose an order prohibiting possession of firearms, ammunition or explosive substances under s. 100(2).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

## SYNOPSIS

Section 148 creates the offence of assisting a *prisoner of war to escape*. Section 148(a) and (b) spell out the details of the prisoner of war's status at the time of the offence. Both offences require that the accused *know* of the status of the prisoner of war and *wilfully* assist in the escape. The maximum sentence for this indictable offence is five years imprisonment.

## SERVICE OF TERM FOR ESCAPE / Determination of term of imprisonment / Definition of "escape".

149. (1) A person convicted for an escape committed while undergoing imprisonment shall be sentenced to serve the term of imprisonment to which he is sentenced for the escape either concurrently with the portion of the term of imprisonment that he was serving at the time of his escape that he had not served or, if the court, judge, justice or provincial court judge by whom he is sentenced for the escape so orders, consecutively, and such imprisonment shall be served

(a) in a penitentiary if the time to be served is two years or more; or

(b) if the time to be served is less than two years,

(i) in a prison, or

(ii) notwithstanding section 731, in a penitentiary if the court, judge, justice or provincial court judge by whom he is sentenced for the escape so orders.

**NOTE:** Subsection (1)(b)(ii) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 731 with s. 743.1.

(2) For the purposes of subsection (1), section 139 of the *Corrections and Conditional Release Act* applies in determining the term of imprisonment that a person who escapes while undergoing imprisonment was serving at the time of his escape.

(3) For the purposes of subsection (1), "escape" means breaking prison, escaping from lawful custody or, without lawful excuse, being at large before the expiration of a term of imprisonment to which a person has been sentenced. R.S., c. C-34, s. 137; 1972, c. 13, s. 9; 1976-77, c. 53, s. 6; 1992, c. 20, s. 199.

**NOTE:** Section 149 replaced 1995, c. 22, s. 1 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

## SERVICE OF TERM FOR ESCAPE / Definition of "escape".

149.(1) Notwithstanding section 743.1, a court that convicts a person for an escape committed while undergoing imprisonment may order that the term of imprisonment be served in a penitentiary, even if the time to be served is less than two years.

(2) In this section, "escape" means breaking prison, escaping from lawful custody or, without

*lawful excuse, being at large before the expiration of a term of imprisonment to which a person has been sentenced.*

## CROSS-REFERENCES

The terms “justice” and “provincial court judge” are defined in s. 2. “Penitentiary” is defined in s. 2 of the Penitentiary Act, R.S.C. 1985, c. P-5. The rules enacted in this section refer to the escape (defined in subsec. (3)) offences in ss. 144 and 145(1). For additional cases, relating to the calculation of sentence in cases of escape or where the accused is convicted of further offences while unlawfully at large or on parole, readers are referred to notes under the Corrections and Conditional Release Act in *Martin’s Related Criminal Statutes*, 1993.

## SYNOPSIS

This section sets out that a *sentence for escape* may be ordered to be served concurrently or consecutively to the sentence existing at the time of the escape, and where the sentence will be served. Subsection (3) contains a broad definition of “escape” so that it includes prison breach (s. 144) and escaping or being unlawfully at large (s. 145(1)). Section 149(2) states that s. 20 of the Parole Act is to be applied to calculate the length of the (previous) sentence remaining at the time of the escape (the remanet).

Section 149(1)(a) and (1)(b)(i) restate the usual rule regarding where a sentence will be served, namely that a sentence for escape of less than two years will be served in a reformatory and longer sentences in a penitentiary. However, s. 149(1)(b)(ii) provides an exception and permits the sentencing justice, judge or provincial court judge to require that a sentence of less than two years will be served in a penitentiary. If such an order is made, the remanet will also be served in a penitentiary.

## ANNOTATIONS

**Place of service of sentence** – Where the trial Judge exercises his discretion under subsec. (1)(b)(ii) and orders that “such imprisonment” shall be served in a penitentiary then the entire sentence including the remanet of the sentence to which the accused was subject at the time of the escape must be served in the penitentiary, not just that portion imposed for the offence of escaping custody: *Re Carr and The Queen* (1979), 46 C.C.C. (2d) 1, [1979] 3 W.W.R. 226 (B.C.C.A.).

**Manner of service of sentence** – Where the judge orders that the sentence for escape be served consecutively, it is to be served consecutively to the remanet of the sentence he was serving at the time and not to a sentence imposed for some offence committed while he was at large: *Re Frankum and The Queen* (1986), 29 C.C.C. (3d) 477 (B.C.C.A.).

Under this section, a term of imprisonment imposed for escaping custody may be made concurrent to the sentence the accused was serving at the time of the escape or consecutive to such sentence, but not consecutive to a sentence imposed for some further offence. Where the trial judge mistakenly made an order that the escape sentence be consecutive to the sentence for new offences imposed on that day as well as the remanet, then on an application in the nature of *certiorari*, rather than simply quashing the illegal sentence, the court may carry out the obvious intention of the trial judge and reverse the sequence of sentences so that the escape sentence runs consecutively to the time remaining unserved and the new sentences run consecutive to the escape sentence: *R. v. Easton* (1989), 8 W.C.B. (2d) 206 (Ont. C.A.), affd [1991] 2 S.C.R. 209.

**No credit for time spent unlawfully at large** – At common law the time during which an escaped prisoner was unlawfully at large did not count as part of the service by him of the term of imprisonment. Thus even if this section does not apply because the prisoner was not convicted of an escape he is not entitled to credit for the time spent unlawfully at large: *Re MacDonald and Deputy A.-G. Can.* (1981), 59 C.C.C. (2d) 202 (Ont. C.A.). *Folld: Re Dunlop and The Queen* (1981), 60 C.C.C. (2d) 380 (B.C.C.A.).

In calculating the term of imprisonment left to be served, an accused who escaped and

was subsequently held in custody in the United States is not entitled to any credit for time spent in custody awaiting extradition to Canada: *Re Morley and The Queen* (1981), 61 C.C.C. (2d) 190, 22 C.R. (3d) 331 *sub nom. Morley v. Director Of Stony Mountain Institution* (Man. C.A.).

Nor is the accused entitled to credit for time spent in custody in the United States serving a sentence imposed in that jurisdiction: *Re Dozois and The Queen* (1981), 61 C.C.C. (2d) 171, 22 C.R. (3d) 213 (Ont. C.A.). Folld: *Leschenko v. A.-G. Can. et al.* (1982), 1 C.C.C. (3d) 522, 44 N.R. 297 (Fed. C.A.).

## Part V / SEXUAL OFFENCES, PUBLIC MORALS AND DISORDERLY CONDUCT

### Interpretation

#### DEFINITIONS / "Guardian" / "Public place" / "Theatre".

##### 150. In this Part

"guardian" includes any person who has in law or in fact the custody or control of another person;

"public place" includes any place to which the public have access as of right or by invitation, express or implied;

"theatre" includes any place that is open to the public where entertainments are given, whether or not any charge is made for admission. R.S., c. C-34, s. 138.

#### CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. Despite the heading of this Part, in fact, many of the sexual offences are found in Part VIII and many of the offences dealing with public disorder are found in Part II.

#### ANNOTATIONS

**Public place** – As the definitive words preceded by the word "includes" were not intended to be exhaustive and to exclude the ordinary dictionary meaning of those words, private property, frequented by members of the public with no objection by the owner, is a public place: *R. v. Lavoie*, [1968] 1 C.C.C. 265 (N.B.C.A.).

To constitute a public place it is not necessary that all segments of the public have a right of access thereto and accordingly a beverage room, from which a portion of the public may be excluded by law or by choice, is a public place under this section: *Tegstrom v. The Queen*, [1971] 1 W.W.R. 147 (Sask. D.C.).

## Sexual Offences

#### CONSENT NO DEFENCE / Exception / Exemption for accused aged twelve or thirteen / Mistake of age / Idem.

150.1 (1) Where an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

(2) Notwithstanding subsection (1), where an accused is charged with an offence



under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused

- (a) is twelve years of age or more but under the age of sixteen years;
- (b) is less than two years older than the complainant; and
- (c) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

(3) No person aged twelve or thirteen years shall be tried for an offence under section 151 or 152 or subsection 173(2) unless the person is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a relationship of dependency.

(4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

(5) It is not a defence to a charge under section 153, 159, 170, 171 or 172 or subsection 212(2) or (4) that the accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant. R.S.C. 1985, c. 19 (3rd Supp.), s. 1.

#### CROSS-REFERENCES

The term “complainant” is defined in s. 2. The terms “position of trust or authority” and “relationship of dependency” are not defined. The Report of the Committee on Sexual Offences Against Children and Youths [The “Badgley” Report], released in 1984, contained many recommendations concerning the treatment of sexual offences against children and appears to have been the origin of many of the offences now found in this Part. That report, in its Recommendation 9, had suggested a definition of person in position of trust as including parent; step-parent; adoptive parent; foster parent; legal guardian; common-law partner of child’s parent, step-parent, adoptive parent, foster parent, or legal guardian; grandparent; uncle, aunt; boarder in young person’s home; teacher, baby-sitter; group home worker; youth group worker; and employer.

In effect, this section attempts to define the circumstances in which a child may legally consent to sexual activity and the parameters of the “defence” of mistake of fact where the mistake is as to the age of the complainant. As to other notes concerning the mistake defence generally, see notes following s. 19 and, with respect to consent in particular, the notes following s. 265.

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for any of the offences in ss. 151 to 153, 155, 159, 160, and 170 to 173 and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. That provision, in effect, reverses the common law rule of practice that required the trial judge to direct the jury as to the need for corroboration for most sexual offences, especially those involving children. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting ss. 151 to 153, 155, 159, 160(2), (3), and 170 to 173. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned with respect to his or her prior sexual conduct with persons other than the accused in proceedings under ss. 151 to 153, 155, 159, 160(2), (3), and 170 to 173. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under ss. 151 to 153, 155, 159, 160(2), (3), and 170 to 173. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence in ss. 151 to 153,

155, 159, 160, or 170 to 173 and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that where an accused is charged with an offence under ss. 151 to 153, 155, 159, 160(2), (3), and 170 to 173 and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen, where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under ss. 151 to 153, 155, 159, 160, and 170 to 173, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under these provisions in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 659 abrogates any ruling requiring a warning about convicting the accused on the evidence of a child. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age. Section 715.1 provides that, in proceedings under ss. 151 to 153, 155, 159, 160(2), (3), and 170 to 173 in which the complainant was under the age of 18 years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with an offence under ss. 151 to 153, 155, 159, 160(2), (3), 170 to 173, or 177 is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

## SYNOPSIS

This section provides a series of rules which apply to enumerated sections to prevent an accused from relying on the consent of a complainant under a specified age. It also spells out when a mistake by the accused may be a defence.

Subsection (1) provides that the consent of the complainant, who is less than 14 years old, is no defence to the sexual assault offences (ss. 271 to 273) and no defence at all, no matter what the age of the complainant, to the other enumerated offences, such as sexual exploitation (s. 153).

Subsection (2) provides an *exception* to subsec. (1) and permits the defence of consent to be raised to the offences of sexual interference (s. 151), invitation to sexual touching (s. 152), indecent exposure to a person under 14 (s. 173(2)), or sexual assault (s. 271) if the complainant is at least 12 but less than 14 years old and the additional requirements of the subsection are met. The further conditions which must be met for the exception to apply are as follows: (a) the accused is at least 12 but less than 16; (b) the accused is less than two years older than the complainant; (c) the accused is neither in a position of trust nor is the complainant in a relationship of dependency with the accused.

Subsection (3) prohibits the prosecution of a 12 or 13-year-old unless the accused comes within condition (c) noted above.

Subsections (4) and (5) limit the circumstances under which a *mistake* of fact regarding the complainant's age will be an excuse. Subsection (4) lists a series of offences for which the excuse of mistake of fact will be limited to circumstances in which the accused believed that the complainant was 14 years or over. Similarly, subsec. (5) lists another series of offences for which a mistake of fact will be permitted, if the accused believed that the complainant was 18 years or over. However, to rely on either subsection, the accused must have taken *all reasonable steps* to ascertain the age of the complainant.

## ANNOTATIONS

**Application of Charter of Rights** – It has been held that former s. 246.1(2), which also limited the consent defence where the complainant was under fourteen years of age, did not constitute an unconstitutional violation of the equality rights guaranteed by s. 15 of the Charter of Rights: *R. v. Bearhead* (1986), 27 C.C.C. (3d) 546, 22 C.R.R. 211 (Alta. Q.B.); *R. v. Le Gallant* (1986), 29 C.C.C. (3d) 291, 54 C.R. (3d) 46, 33 D.L.R. (4th) 444 (B.C.C.A.); *R. v. Perkins* (1987), 59 C.R. (3d) 56, [1987] N.W.T.R. 308 (S.C.); *R. v. Halleran* (1989), 39 C.C.C. (3d) 177 (Nfld. C.A.). *Contra*: *R. v. Black* (1990), 11 W.C.B. (2d) 557 (B.C.S.C.) where it was held that former s. 246.1(2) infringed s. 7 of the Charter and was not a reasonable limit.

Elimination of the defence of consent by subsec. (1) where the complainant is under 14 years of age does not infringe s. 7 of the Charter: *R. v. M.* (R.S.) (1991), 69 C.C.C. (3d) 223, 10 C.R. (4th) 121 (P.E.I.C.A.).

The removal of the defence of consent to a charge contrary to s. 153 violates neither s. 7 nor s. 15 of the Charter: *R. v. Hann* (1992), 75 C.C.C. (3d) 355, 15 C.R. (4th) 355, 11 C.R.R. (2d) 140 (Nfld. C.A.).

**Trial of child (Subsec. (3))** – It was held, considering a predecessor to subsec. (3) in relation to the former offence of rape, that the section merely enacted a rule of immunity not incapacity and therefore an accused who is over fourteen years of age may be convicted as a party although the principal being under fourteen years of age is immune from prosecution: *R. v. Cardinal* (1982), 3 C.C.C. (3d) 376, [1983] 1 W.W.R. 689, 42 A.R. 180 (C.A.), *affd* 18 C.C.C. (3d) 96, [1984] 2 S.C.R. 523, [1985] 6 W.W.R. 385 (7:0).

The fact that subsec. (3) does not extend immunity from prosecution to the offence of sexual assault under s. 271 does not violate an offender's rights under s. 7 of the Charter. Nevertheless, the discretion as to whether the accused should be charged with sexual assault must be exercised in a proper manner and for a proper motive and it would be for the Crown to ensure that a 12- or 13-year-old offender, who did not use force in circumstances which would only amount to an offence under s. 151 or 152, was not charged under s. 271 merely to avoid the immunity provisions of subsec. (3): *R. v. V.* (K.S.) (1994), 89 C.C.C. (3d) 477, 119 Nfld. & P.E.I.R. 290 (Nfld. C.A.), *leave to appeal to S.C.C. refused* 95 C.C.C. (3d) vi.

**Mistake as to age** – It was held in *R. v. Brooks* (1989), 47 C.C.C. (3d) 276, [1989] 3 W.W.R. 1, 93 A.R. 1 (C.A.), that the defence of honest belief provided by subsec. (4) should be given retrospective effect so as to give an accused charged with the offence under s. 271, in relation to a complainant under the age of 14 years, the benefit of that subsection, although the offence was committed prior to enactment of this subsection but after proclamation of the Charter of Rights and Freedoms. It would be contrary to the fundamental guarantee in s. 7 to deprive the accused of a defence of reasonable mistake of fact in such circumstances. [Also see note: *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 6 W.W.R. 289, [1990] 2 S.C.R. 906 (5:2) under the Charter, s. 7.]

The accused, in order to rely on the defence of mistake, need only raise a reasonable doubt. The accused must, however, have made an earnest inquiry or there should be some compelling factor that obviates the need for such an inquiry. Thus, the accused must show what steps he took and those steps were all that could be reasonably required of him in the circumstances: *R. v. Osborne* (1992), 17 C.R. (4th) 350, 102 Nfld. & P.E.I.R. 194 (Nfld. C.A.).

**Consent defence** – The burden is on the accused to prove the consent defence provided by age proximity in subsec. (2)(a): *R. v. Thompson* (1992), 76 C.C.C. (3d) 142 (Alta. C.A.).

Whether the accused took “all reasonable steps” will depend on the circumstances. In order to rely on this provision, the accused need not necessarily directly ask the victim her age or ask collateral questions that would disclose her age. The age differential



between the accused and the victim may be considered in determining whether the steps taken were reasonable and the greater the disparity in ages, the more inquiry will be required: *R. v. K.(R.A.)* (unreported, February 22, 1996, N.B.C.A.) [096/072/023-6 pp.].

Whether the accused is in a position of trust for the purpose of subsec. 2(c) must be considered with respect to the accused's position toward the complainant. While the position of the accused as viewed by other individuals, such as family members, may be relevant, it is not determinative. It will be an infrequent case in which the accused, who is a young person close in age to the complainant, will have been entrusted with sufficient responsibility to have been considered to have been in a position of trust toward the complainant, although such cases may arise where the accused was the complainant's baby-sitter, camp counsellor, lifeguard or tutor: *R. v. L.(D.B.)* (1995), 101 C.C.C. (3d) 406, 25 O.R. (3d) 649 (C.A.).

**Expert evidence respecting child abuse** – Evidence adduced solely for the purpose of bolstering the credibility of a witness is excluded by virtue of the rule against oath-helping: *R. v. Kyselka* (1962), 133 C.C.C. 103, 37 C.R. 391, [1962] O.W.N. 160 (C.A.). Thus, the opinion of a child witness' teacher that she was a trustworthy witness is inadmissible: *R. v. Hill* (1986), 32 C.C.C. (3d) 314 (Ont. C.A.). Further the opinion of a psychologist that children rarely lie about sexual abuse is inadmissible: *R. v. Kostuck* (1986), 29 C.C.C. (3d) 190, 43 Man. R. (2d) 84 (C.A.).

While expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility is admissible, provided that the testimony goes beyond the ordinary experience of the trier of fact. Where such evidence is admitted, the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the expert evidence: *R. v. Marquard*, [1993] 4 S.C.R. 223, 85 C.C.C. (3d) 193, 25 C.R. (4th) 1 (S.C.C.).

It did not violate the rule against "oath-helping" to ask an expert on child sexual abuse whether, as far as he was aware, the complainant had told him something that was untrue. The expert's evidence was directed to legitimate purposes having nothing to do with whether the complainant was truthful or not. The question and answer was admissible for the purpose of supporting the opinion of the expert expressed on other matters, such as his diagnosis of the complainant's condition and his explanation of her behaviour. His conclusions were based, in large part, on what the complainant had told him and those conclusions would be weakened if not invalidated if the expert did not believe what she had told him. It was therefore relevant to determine whether he believed her or not: *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193, 29 C.R. (4th) 113 *sub nom. R. v. B. (R.H.)*.

In *R. v. Beliveau* (1986), 30 C.C.C. (3d) 193 (B.C.C.A.), it was held that, while an expert could not be asked whether a child witness was truthful, the expert could give an opinion that certain observed behaviour, demeanour and other facts were consistent with the child having been sexually abused. Similarly *R. v. H.(E.L.)* (1990), 2 C.R. (4th) 187, 100 N.S.R. (2d) 1 (C.A.). In *R. v. J.(F.E.)* (1990), 53 C.C.C. (3d) 64, 74 C.R. (3d) 269 (Ont. C.A.), it was held that a psychologist and social worker could give expert evidence to the effect that a letter written by the child complainant, recanting the allegations of sexual abuse by her father, was typical of the recantations commonly seen among children who have been sexually abused when they realize the problems that their revelations have caused. However, the further opinion by the expert, that he had not found one case in which a child was being truthful when recanting, was inadmissible.

Expert evidence from a clinical psychologist, specializing in the treatment of young victims and perpetrators of sexual offences, that several behavioural characteristics noticed in the young victim were similar to those experienced by young victims of sexual offences is admissible on the trial of a charge of sexual assault and such evidence will

often prove invaluable: *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 161, [1990] 2 S.C.R. 3, [1990] 4 W.W.R. 577, 77 C.R. (3d) 327 (5:0).

On the trial of charges of sexual assault by the accused on his stepsons, expert evidence from a sexual abuse therapist was properly admitted concerning the *indicia* of sexual abuse and, in particular, to explain why the victims continued to associate with the accused, why the child did not immediately complain to the other parent, but did complain to outsiders, and why the memory of the events could improve as the self-protective mechanism of involuntary forgetting is overcome by the child being required to repeat the story on many occasions. This kind of evidence could be helpful to the jury on the issues of credibility by tending to show that the inferences which might well be drawn on the basis of common sense and common experience should not be drawn as a matter of course in cases of sexual abuse. The jury must, however, be warned as to the dangers in utilizing this kind of evidence, especially the danger of giving undue weight to the expert opinion: *R. v. C. (R.A.)* (1990), 57 C.C.C. (3d) 522, 78 C.R. (3d) 390 (B.C.C.A.).

It is open to the defence to call witnesses who could testify that the complainant should not be believed under oath and to give the basis for their opinion, in particular, that she was known to tell strange tales of sexual assault. However, in light of this evidence, it was open to the Crown to call the evidence of witnesses, that they would rely on the sworn testimony of the complainant, and to call evidence from experts, who had examined the complainant, to explain why she would tell these tales of sexual assaults upon her. This latter testimony explained that these accounts were in themselves symptomatic of sexual assaults upon the complainant. The further opinion by the expert, that only a small percentage of children who complain about sexual abuse are lying, was inadmissible. The trial judge must, in any event, give the jury a careful direction as to the limited use of this evidence: *R. v. Taylor* (1986), 31 C.C.C. (3d) 1 (Ont. C.A.).

In a case involving alleged physical abuse of a child, the opinion of an expert is admissible as to whether certain injuries were caused accidentally or intentionally; whether it is usual or rare to find injuries of a particular kind in a child of a particular age; the kind and degree of force required to cause the injuries; the age of the injuries; and the consistency or inconsistency of the injuries with explanations given for them. However, it is within the discretion of the trial judge to rule that the evidence be given in a less emotional but just as accurate form, for example, by use of the term “intentional force” rather than “child abuse”. The judge may also require that a conclusory statement be excluded where opinion evidence can be given just as accurately in less conclusory terms, for example, in terms of the degree of likelihood of the injuries being caused in a particular manner, provided that this does not affect the honesty or accuracy of the opinion. Further, in a jury case, the trial judge must give a careful direction to the jury as to the manner in which this evidence must be analyzed and applied by the jury: *R. v. Millar* (1989), 49 C.C.C. (3d) 193, 71 C.R. (3d) 78, 33 O.A.C. 165 (C.A.).

Before an expert’s opinion is admissible on behalf of the defence to show that the accused by reason of his disposition could not have been the perpetrator of the offence, the trial judge must be satisfied, as a matter of law, that either the perpetrator of the crime or the accused has a distinctive behavioural characteristic such that a comparison of one with the other will be of material assistance in determining innocence or guilt. The court must consider whether the scientific community has developed a standard profile for the offender who commits this type of crime: *R. v. Mohan*, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, 29 C.R. (4th) 243.

An expert may not testify that, based upon “statement validity analysis”, the allegation by the complainant is credible. Evidence tendered for the specific purpose of bolstering the credibility of a witness is inadmissible and, in any event, this theory has not been shown to be scientifically valid: *R. v. Jmieff* (1994), 94 C.C.C. (3d) 157, 84 W.A.C. 213 (B.C.C.A.).

**Similar fact evidence respecting child abuse** – It was held in *R. v. D.(L.E.)* (1989), 50

C.C.C. (3d) 142, [1989] 2 S.C.R. 111, 71 C.R. (3d) 1 (4:1), that testimony from the complainant, the accused's daughter, as to much more serious acts of sexual assault than those alleged in the charges, was inadmissible. This similar fact evidence bore nearly the entire burden of proving the Crown's case against the accused on the acts charged and its probative value was not sufficient to overcome its prejudicial effect. However, evidence from the complainant of other conduct, similar to the acts charged and more proximate in time, was properly admitted. Where similar fact evidence is admitted, the jury must be specifically warned that it is not to rely on the evidence as proof that the accused is the sort of person who would commit the offence charged and, on that basis, infer that the accused is in fact guilty of the offence charged.

In *R. v. B.(C.R.)* (1990), 55 C.C.C. (3d) 1, 76 C.R. (3d) 1, [1990] 1 S.C.R. 717 (5:2) it was held that, on the trial of charges of sexual assault of the accused's natural daughter, evidence was admissible of sexual assaults by the accused upon the daughter of a woman with whom he had lived several years before. While there were differences between the conduct alleged by the complainant and by the similar fact witness it was open to the trial judge to conclude that the probative value of the similar fact evidence with respect to the credibility of the complainant outweighed its prejudicial effect.

On a charge of manslaughter involving the death of an infant, evidence was admissible of other injuries, suffered by the child in the weeks prior to his death, where there was evidence from which the jury could find that these other injuries were intentionally inflicted by the accused: *R. v. Millar* (1989), 49 C.C.C. (3d) 193, 71 C.R. (3d) 78, 33 O.A.C. 165 (C.A.).

**Credibility of children** – While the court must carefully assess the credibility of child witnesses the standard of a reasonable adult is not necessarily appropriate in assessing the credibility of young children. Young children may not be able to recount precise details and communicate the when and where of an event with exactitude, but this does not mean that they have misconceived what happened to them or who did it: *R. v. B.(G.)*, *supra*.

There have been major changes in recent years with respect to the treatment of evidence of children. While, in a proper case, a child's evidence may be treated with caution, there is no assumption that children's evidence is always less reliable than the evidence of adults. Thus, if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into error. It is also wrong to apply adult tests for credibility to the evidence of children. This does not mean that the evidence of children should not be subject to the same standard of proof as evidence of adult witnesses in criminal cases, but only that the evidence of children must not be approached from the perspective of rigid stereotypes but on the basis of common sense, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case. The credibility of every witness of whatever age must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. In general, however, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness bearing in mind that the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she was testifying: *R. v. W.(R)* (1992), 74 C.C.C. (3d) 134, 137 N.R. 214 (S.C.C.).

**Hearsay exception** – It is open to the courts to create new hearsay exceptions where the circumstances meet the requirements for necessity, meaning "reasonably necessary", and reliability. In the case of out of court statements by children, necessity may be created where the child is found not to be competent to testify or where there is expert evidence that testimony in court might be traumatic for the child or harm the child. The requirement of necessity will probably mean that, in most cases, children will be called to give *viva voce* evidence. As regards the reliability requirement, the court would have



to take into consideration many facts such as timing, demeanour, personality of the child, the intelligence and understanding of the child and the absence of any reason to expect fabrication. The trial judge might also attach conditions to the admission of the evidence in order to safeguard the interests of the accused. This might include the right to cross-examine the child, where the judge thinks it is possible and fair in all the circumstances: *R. v. Khan* (1990), 59 C.C.C. (3d) 92, 79 C.R. (3d) 1, [1990] 2 S.C.R. 531 (5:0).

In a case where the child testifies, her hearsay statement will be admissible if reasonably necessary and if there are *indicia* of reliability present. Reasonable necessity in this context refers to the need to obtain an accurate and frank rendition of the child's version of events pertaining to the alleged assault: *Khan v. College of Physicians and Surgeons of Ontario* (1992), 76 C.C.C. (3d) 10, 94 D.L.R. (4th) 193, 9 O.R. (3d) 641 (C.A.).

In *R. v. A. (S.)* (1992), 76 C.C.C. (3d) 522, 17 C.R. (4th) 233, 11 O.R. (3d) 16 (C.A.) the court set out guidelines to assist the trial judge in directing the jury as to the use to be made of a hearsay complaint. The court recommended that the jury be told they must determine whether the statement was made and, if it was, its contents; that the statement cannot be placed on the same footing as a statement made by a witness in the course of her testimony since out-of-court statements made by persons who do not testify, offered for the truth of their contents, are subject to frailties which warrant a cautious approach; and that the weight to be given to the statement will be affected by the other evidence which may support or undermine the reliability of the statement.

## SEXUAL INTERFERENCE.

**151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 19 (3rd Supp.), s. 1.**

## CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child. The term "sexual purpose" is not defined. The defences of consent and mistaken belief as to the age of the complainant are defined in s. 150.1. Under s. 150.1(3), a young offender aged 12 or 13 years may not be tried for an offence under subsec. (2) unless he is in a position of trust or authority. A person convicted of this offence, who is found to be loitering in or near a school ground, playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18 years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, may, depending on the circumstances, be liable to either the mandatory prohibition order in s. 100(1) or to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

This section creates the offence of *sexual interference* with a person *under 14* years and spells out the sentence for it. The offence may be committed by touching the complainant's body, directly or indirectly, with either a part of the accused's body or an object. It must be proven that the accused had a *sexual purpose* for the touching. This offence is punishable by way of summary conviction or by way of indictment. In the latter case, it is punishable by a maximum sentence of 10 years.

## ANNOTATIONS

An accused who intends sexual interaction of any kind with a child and with that intent makes contact with the body of a child, "touches" the child within the meaning of this section, even where the sexual interaction is suggested by the child: *R. v. Sears* (1990), 58 C.C.C. (3d) 62 (Man. C.A.).

Setting the age limit at 14 years is clearly reasonable and does not violate the Charter: *R. G. (R. F.)* (1992), 17 W.C.B. (2d) 188 (Alta. C.A.).

## INVITATION TO SEXUAL TOUCHING.

152. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 19 (3rd Supp.), s. 1.

## CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child. The term “counsels” is defined in s. 22 and in fact includes “incite”. The term “sexual purpose” is not defined. The defences of consent and mistaken belief as to the age of the complainant are defined in s. 150.1. Under s. 150.1(3), a young offender aged 12 or 13 years may not be tried for an offence under subsec. (2) unless he is in a position of trust or authority. A person convicted of this offence, who is found to be loitering in or near a school ground, playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18 years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, may, depending on the circumstances, be liable to either the mandatory prohibition order in s. 100(1) or to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with an offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen, where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant, or any such witness, not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prose-



cution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

Section 152 provides for the offence of *inviting*, counselling or inciting a *person under 14 years of age* to touch, directly or indirectly, any person's body. The touching may be with a part of the body or with an object. The person inviting the touching must do so for a *sexual purpose*. The section applies regardless of whether the accused invites the touching of his or herself or another person or incites the person under 14 to touch their own body. Upon conviction, the maximum punishment is 10 years on indictment or the charge may be proceeded with by summary conviction.

## ANNOTATIONS

This offence does not require proof of actual physical contact between body parts or an invitation to engage in that level of contact. This section covers not only actual touching but "indirect" touching and thus includes an invitation by the accused to the complainant to hold a tissue onto which the accused ejaculated: *R. v. Fong* (1994), 92 C.C.C. (3d) 171 (Alta. C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) 171.

## SEXUAL EXPLOITATION / Definition of "young person".

**153. (1)** Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

- (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person, or
- (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

**(2)** In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years. R.S.C. 1985, c. 19 (3rd Supp.), s. 1.

## CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child or young person. The term "counsels" is defined in s. 22 and in fact includes "incite". The term "sexual purpose" is not defined. The terms "position of trust or authority" and "relationship of dependency" are not defined. The Report of the Committee on Sexual Offences Against Children and Youths [The "Badgley" Report], released in 1984, contained many recommendations concerning the treatment of sexual offences against children and appears to have been the origin of many of the offences now found in this Part. That report, in its Recommendation 9, had suggested a definition of person in position of trust as including parent; step-parent; adoptive parent; foster parent; legal guardian; common-law partner of child's parent, step-parent, adoptive parent, foster parent, or legal guardian; grandparent; uncle, aunt; boarder in young person's home; teacher; baby-sitter, group home worker; youth group worker; and employer. The defences of consent and mistaken belief as to the age of the complainant are defined in s. 150.1. A person convicted of this offence, who is found to be loitering in or near a school ground, playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18

years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section, may, depending on the circumstances, be liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with an offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant, or any such witness, not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion, respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant nor under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

This section creates the hybrid offence of *sexual exploitation of a young person*. Section 153(2) provides a definition of “young person”, namely a person between 14 and 17 years old inclusive. The offence is predicated upon either the accused being in a position of trust toward the young complainant or the young person being in a relationship of dependency with the accused. If either relationship exists and the accused commits acts amounting to either sexual interference (s. 151) or invitation to sexual touching (s. 152) then the offence is committed. (Note that it must be shown that the accused had a *sexual purpose*.) The maximum sentence upon conviction for the indictable offence of sexual exploitation is five years.

## ANNOTATIONS

Sexual assault, as defined by s. 271, is not an included offence to the offence created by this section: *R. v. Nelson* (1989), 51 C.C.C. (3d) 150 (Ont. H.C.J.).

Unlike sexual assault, as defined by s. 271, the offence created by this section is a specific intent offence: *R. v. Nelson*, *supra*.

The combined effect of this section and s. 150.1(1) does not result in violation of the equality provisions of s. 15 of the Charter, although some professions, such as teachers, are treated differently since the defence that the complainant consented is denied them. Nor does the denial of the consent defence violate s. 7 of the Charter: *R. v. Hann* (1992), 75 C.C.C. (3d) 355, 15 C.R. (4th) 355, 11 C.R.R. (2d) 140 (Nfld. C.A.).

Although the accused was physically bigger than the complainant and ran the arcade where the complainant was employed, it was not shown that the accused was in a position of trust or authority or that the young person was in a relationship of dependency: *R. v. Caskenette* (1993), 80 C.C.C. (3d) 439, 43 W.A.C. 217 (B.C.C.A.).

It was a question of fact whether the accused was in a position of trust or authority towards the 17 year old daughter of his common law wife and whether she was in a relationship of dependency although they lived in the same house. The relationship of trust or authority on the part of the man or dependency on the part of the complainant could not be conclusively presumed to exist as a matter of law: *R. v. J. (R.H.)* (1993), 86 C.C.C. (3d) 354, 27 C.R. (4th) 40, 60 W.A.C. 272 (B.C.C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 29 C.R. (4th) 400n, 88 W.A.C. 160n.

The term "dependency" is to be read *ejusdem generis* with two other categories of trust or authority and contemplates a relationship in which there is a *de facto* reliance by a young person on a figure who has assumed a position of power, such as trust or authority over the young person along non-traditional lines. The disempowering condition of dependency must exist independently of a sexual relationship: *R. v. Galbraith* (1994), 90 C.C.C. (3d) 76, 30 C.R. (4th) 230 *sub nom.* *R. v. G.(C.)*, 18 O.R. (3d) 247 (C.A.), leave to appeal to S.C.C. refused 92 C.C.C. (3d) vi.

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#### 154. [Repealed. R.S.C. 1985, c. 19 (3rd Supp.), s. 1.]

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#### INCEST / Punishment / Defence / Definition of "brother" and "sister".

155. (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

(2) Every one who commits incest is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(3) No accused shall be determined by a court to be guilty of an offence under this section if the accused was under restraint, duress or fear of the person with whom the accused had the sexual intercourse at the time the sexual intercourse occurred.

(4) In this section, "brother" and "sister", respectively, include half-brother and half-sister. R.S., c. C-34, s. 150; 1972, c. 13, s. 10; R.S.C. 1985, c. 27 (1st Supp.), s. 21.

#### CROSS-REFERENCES

Section 4(5) sets out a definition for sexual intercourse.

The accused may elect his mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18 years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.



A person, found guilty of the offence in this section, may, depending on the circumstances, be liable to the mandatory prohibition order prescribed by s. 100(1) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under 18 years of age at the time of the alleged offence and adopts the contents of the videotape while testifying. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## ANNOTATIONS

This provision does not violate s. 7 of the Charter. In addition, the denial of the defence of consent does not violate s. 7; *R. v. F.(R.P.)* (unreported, February 21, 1996, N.S.C.A.) [096/074/018-24 pp.].

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156. [*Repealed*. R.S.C. 1985, c. 19 (3rd Supp.), s. 2.]

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157. [*Repealed*. R.S.C. 1985, c. 19 (3rd Supp.), s. 2.]

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158. [*Repealed*. R.S.C. 1985, c. 19 (3rd Supp.), s. 2.]

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## ANAL INTERCOURSE / Exception / Idem.

159. (1) Every person who engages in an act of anal intercourse is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

(2) Subsection (1) does not apply to any act engaged in, in private, between

- (a) husband and wife, or
- (b) any two persons, each of whom is eighteen years of age or more, both of whom consent to the act.

(3) For the purposes of subsection (2),

- (a) an act shall be deemed not to have been engaged in in private if it is engaged in in a public place or if more than two persons take part or are present; and
- (b) a person shall be deemed not to consent to an act
  - (i) if the consent is extorted by force, threats or fear of bodily harm or is obtained by false and fraudulent misrepresentations respecting the nature and quality of the act, or
  - (ii) if the court is satisfied beyond a reasonable doubt that that person could not have consented to the act by reason of mental disability. R.S.C. 1985, c. 19 (3rd Supp.), s. 3.

#### CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child or young person. The defence of mistake as to age is set out in s. 150.1(5). The term "public place" is defined in s. 150. The term "mental disability" is not defined although there is a definition of "feeble-minded person" in s. 2. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18 years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, may, depending on the circumstances, be liable to the mandatory prohibition order under s. 100(1) or the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge

shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under 18 years of age at the time of the alleged offence and adopts the contents of the videotape while testifying. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

Section 159 creates the offence of *anal intercourse* and also sets out a number of exemptions from its application. Section 159(1) sets out the prohibition against anal intercourse and provides for prosecution by way of summary conviction procedure or by indictment. In the latter case the maximum sentence is 10 years.

Section 159(2) provides an exemption from liability if the acts were done in *private*, with the *mutual consent* of those involved, by either *husband and wife* or by two persons both of whom are at least 18 years old.

Section 159(3) limits the scope of the exceptions in subsec. (2) in two ways. First, the meaning of “private” excludes acts done in a public place, or with more than two persons present. Second, s. 159(3)(b) limits what is meant by “consent”. The accused cannot rely upon consent if it is proven beyond a reasonable doubt that the other person was unable to consent due to mental disability. In addition, consent is rendered invalid if it was obtained by force, threats, fear or fraud.

## ANNOTATIONS

**Burden of proof of exception** – It was held in *R. v. Volk* (1973), 12 C.C.C. (2d) 395, 24 C.R.N.S. 166, [1973] 6 W.W.R. 29 (Alta. C.A.), and *Duchesne v. The Queen* (1976), 36 C.R.N.S. 365 (Que. C.A.), in relation to the predecessor to subsec. (2), that the burden of proof of this exception was upon the accused. This conclusion was reached by relying upon s. 794(2) which, however, would appear applicable only to summary conviction proceedings and both of those cases concerned the former indictable offence of gross indecency. It may be that these cases must, in any event, be reassessed in light of s. 11(d) of the Charter of Rights and Freedoms. In *R. v. Khadikin* (1986), 29 C.C.C. (3d) 154 (B.C.S.C.), it was held that the exception did not on its face offend s. 11(d) and, in the circumstances of the case, it was not necessary to consider the constitutionality of s. 794(2).

**Public place** – In *R. v. P.*, [1968] 3 C.C.C. 129 (Man. C.A.), which involved a charge of gross indecency prior to the enactment of this section the majority was of the view that the act was committed in private where although a third person was present he was in a drunken stupor and was totally unaware of and incapable of observing the act and notwithstanding the police officers arriving at the accused’s residence were able to observe the act through a window.

A locked cubicle in a subway washroom into which the public could see is a public place: *R. v. Hogg* (1970), 15 C.R.N.S. 106 (Ont. C.A.); as is an alcove used by the staff of a public beach even where the act is committed late at night, the alcove being open and accessible to people: *R. v. Goguen* (1977), 36 C.C.C. (2d) 570, [1977] 5 W.W.R. 430 (B.C.C.A.) where it was also held that the definition of “public place” set out in s. 138



[now s. 150] was not exhaustive and the court may resort to the ordinary meaning of those words.

**Application of the Charter of Rights** – It was held in *R. v. M.(C.)* (1995), 98 C.C.C. (3d) 481, 41 C.R. (4th) 134, 23 O.R. (3d) 629 (C.A.) that this section discriminates on the basis of age contrary to s. 15 of the Charter and is therefore of no force and effect.

**BESTIALITY / Compelling the commission of bestiality / Bestiality in presence of or by child.**

**160. (1) Every person who commits bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.**

**(2) Every person who compels another to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.**

**(3) Notwithstanding subsection (1), every person who, in the presence of a person under the age of fourteen years, commits bestiality or who incites a person under the age of fourteen years to commit bestiality is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 19 (3rd Supp.), s. 3.**

#### CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. The term "incites" is within the definition of "counsels" in s. 22(3). A person convicted of the offence under subsec. (2) or (3), who is found to be loitering in or near a school ground, playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179. Section 170 creates an offence for a parent or guardian to procure a person under the age of 18 years for the purpose of engaging in any sexual activity prohibited by the Code. Section 171 creates an offence for a householder and other similarly situated persons to permit a person under the age of 18 years to resort to premises for the purpose of engaging in any sexual activity prohibited by the Code.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, may, depending on the circumstances, be liable to either the mandatory prohibition order under s. 100(1) or the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Where the accused is convicted or given a discharge for the offence under subsec. (2) or (3) in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas or taking certain employment which will bring him into contact with persons under 14 years of age.

Section 150.1(4) deals with the defence of mistake of age for the offence under subsec. (3).

**Special evidentiary and procedural provisions:** Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting the offences in subsec. (2) and (3). Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under subsec. (2) and (3). Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under subsec. (2) and (3). Section 486(1) and (2) provide that the judge

may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under subsec. (2) or (3), a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under 18 years of age at the time of alleged offence and adopts the contents of the videotape while testifying. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## ANNOTATIONS

The offence of bestiality may be committed although the accused and the animal are of the same gender. Further, this offence being one of “general intent” drunkenness is no defence to either the full offence or an attempt: *R. v. Triller* (1980), 55 C.C.C. (2d) 411 (B.C. Co. Ct.).

### 161. (old provision) [*Repealed. R.S.C. 1985, c. 19 (3rd Supp.), s. 4.*]

#### ORDER OF PROHIBITION / Duration of prohibition / Court may vary order/Offence.

161. (1) Where an offender is convicted, or is discharged on the conditions prescribed in a probation order under section 736, of an offence under section 151, 152, 155 or 159, subsection 160(2) or (3) or section 170, 171, 271, 272 or 273, in respect of a person who is under the age of fourteen years, the court that sentences the offender or directs that the accused be discharged, as the case may be, in addition to any other punishment that may be imposed for that offence or any other condition prescribed in the order of discharge, shall consider making and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from

- (a) attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre; or
- (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of fourteen years.

(2) The prohibition may be for life or for any shorter duration that the court considers desirable and, in the case of a prohibition that is not for life, the prohibition begins on the later of

- (a) the date on which the order is made; and
- (b) where the offender is sentenced to a term of imprisonment, the date on which

the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release.

(3) A court that makes an order of prohibition or, where the court is for any reason unable to act, another court of equivalent jurisdiction in the same province, may, on application of the offender or the prosecutor, require the offender to appear before it at any time and, after hearing the parties, that court may vary the conditions prescribed in the order if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.

(4) Every person who is bound by an order of prohibition and who does not comply with the order is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction. 1993, c. 45, s. 1.

#### CROSS-REFERENCES

Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. 1-21. Section 658 provides means of proving the age of a child.

By virtue of s. 20(11) of the Young Offenders Act, an order cannot be made under this section with respect to a young offender. Under s. 810.1, a person may apply to a provincial court judge for an order requiring the defendant to enter into a recognizance including conditions resembling the conditions which can be imposed as part of a prohibition order under this section.

#### SYNOPSIS

This provision permits the court to make an order prohibiting the offender from attending near certain public places and other facilities where persons under 14 years of age may be present and from obtaining employment which may involve the offender being in a position of trust or authority over persons under 14 years of age. The order may be made where the offender is found guilty of a specified sexual offence and the complainant was under 14 years of age. The order may be for life or some shorter period and its terms may be varied upon application of the offender or the prosecutor. Failure to comply with the prohibition order is a Crown option offence. It would seem that this section will now be resorted to rather than s. 179(b) which has been held to be unconstitutional by the British Columbia Court of Appeal.

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162. [*Repealed*. R.S.C. 1985, c. 19 (3rd Supp.), s. 4.]

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### *Offences Tending to Corrupt Morals*

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CORRUPTING MORALS / *Idem* / Defence of public good / Question of law and question of fact / Motives irrelevant / Ignorance of nature no defence / Definition of "crime comic" / Obscene publication.

163. (1) Every one commits an offence who

- (a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or
- (b) makes, prints, publishes, distributes, sells or has in his possession for the purposes of publication, distribution or circulation a crime comic.

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

- (a) sells, exposes to public view or has in his possession for such a purpose any



obscene written matter, picture, model, phonograph record or other thing whatever;

- (b) publicly exhibits a disgusting object or an indecent show;
  - (c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or
  - (d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.
- (3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.
- (4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.
- (5) For the purposes of this section, the motives of an accused are irrelevant.
- (6) [Repealed. 1993, c. 46, s. 1.]
- (7) In this section, “crime comic” means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially
- (a) the commission of crimes, real or fictitious; or
  - (b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.
- (8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene. R.S., c. C-34, s. 159; 1993, c. 46, s. 1.

#### CROSS-REFERENCES

Possession is defined by s. 4(3). The punishment for this offence is set out in s. 169. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 [although note the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. This offence is an enterprise crime offence for the purposes of Part XII.2 and the offence in subsec. (1)(a) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant for video surveillance by reason of s. 487.01(5). Section 584 deals with the sufficiency of an indictment in relation to obscene written material and s. 587(1)(d) provides for the ordering of particulars in such cases.

Section 164 enacts an alternative procedure, “*in rem*” proceedings, for determination of whether or not a publication is obscene or a crime comic. Where an order has been made under s. 164 then no proceedings may be taken under this section except with the consent of the Attorney General. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. Section 165 makes it an offence to refuse to supply publications to a person because he refuses to purchase or acquire publications which he believes to be obscene or a crime comic. Section 166 makes it an offence to publish certain material calculated to injure public morals or in relation to marital and similar proceedings. Section 167 makes it an offence to take part in immoral theatrical performances. Section 168 makes it an offence

to use the mail for the purpose of transmitting obscene material. Wilfully doing an indecent act is an offence under s. 173. Public nudity is an offence under s. 174. Exposing an indecent exhibition is an offence under s. 175(1)(b). Child pornography is dealt with in s. 163.1.

## SYNOPSIS

Section 163 makes it an offence to produce, publish or distribute *obscene things or crime comics*.

Section 163(1)(a) is very broadly worded to prohibit all phases of the making, printing, publication, distribution and circulation, and the possession of *obscene things*, with the intention of doing any of the prohibited activities. The prohibited class of obscene things is expansive, covering written material, pictures, models, records or "any other thing whatsoever". Section 163(8) provides the sole definition of what is deemed to be obscene. It states that if a dominant characteristic of the publication is the *undue exploitation of sex*, or the combination of sex and at least one of crime, horror, cruelty or violence. The acts described within the section have received a broad interpretation, as reflected, for example, by a decision stating that the display of such objects in plain view within a store amounts to publication.

Section 163(1)(b), which deals with *crime comics*, prohibits many aspects of the publication process including the distribution and sale of crime comics, or their possession for such purposes. Section 163(7) defines what constitutes a crime comic.

Section 163(5) makes the accused's motives irrelevant. Subsection (6) purports to state that it is *no defence* that the accused was ignorant of the nature or presence of obscene content of the thing or of the crime comic. However, decisions made under the Canadian Charter of Rights and Freedoms have held that this subsection is unconstitutional and have established that it is a defence if the accused made an *honest and reasonable mistake of fact*. A mistake of law, which causes the accused to believe that the material he or she knows the nature or presence of is not obscene or a crime comic, is not a defence.

Section 163(2) makes it an offence to *knowingly* and *without lawful justification or excuse* engage in any of the acts listed in this subsection, which relate to obscenity, indecent objects, drugs and other things used to induce (or said to be useful to induce) abortions or miscarriages, and a number of other specified sex related materials.

Section 163(3) provides a defence if the accused *establishes* that the acts which make out the offence under this section *served the public good*, and extended no further than was required to achieve that objective. Subsection (4) states that whether an act served the public good, and whether there is any evidence that the act extended beyond what was required to achieve that end, are questions of law. That means that in a jury trial these issues would be determined by the trial judge. However, the subsection also provides that if it is determined that there is some evidence, the decision as to whether the act actually extended beyond what was needed to achieve the public good is a question of fact and will, therefore, be determined by the trier of fact.

## ANNOTATIONS

**Subsec. (1) / Elements of offence generally / Distinction between subsecs. (1) and (2)**—There is a difference between selling or having in possession for the purpose of selling contrary to subsec. (2) and distributing contrary to subsec. (1): *Fraser et al. v. The Queen*, [1967] 2 C.C.C. 42, 59 D.L.R. (2d) 240 (S.C.C.) (5:0).

In *R. v. Dorosz* (1971), 4 C.C.C. (2d) 203, 14 C.R.N.S. 357 (Ont. C.A.), the evidence upon conviction of possession of obscene matter for the purpose of distribution was simply the display for sale in a variety store of certain obscene publications. It was held (2:1) that Parliament had drawn a line in the chain from production to consumption of such material by virtue of mutually exclusive subsecs. (1) and (2), with the result that although the omission of proof of knowledge of obscenity is directed against the maker, circulator and distributor, that element must be proven against the person through whose hands the publication must finally pass before public consumption. Furthermore,

it was the unanimous view of the Court that in any event the retail store clerk is not a distributor. Also see *R. v. Sudbury News Service Ltd.* (1978), 39 C.C.C. (2d) 1, 18 O.R. (2d) 428 (C.A.).

**Meaning of “circulates” and “distributes”** – A private showing of obscene films in the accused’s home does not constitute circulation: *R. v. Rioux*, [1970] 3 C.C.C. 149, 8 C.R.N.S. 21 (S.C.C.).

While the mere renting of video movie cassettes may not constitute the offence under this paragraph, the offence was made out where the accused copied tapes for rental to other persons: *R. v. Harris and Lighthouse Video Centres Ltd.* (1987), 35 C.C.C. (3d) 1, 57 C.R. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused December 7, 1987.

**Mens rea and mistake of fact** – The rental of video movie cassettes comes within the meaning of distribution or circulation in this subsection: *R. v. Video Moviestop* (1982), 67 C.C.C. (2d) 87, 36 Nfld. & P.E.I.R. 321 (Nfld. S.C. T.D.). *Contra: R. v. Household-ers T.V. and Appliances Ltd. et al.* (1984), 20 C.C.C. (3d) 561 (Ont. Co. Ct.), affd 20 C.C.C. (3d) 571 (C.A.).

While an intent to publish is not an element of all the offences created by this subsection, such as the offence of making, where the crown has framed its information to allege making an obscene publication, the allegation of publication cannot be said to be mere surplusage and the accused was entitled to be discharged where there was no evidence of publication or intent to publish: *Hawshaw v. The Queen* (1986), 26 C.C.C. (3d) 129, 51 C.R. (3d) 289, [1986] 1 S.C.R. 668 (7:0).

In *R. v. Metro News Ltd.* (1986), 29 C.C.C. (3d) 35, 53 C.R. (3d) 289, 32 D.L.R. (4th) 321 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C., D.L.R. *loc. cit.*, while the court held that subsec. (6) was unconstitutional as it had the effect of making the offences under this subsection absolute liability offences, nevertheless this holding did not have the effect of requiring the crown to prove *mens rea*. Rather, the act of distributing matter which is in fact obscene *prima facie* imports the offence, but it is open to an accused to avoid criminal liability by raising a reasonable doubt that he acted under an honest and reasonable belief in a state of facts which, if it had been as he believed them to be, would make his act innocent. However an accused’s belief that the magazine did not exceed the community standards of tolerance and was not obscene did not constitute a reasonable mistake of fact nor give rise to a defence of due diligence. Whether a publication unduly exploits sex under subsec. (8) or whether the allegedly obscene matter exceeded the community’s standard of tolerance constitutes a value judgment to which the doctrine of mistake of fact is inapplicable. An accused’s belief that the publication was not legally obscene is not a defence.

Where a distributor delegates to an advisory committee the decision whether or not a publication is obscene, the knowledge of the committee as to the contents of the publication is imputed to the distributor: *R. v. Regina News Ltd.* (1987), 39 C.C.C. (3d) 170, 62 Sask. R. (C.A.).

**Subsec. (2) / Meaning of “knowingly”** – The offence of “knowingly” selling obscene material requires proof of knowledge with respect to all aspects of the *actus reus*. It is not sufficient that the accused was aware that the dominant characteristic of the material was the exploitation of sex as the sale of such material is lawful. The Crown must show that the seller of the obscene material was aware of the relevant facts that made the material obscene. In the case of pornographic films and videos, it cannot easily be inferred that those selling the materials know their contents. While it may be inferred that the retailer is aware that the materials are erotic or pornographic and deal with the exploitation of sex, selling films dealing with the exploitation of sex is not illegal unless the material is obscene. Not only must the dominant characteristic of the material be the exploitation of sex, but the exploitation of sex must be undue. To prove knowledge, the Crown must prove beyond a reasonable doubt that the accused knew that the materials being sold have the qualities or contain the specific scenes which render such material obscene in



law. This does not require proof that the retailer actually viewed the tapes. Knowledge can be proven by circumstantial evidence. In addition, in proper circumstances, the Crown can rely upon the principles of willful blindness. Where the accused knew of the presence of the ingredients of the subject-matter which rendered the exploitation of sex undue and thus obscene, the fact that the material had been approved by the provincial film review board does not constitute a lawful justification or excuse nor negative the necessary *mens rea*: *R. v. Jorgensen*, [1995] 4 S.C.R. 55, 102 C.C.C. (3d) 97, 43 C.R. (4th) 137.

**Expose to public view** – An obscene film was not exposed to public view within the meaning of this subsection where it was only shown to friends and relatives of the groom attending a private “stag party”. The hall in which the film was shown was, at the time, not open to the public, but rather, was used for a private gathering. In this respect, the definition of “private” in the *Oxford English Dictionary* as “. . . kept or removed from public view . . . not within the cognizance of people generally . . . not open to the public; intended only for the use of particular and privileged persons” accurately described the circumstances in which the film was shown: *R. v. Harrison* (1973), 12 C.C.C. (2d) 26, [1973] 4 W.W.R. 439 (Alta. Dist. Ct.).

On the other hand, where an obscene film was shown not only to invited guests but to others who merely paid an admission charge then there was an exposure to public view: *R. v. Vigue*, 13 C.C.C. (2d) 381, 24 C.R.N.S. 210, [1973] 6 W.W.R. 573 (B.C. Prov. Ct.).

**Disgusting object, indecent show (para. b)** – The offence created by para. (b) of exhibiting an indecent show is not so vague as to be an unconstitutional infringement of freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. The test to be applied in determining indecency is that of the community standard of tolerance. A relevant consideration in applying that test is the nature of the audience, the issue being whether the show is inappropriate according to Canadian standards of tolerance because of the context in which it takes place: *R. v. Pelletier* (1985), 27 C.C.C. (3d) 77, 49 C.R. (3d) 253, [1986] R.J.Q. 595 (C.A.).

The word “disgusting” was held to have a known dictionary as well as judicial meaning and, therefore, not to violate the due process guarantee under the Canadian Bill of Rights: *R. v. Isaacs' Gallery Ltd.* (1975), 19 C.C.C. (2d) 570 (Ont. C.A.), leave to appeal refused [1975] 1 S.C.R. ix, 5 N.R. 122.

The offence of exhibiting a disgusting object is unconstitutionally vague and violates ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms and is of no force and effect: *R. v. Glassman and Bogoy* (1986), 53 C.R. (3d) 164 (Ont. Prov. Ct.).

**Note:** Also see notes under ss. 174 and 175.

**Subsec. (3) (public good)** – Where, although the book has certain literary merit particularly for the more sophisticated reader, it was available for the general public to whom the book was neither symbolism nor a psychological study the accused cannot rely on the defence of public good: *R. v. Delorme* (1973), 15 C.C.C. (2d) 350, 21 C.R.N.S. 305 (Que. C.A.) (2:1).

In *R. v. American News Co. Ltd.* (1957), 118 C.C.C. 152, 25 C.R. 374 (Ont. C.A.), Laidlaw J.A. adopted as a definition of the words “public good” a formula used in Stephen’s *Digest of Criminal Law*, namely, “necessary or advantageous to religion or morality to the administration of justice, the pursuit of science, literature or art, or other objects of general interest”.

**Subsec. (6)** – This subsection is of no force and effect by reason of its inconsistency with s. 7 of the Canadian Charter of Rights and Freedoms: *R. v. Metro News Ltd.* (1986), 29 C.C.C. (3d) 35, 53 C.R. (3d) 289, 32 D.L.R. (4th) 321 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C., D.L.R. *loc. cit.*; *R. v. St. John News Co. Ltd.* (1984), 17 C.C.C. (3d) 234, 16 D.L.R. (4th) 248 (N.B.Q.B.). *Contra*: *R. v. Red Hot Video Ltd.* (1984), 11

C.C.C. (3d) 389, 38 C.R. (3d) 275 (B.C.Co.Ct.), affd on other grounds 18 C.C.C. (3d) 1, 45 C.R. (3d) 36 (C.A.), leave to appeal to S.C.C. refused [1985] 2 S.C.R. x.

**Subsec. (8) [definition of obscenity] / Test for obscenity** – In *Towne Cinema Theatres Ltd. v. The Queen* (1985), 18 C.C.C. (3d) 193, 45 C.R. (3d) 1, [1985] 4 W.W.R. 1 (S.C.C.) (7:0) the Court considered the community standards test embodied in this section as it related to a film which had been shown in a commercial theatre with the approval of the provincial censor board. While several of the members of the Court gave reasons, there was agreement among the majority of the Court that the community standard test is a test of tolerance – not what Canadians think is right for themselves to see but what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standards of tolerance to allow them to see it.

In *R. v. Butler* (1992), 70 C.C.C. (3d) 129, 11 C.R. (4th) 137, [1992] 1 S.C.R. 452 the court laid down a new comprehensive interpretation of subsec. (8). It would appear that this test is to be applied in two stages. The first stage involves a determination of whether the particular material involves the undue exploitation of sex. The second stage requires application of a test of “internal necessities”. For the purposes of this definition, the court referred to three categories of pornography: (1) explicit sex with violence; (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing. Violence in this context includes both actual physical violence and threats of physical violence. In applying the definition to the three categories, the courts must determine what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men or possibly the reverse. Anti-social conduct for this purpose is conduct which society formally recognizes as incompatible with its proper functioning. The stronger the inference of risk of harm, the lesser the likelihood of tolerance. Material falling in the first category will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Explicit sex that is not violent and neither degrading nor dehumanizing is generally tolerated and will not fall within the definition unless it employs children in its production. If material is not obscene under this framework, it does not become so by reason of the person to whom it is or may be shown or exposed nor by reason of the place or manner in which it is shown. Even if the work contains sexually explicit material that, by itself, would constitute the undue exploitation of sex, the portrayal of sex must then be viewed in context to determine whether that is the dominant theme of the work as a whole [the “internal necessities” test]. In other words, is undue exploitation of sex the main object of the work or is this portrayal of sex essential to a wider artistic, literary, or other similar purpose? Again, the community standards test applies at this stage, the court having to determine whether the sexually explicit material, when viewed in the context of the whole work, would be tolerated by the community as a whole. Since artistic expression rests at the heart of freedom of expression values, any doubt in this regard must be resolved in favour of freedom of expression.

Videotapes which merely display a large number of explicit sexual acts in a non-violent consensual manner, although devoid of any loving or affectionate relationship or any plot of meaningful value, are not necessarily degrading or dehumanizing. Further, even if the material could be found to be degrading or dehumanizing, it will not necessarily be found to be obscene. The material must also create a substantial risk of harm to society. Like any element of criminal allegation, it must be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at trial. It does not follow from proof of portrayal of sexually explicit acts in a degrading or dehumanizing manner that the films are harmful and therefore obscene. It is open to the court to find that the harm component of the offence is not established. Where the participants appear as fully willing participants occupying substantially equal roles in a setting devoid of violence, bond-

age or bestiality or sex associated with crime, horror, cruelty, coercion or children, the risk of societal harm may not be evident. Further evidence may be required to prove that exposure to the impugned material will create a substantial risk of an identifiable harm that may cause persons to act in a manner inimical to the proper functioning of society. The question is essentially one of degree but the onus remains on the crown to prove that the offence is made out: *R. v. Hawkins* (1993), 86 C.C.C. (3d) 246, 26 C.R. (4th) 75, 15 O.R. (3d) 549 (C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 66 O.A.C. 46.

**Effect of audience to which publication directed** – The audience viewing a publication is not relevant in determining whether the publication is obscene. Thus, the fact that articles were for sale in a store restricted to adults did not prevent a finding that the articles were obscene: *Germain v. The Queen* (1985), 21 C.C.C. (3d) 289, 21 D.L.R. (4th) 296 (S.C.C.) (9:0); *R. v. Butler*, *supra*.

**Application of subsection to articles other than publications** – It was held in *Hawshaw v. The Queen* (1986), 26 C.C.C. (3d) 129, 51 C.R. (3d) 289, [1986] 1 S.C.R. 668 (7:0) that this subsection sets out the sole test for obscenity in charges under the Criminal Code whether based on publication or not, thus clearing up the issue left open in several earlier cases such as *Dechow v. The Queen* (1977), 35 C.C.C. (2d) 22, [1978] 1 S.C.R. 951, 76 D.L.R. (3d) 1 and *Germain v. The Queen*, *supra*.

**Proof of community standards** – The Crown is not required to adduce expert evidence as to community standards. In a case involving an alleged obscene motion picture, the trial judge must consider the evidence, adduced by the defence from the chairman of the provincial censor board, as it may have been indicative of community standards of tolerance: *Towne Cinema Theatres Ltd. v. The Queen*, *supra*; *R. v. Butler*, *supra*.

The basis upon which the provincial film classification director approved or disapproved of a film for public showing is evidence which the jury may consider in determining the issue of obscenity (Robertson, J.A., dissenting upon this specific point) but his lawful approval of the film cannot amount to justification or excuse on the part of the accused. However the Court was of the unanimous view that evidence of the criteria employed by the film classification director in determining his classification of the film was admissible as relevant to show the standard of the community with respect to the acceptance of the film for display to the public: *R. v. McFall* (1975), 26 C.C.C. (2d) 181 (B.C.C.A.). Similarly *R. v. Hawkins*, *supra*. Also see *R. v. Jorgensen*, *supra*.

When judging novels, the opinions of literary persons are most helpful as they assist the trier of fact in relating the offending passages to the entire work and in deciding whether, taking the novel as a whole, the exploitation of sex is a dominant characteristic at all or whether, in the light of its theme and literary merit, the work is tolerable. Similar evidence is valuable in respect of works of art. Opinion evidence respecting community standards of tolerance is less helpful, since it relates to something which is probably incapable of scientific proof and may be based on little more than the personal views of the witness. In the final analysis, it is for the trier of fact to determine what is the prevailing standard of tolerance: *R. v. Penthouse International Ltd.* (1979), 46 C.C.C. (2d) 111, 96 D.L.R. (3d) 735, 23 O.R. (2d) 786 (C.A.).

**Application of Charter of Rights** – The prohibition on obscene material as defined by subsec. (8) infringes freedom of expression but constitutes a reasonable limit prescribed by law within the meaning of s. 1: *R. v. Butler*, *supra*.

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**DEFINITION OF "CHILD PORNOGRAPHY"** / Making child pornography / Distribution or sale of child pornography / Possession of child pornography / Defence / Defences / Other provisions to apply.

**163.1 (1)** In this section, "child pornography" means



- (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
    - (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
    - (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; or
  - (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act.
- (2) Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) an offence punishable on summary conviction.
- (3) Every person who imports, distributes, sells or possesses for the purpose of distribution or sale any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) an offence punishable on summary conviction.
- (4) Every person who possesses any child pornography is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
  - (b) an offence punishable on summary conviction.
- (5) It is not a defence to a charge under subsection (2) in respect of a visual representation that the accused believed that a person shown in the representation that is alleged to constitute child pornography was or was depicted as being eighteen years of age or more unless the accused took all reasonable steps to ascertain the age of that person and took all reasonable steps to ensure that, where the person was eighteen years of age or more, the representation did not depict that person as being under the age of eighteen years.
- (6) Where the accused is charged with an offence under subsection (2), (3) or (4), the court shall find the accused not guilty if the representation or written material that is alleged to constitute child pornography has artistic merit or an educational, scientific or medical purpose.
- (7) Subsections 163(3) to (5) apply, with such modifications as the circumstances require, with respect to an offence under subsection (2), (3) or (4), 1993, c. 46. s. 2.

#### CROSS-REFERENCES

Possession is defined by s. 4(3). For notes on procedure on arrest and trial for this offence, see the notes under s. 163.

Section 164 enacts an alternative procedure, “*in rem*” proceedings, for determination of whether or not the representation or written material is child pornography. The offences in this section are enterprise crime offences for the purposes of Part XII.2 and may be the basis for obtaining an authorization to intercept private communications or a warrant for video surveillance.

#### SYNOPSIS

This section creates various offences relating to child pornography which is defined in subsec. (1). To determine whether the material offends para. (b) of the definition, resort will have to be made to the various sexual offences of the Code: ss. 151, 152, 153, 155,

159, 160, 170, 171, 172, and 271 to 273. Subsections (2) and (3) correspond to the similar offences under s. 163 and notes under that section should be referred to in determining whether the material has, for example, been published. Subsection (4) creates an offence of simple possession of child pornography. Subsection (5) allows for a limited defence of reasonable mistake of fact as to the age of the persons depicted. Subsection (6) explicitly recognizes a defence of artistic merit or educational, scientific or medical purposes. A similar defence had been recognized by the courts under s. 163, although it was not expressly provided for. Pursuant to subsec. (7), the defence of public good in s. 163(3) is incorporated by reference. For notes on that defence, see s. 163.

## ANNOTATIONS

**Application of Charter of Rights** – Although this section infringes the guarantee to freedom of expression in s. 2(b) of the Charter, it constitutes a reasonable limit and is therefore valid: *Ontario (Attorney General) v. Langer* (1995), 97 C.C.C. (3d) 290, 123 D.L.R. (4th) 289, 40 C.R. (4th) 204 (Ont. Ct. (Gen. Div.)), leave to appeal to S.C.C. refused 100 C.C.C. (3d) vi, 126 D.L.R. (4th) vii.

**Artistic merit defence** – As with the definition of obscenity under s. 163, the determination of artistic merit in the context of child pornography under this section must include consideration of contemporary standards of community tolerance. Determination of artistic merit must be made on an objective basis. Thus, the creator of the work must not only have had an artistic purpose, but also have produced something with actual artistic merit: *Ontario (Attorney General) v. Langer, supra*.

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**WARRANT OF SEIZURE / Summons to occupier / Owner and maker may appear / Order of forfeiture / Disposal of matter / Appeal / Consent / Definitions / "Court" / "Crime comic" / "Judge".**

**164. (1)** A judge who is satisfied by information on oath that there are reasonable grounds for believing that

- (a) any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is obscene or a crime comic, within the meaning of section 163, or
- (b) any representation or written material, copies of which are kept in premises within the jurisdiction of the court, is child pornography within the meaning of section 163.1,

shall issue a warrant authorizing seizure of the copies.

**(2)** Within seven days of the issue of the warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

**(3)** The owner and the maker of the matter seized under subsection (1), and alleged to be obscene, a crime comic or child pornography, may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

**(4)** If the court is satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

**(5)** If the court is not satisfied that the publication, representation or written material referred to in subsection (1) is obscene, a crime comic or child pornography, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

- (a) on any ground of appeal that involves a question of law alone,
  - (b) on any ground of appeal that involves a question of fact alone, or
  - (c) on any ground of appeal that involves a question of mixed law and fact,
- as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI and sections 673 to 696 apply with such modifications as the circumstances require.

(7) Where an order has been made under this section by a judge in a province with respect to one or more copies of a publication, representation or written material, no proceedings shall be instituted or continued in that province under section 163 or 163.1 with respect to those or other copies of the same publication, representation or written material without the consent of the Attorney General.

(8) In this section,  
“court” means

- (a) in the Province of Quebec, the Court of Quebec, the municipal court of Montreal and the municipal court of Quebec,
- (a.1) in the Province of Ontario, the Ontario Court (General Division),
- (b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,
- (c) in the Provinces of Prince Edward Island and Newfoundland, the Trial Division of the Supreme Court,
- (c.1) [*Repealed. 1992, c. 51, s. 34.*]
- (d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, the Supreme Court;

**NOTE:** Definition “court” amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting para. (d). The text of para. (d), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory, the Northwest Territories and Nunavut, the Supreme Court;

“crime comic” has the same meaning as it has in section 163;

“judge” means a judge of a court. R.S., c. C-34, s. 160; 1974-75-76, c. 48, s. 25; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 3; 1990, c. 17, s. 9; 1992, c. 1, s. 58; 1992, c. 51, s. 34; 1993, c. 46, s. 3.

#### CROSS-REFERENCES

The definition of obscenity is in s. 163(8) and of child pornography in s. 163.1(1). Attorney General is defined in s. 2. An ordinary search warrant to search for evidence of the obscenity and child pornography offences under other sections of the Criminal Code may be obtained under ss. 487 and 487.1 [Re Video Movies Ltd. and The Queen (1984), 16 C.C.C. (3d) 351 (N.B.Q.B.)]. The procedure in this section relates only to the *in rem* proceedings.

#### SYNOPSIS

This provision authorizes special *search and seizure* powers in relation to obscene publications, crime comics and child pornography and for the restoration or forfeiture of seized items.

Section 164(1) permits a judge to issue a warrant to seize crime comics, obscene publications and child pornography located at a place within the jurisdiction of the judge. The procedure is like that usually employed in the issuance of warrants. It requires that after receiving information on oath the judge is to be satisfied that there are *reasonable grounds to believe* there are copies of any publication *kept for sale or distribution* at the place to be



searched. Subsection (8) provides definitions of the terms “judge”, “court”, and “crime comic” for the purposes of this section.

Section 164(2) commences the *in rem* forfeiture proceedings the details of which are set out in the rest of this section. The judge shall issue a *summons* within *seven days of the issuance of the search warrant*, to the *occupier* of the searched premises, requiring that person to *show cause* why the items should not be forfeited. Despite the wording of this subsection it has been determined that the onus remains on the Crown.

Section 164(3) permits the owner and author of the seized items to be represented in the forfeiture proceedings and oppose the proposed forfeiture.

Section 164(4) provides that if the court is satisfied that the seized items are either obscene or crime comics it *shall make an order of forfeiture*, and the Attorney General will direct the disposal of the items. However, if the court is *not satisfied* that the items come within the prohibited categories then the items *shall be restored* to the person from whom they were seized (subsec. (5)). An order under this subsection will not be made until the time for launching an appeal has passed. Subsection (6) provides for a right of appeal to any one who appeared in the proceedings as if it was an indictable appeal under Part XXI with such modifications as are required. The grounds of appeal are the broadest possible, ranging from questions of fact to questions of law, or a mixture of the two. The incorporation of the sections relating to indictable appeals specified in this subsection also incorporates an appeal to the Supreme Court of Canada, but only on the usual ground, *i.e.*, a question of law, and not the broader grounds permitted in the initial level of appeal.

Section 164(7) provides that where a judge has made an order of restoration or forfeiture under this section *no prosecution* under s. 163 (which prohibits possessing obscene items or crime comics for certain purposes) may be brought in relation to the same publication *unless the Attorney General consents*.

## ANNOTATIONS

**Sufficiency of warrant** – The warrant under this subsection must specify the publications and the phrase “and others” following certain titles will be severed from the warrant as being too indefinite: *Re Laborde and The Queen* (1972), 7 C.C.C. (2d) 86, [1972] 4 W.W.R. 290 *sub nom. Laborde v. Bendas* (Sask. Q.B.).

For the purposes of this section a video tape is not a “publication”: *Re Video Movies Ltd. and The Queen*, *supra*. *Contra: R. v. Nicols* (1984), 17 C.C.C. (3d) 555, 43 C.R. (3d) 54 (Ont. Co. Ct.).

**Procedure on *in rem* proceedings** – The summons must be returnable before the Court and not a Judge in Chambers: *Belding v. The Queen* (1976), 37 C.R.N.S. 229, 16 N.B.R. (2d) 8 (S.C. App. Div.).

Despite the wording of this subsection calling for the owner to “show cause” why the matter should not be forfeited, the burden of proof is on the Crown to show that the material is obscene and the ordinary rules of evidence apply: *R. v. Penthouse Magazine* (1977), 37 C.C.C. (2d) 376 (Ont. Co. Ct.). [An appeal by the owner to the Ont. C.A. was dismissed 46 C.C.C. (2d) 111 without reference to these issues.] Similarly, *R. v. H. H. Marshall Ltd.* (1982), 69 C.C.C. (2d) 197, 51 N.S.R. (2d) 629 (S.C. App. Div.).

The burden on the Crown is to prove beyond a reasonable doubt that the publication is obscene: *R. v. Benjamin News (Montreal) Reg'd et al.* (1978), 48 C.C.C. (2d) 399, 6 C.R. (3d) 281 (Que. C.A.).

The Superior Court has an inherent jurisdiction to quash a warrant issued under this section, where no show cause hearing has ever been held, even where the warrant is originally issued, as in Prince Edward Island, by another Judge of the Superior Court: *Re Shama's Clover Farm et al. and The Queen* (1982), 1 C.C.C. (3d) 119, 40 Nfld. & P.E.I.R. 271 (P.E.I.S.C.).

**Appeal procedure** – This subsection only provides for an appeal to an appellate court

and does not apply to a further appeal to the Supreme Court of Canada: *Provincial News Co. et al. v. The Queen* (1974), 20 C.C.C. (2d) 385, 53 D.L.R. (3d) 402, [1976] 1 S.C.R. 89 (3:2).

**Application of the Charter of Rights** – The requirement in this section that the judge “shall” issue a warrant if the prerequisites are satisfied violates s. 8 of the Charter. However, rather than holding the provision to be of no force and effect, the section should be read down to provide that the judge “may” issue the warrant: *Ontario (Attorney General) v. Langer* (1995), 97 C.C.C. (3d) 290, 123 D.L.R. (4th) 289, 40 C.R. (4th) 204 (Ont. Ct. (Gen. Div.)), leave to appeal to S.C.C. refused 100 C.C.C. (3d) vi, 126 D.L.R. (4th) vii.

## TIED SALE.

**165. Every one commits an offence who refuses to sell or supply to any other person copies of any publication for the reason only that the other person refuses to purchase or acquire from him copies of any other publication that the other person is apprehensive may be obscene or a crime comic. R.S., c. C-34, s. 161.**

## CROSS-REFERENCES

The definitions of obscenity and crime comic are in s. 163. The punishment for this offence is set out in s. 169. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 [although, note the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

## SYNOPSIS

This section prohibits tying the sale or supply of a publication to the purchase or acquisition of any other publication under particular circumstances.

The key to the section is that the seller/supplier refuses to provide another publication to the person based *solely* on the refusal of the would-be recipient to also purchase or receive a publication which that person is *apprehensive may be either obscene or a crime comic*.

**166. [Repealed. 1994, c. 44, s. 9.]**

## IMMORAL THEATRICAL PERFORMANCE / Person taking part.

**167. (1) Every one commits an offence who, being the lessee, manager, agent or person in charge of a theatre, presents or gives or allows to be presented or given therein an immoral, indecent or obscene performance, entertainment or representation.**

**(2) Every one commits an offence who takes part or appears as an actor, a performer or an assistant in any capacity, in an immoral, indecent or obscene performance, entertainment or representation in a theatre. R.S., c. C-34, s. 163.**

## CROSS-REFERENCES

The term “theatre” is defined in s. 150. The definition of obscenity is in s. 163(8). In addition to the obscenity offences in s. 163, related offences are: s. 173, wilfully doing an indecent act; s. 174, public nudity; s. 175(1)(b), exposing an indecent exhibition.

The punishment for this offence is set out in s. 169. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is con-

ducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 [although, note the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

## SYNOPSIS

Section 167 makes it an offence to either take part in an *immoral, indecent or obscene performance*, or to permit such a performance in a theatre.

Section 167(1) prohibits the lessee, manager, agent, or person in charge of the theatre, to give any of the forms of permission or acquiescence listed in the subsection for such a performance. Section 167(2) creates liability for those performing or assisting in such a performance. The determination of what is immoral, indecent or obscene is to be made with reference to Canadian contemporary community standards.

## ANNOTATIONS

**Relationship to public nudity offence** – The fact that Parliament has made it an offence to be nude in a public place under s. 174 is irrelevant to a charge under this section. A performance is not rendered “immoral” solely because it is performed in the nude: *Johnson v. The Queen* (1973), 13 C.C.C. (2d) 402, 40 D.L.R. (3d) 215 (6:3) (S.C.C.).

**Application of obscenity definition** – The definition of “obscenity” in s. 163(8) applies to a charge under this section of presenting an obscene entertainment where the entertainment is a movie and thus a “publication” within the meaning of s. 163(8): *Towne Cinema Theatres Ltd. v. The Queen* (1985), 18 C.C.C. (3d) 193 (S.C.C.) (7:0).

In *Re Nova Scotia Board of Censors et al. and McNeil* (1978), 44 C.C.C. (2d) 316, 84 D.L.R. (3d) 1, [1978] 2 S.C.R. 662 (5:4) provincial legislation establishing a board of censors with powers to prohibit the use or exhibition of films was held to be *intra vires* the province notwithstanding it was reasonable to assume that prohibition of films was based on moral grounds. The Court noted however that notwithstanding a film had been passed by the Board a charge under this section could still be made out.

**Proof of offence** – A manager cannot avoid criminal liability by alleging that he was not present for the very performance that was the subject of the charge. He has the opportunity, right and obligation to supervise the performances given in his theatre and the Crown need only prove that he allowed it to be performed: *R. v. Campbell* (1974), 17 C.C.C. (2d) 130 (Ont. Co. Ct.).

While proof that the performance took place in a theatre as defined in s. 150 is an essential element of the Crown’s case the Crown’s case will not fail where it fails to prove that the performance took place in the premises named in the indictment where there is no suggestion the accused were in any way misled or prejudiced: *R. v. MacLean and MacLean*; *R. v. Hilsinger* (1981), 58 C.C.C. (2d) 318 (Ont. C.A.).

The test for whether the performance is immoral is the community standard of tolerance which requires the Judge to have regard to all the circumstances surrounding the commission of the alleged offence, including evidence as to the performer’s purpose: *R. v. MacLean and MacLean* (No. 2) (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), leave to appeal to S.C.C. refused *loc. cit.*

So-called “lap dancing” constitutes an indecent performance within the meaning of this section. Conduct which is not indecent in private may become indecent by reason of the surrounding circumstances and context in which it takes place. The test to be applied is the “community standard of tolerance”: *R. v. Mara* (unreported, February 9, 1996, Ont. C.A.) [096/050/041-28 pp.].

## MAILING OBSCENE MATTER.

168. Every one commits an offence who makes use of the mails for the purpose of



transmitting or delivering anything that is obscene, indecent, immoral or scurrilous, but this section does not apply to a person who makes use of the mails for the purpose of transmitting or delivering anything mentioned in subsection 166(4). R.S., c. C-34, s. 164.

**Editor's Note:** We understand that s. 168 will be amended by future legislation to correct the reference to s. 166 which has been repealed.

#### CROSS-REFERENCES

The punishment for this offence is set out in s. 169. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 [although, note the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. With respect to territorial jurisdiction of a mail in the course of the door-to-door delivery of the mail, see s. 476(e). As to definition of "mail", see s. 2 of the Canada Post Corporation Act, R.S.C. 1985, c. C-10.

#### ANNOTATIONS

A private letter intended only for the recipient may fall under this section: *R. v. Lambert* (1965), 47 C.R. 12, 53 W.W.R. 186 (B.C.S.C.).

Where the matter involved is a magazine or newspaper, it is not necessary that the entire publication is found to be indecent, immoral or scurrilous. As with other offences under this Part the determination of what is immoral or indecent is judged by an objective standard, namely the community standard of tolerance of indecency or immorality. Evidence of such standards while sometimes helpful is not required: *R. v. Popert et al.* (1981), 58 C.C.C. (2d) 505, 19 C.R. (3d) 393 (Ont. C.A.), affg 51 C.C.C. (2d) 485 *sub nom. R. v. Pink Triangle Press et al.* (Ont. Co. Ct.).

#### PUNISHMENT.

**169.** Every one who commits an offence under section 163, 165, 166, 167 or 168 is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction. R.S., c. C-34, s. 165.

**Editor's Note:** We understand that s. 169 will be amended by future legislation to correct the reference to s. 166 which has been repealed.

#### CROSS-REFERENCES

Where the prosecution elects to proceed by indictment on the offences set out in this section then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of the offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 [although, note the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### PARENT OR GUARDIAN PROCURING SEXUAL ACTIVITY.

**170.** Every parent or guardian of a person under the age of eighteen years who pro-

cures that person for the purpose of engaging in any sexual activity prohibited by this Act with a person other than the parent or guardian is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person procured for that purpose is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person so procured is fourteen years of age or more but under the age of eighteen years. R.S., c. C-34, s. 166; R.S.C. 1985 c. 19 (3rd Supp.), s. 5.

#### CROSS-REFERENCES

The term "guardian" is defined in s. 150. "Procures" is part of the definition of "counsels" in s. 22(3). Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. c. I-21. The defence of mistake as to age is set out in s. 150.1(5). Section 658 provides means of proving the age of a child or young person. Sexual activity prohibited by this Act would refer to, *inter alia*, the offences in ss. 151 to 153, 155, 159, 160, the various forms of sexual assault in ss. 217 to 273 and may also refer to the prostitution offences in ss. 210 to 213. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant nor under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape made, within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years. Note that s. 2 defines "complainant" to mean the victim of the offence.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

#### SYNOPSIS

Section 170 makes it an indictable offence for every parent or guardian of a person under

the age of 18 to procure that person *for the purpose* of engaging in any sexual activity prohibited by the Code with a person other than the parent or guardian. The punishment for the offence varies with the age of the young person the accused procures. If the young person is under 14 the maximum sentence is five years. If the person procured is 14 or over but under 18 the maximum punishment available under this section is two years.

#### HOUSEHOLDER PERMITTING SEXUAL ACTIVITY.

**171.** Every owner, occupier or manager of premises or other person who has control of premises or assists in the management or control of premises who knowingly permits a person under the age of eighteen years to resort to or to be in or on the premises for the purpose of engaging in any sexual activity prohibited by this Act is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, if the person in question is under the age of fourteen years, or to imprisonment for a term not exceeding two years if the person in question is fourteen years of age or more but under the age of eighteen years. R.S., c. C-34, s. 167; R.S.C. 1985, c. 19 (3rd Supp.), s. 5.

#### CROSS-REFERENCES

Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. c. I-21. Section 658 provides means of proving the age of a child or young person. The defence of mistake as to age is set out in s. 150.1(5). Sexual activity prohibited by this Act would refer to, *inter alia*, the offences in ss. 151 to 153, 155, 159, 160, the various forms of sexual assault in ss. 217 to 273 and presumably the prostitution offences in ss. 210 to 213. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276, 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness is under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant nor under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the



spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years. Note that s. 2 defines "complainant" to mean the victim of the offence.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

This section is aimed at a householder who permits the premises to be used for sexual activities involving persons under the age of 18.

The class of accused is described as the owner, occupier, manager or other person with control over the premises, or a person who assists in its management and control. It is an indictable offence for an accused who comes within one of these categories of persons to *knowingly permit* a person under 18 to be in, or to resort to the relevant premises *for the purpose of engaging in any sexual act prohibited by the Criminal Code*.

The sentence provision is a sliding scale based on the age of the young person involved in the illicit sexual activity. The maximum sentence if the young person is under 14 is five years, but is decreased to two years if the young person is 14 or over but under 18.

## CORRUPTING CHILDREN / Limitation / Definition of "child" / Who may institute prosecutions.

**172. (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

**(2) [Repealed. R.S.C. 1985, c. 19 (3rd Supp.), s. 6.]**

**(3) For the purposes of this section, "child" means a person who is or appears to be under the age of eighteen years.**

**(4) No proceedings shall be commenced under subsection (1) without the consent of the Attorney General, unless they are instituted by or at the instance of a recognized society for the protection of children or by an officer of a juvenile court. R.S., c. C-34, s. 168; R.S.C. 1985, c. 19 (3rd Supp.), s. 6.**

## CROSS-REFERENCES

Attorney General is defined in s. 2. The term "officer of a juvenile court" is not defined and presumably referred to an officer of the "juvenile court" as defined in s. 2(1) of the former Juvenile Delinquents Act, R.S.C. 1970, c. J-3. This section was not amended when that Act was repealed and the Young Offenders Act proclaimed. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. Section 658 provides means of proving the age of a child. The defence of mistake as to age is set out in s. 150.1(5).

The accused has an election as to mode of trial of the offence described in subsec. (1) pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or

any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape, made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant adopts its contents. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years. Note that s. 2 defines “complainant” to mean the victim of the offence.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## SYNOPSIS

This section makes it an indictable offence to indulge in behaviour, in a *child's home*, which corrupts children. Children are defined in s. 172(3) as being *under or apparently under* the age of 18. The prohibited activities listed in the section are expansively defined by adultery, sexual immorality, habitual drunkenness, or *any other form of vice*. However, it must be shown that the *result* of this behaviour is to *endanger the morals* of a child or to make the house unfit for a child to live in. It does not appear to be necessary that the accused intend that the conduct indulged in will have this result, only that the accused intended to behave in the proscribed way and certain results flowed from those actions. Conviction for this offence makes the accused liable to imprisonment for two years.

Prosecution under this section may only be undertaken with the Attorney General's consent, unless the prosecution is by a recognized society for the protection of children (such as a Children's Aid Society) or by an officer of a juvenile court.

## ANNOTATIONS

In one of the few cases decided under this section the mother of the child and her common law husband were convicted where they had photographed the 11-year-old child in sexually suggestive poses. The only intent required to be proved is the intent to do those acts which if found by the Court to be sexually immoral lead to the result that the morals of the child are endangered. The Crown need not prove that the accused intended such a result: *R. v. E and F* (1981), 61 C.C.C. (2d) 287 (Ont. Co. Ct.).

## Disorderly Conduct

### INDECENT ACTS / Exposure.

- 173. (1) Every one who wilfully does an indecent act**  
 (a) in a public place in the presence of one or more persons, or  
 (b) in any place, with intent thereby to insult or offend any person,  
 is guilty of an offence punishable on summary conviction.

**(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 169; R.S.C. 1985, c. 19 (3rd Supp.), s. 7.**

#### CROSS-REFERENCES

The term "public place" is defined in s. 150. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. c. I-21. Section 658 provides means of proving the age of a child or young person. The defence of mistake as to the age of the victim is set out in s. 150.1(4). A limited defence of consent to the subsec. (2) offence is set out in s. 150.1(2). Under s. 150.1(3) a young offender aged 12 or 13 years may not be tried for an offence under subsec. (2) unless he is in a position of trust or authority. A person convicted of the offence under subsec. (2), who is found to be loitering in or near a school ground, playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179.

The trial of these offences is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Sections 276 to 276.4 enact special rules limiting the circumstances in which the complainant may be questioned, with respect to his or her prior sexual conduct with persons other than the accused, in proceedings under this section. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant nor under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape made, within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under 18 years of age at the time of the alleged offence and adopts its contents while testifying. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years. Note that s. 2 defines "complainant" to mean the victim of the offence.

#### SYNOPSIS

This section makes it an offence punishable by summary conviction to engage in indecent acts or to expose oneself in certain circumstances.

Section 173(1) creates the offence of committing an indecent act. Section 173(1)(a) requires that the indecent act be done in a public place in the presence of one or more other persons. It has been held that if the place is one in which the public could witness



the acts complained of, then it is public for the purposes of this section. It is no defence that the accused did not know that the acts could be seen by others. Section 173(1)(b) makes it an offence to do an indecent act *with the intention of insulting or offending* another person. It has been held, in some cases, that if accused's acts were intended only as a joke, the requisite criminal intent was not made out.

Both paragraphs in subsec. (1) require proof that the accused acted *wilfully*.

Section 173(2) makes it an offence to expose one's genitals to a person under the age of 14, wherever the act occurs if the accused does so *for a sexual purpose*.

## ANNOTATIONS

**Proof of intent** – A presumption of intent to do the indecent act wilfully arises where it is seen by another person: *R. v. Parsons*, [1963] 3 C.C.C. 92, 39 C.R. 353 (B.C.S.C.). *Fold R. v. Dalen* (1978), 44 C.C.C. (2d) 228 (Sask. Dist. Ct.).

In *R. v. Sloan* (1994), 89 C.C.C. (3d) 97, 30 C.R. (4th) 156, 18 O.R. (3d) 143 (C.A.), leave to appeal to S.C.C. refused 91 C.C.C. (3d) vi the members of the court disagreed as to the elements of the offence. Galligan J.A. was of the view that the gravamen of the offence is the wilful commission of an indecent act in the presence of one or more persons and where there was no intention on the part of the accused to perform a sexual act in the presence of any person other than her “client” the surreptitious surveillance by police cannot turn what is essentially an act done in private into one which takes place in public. Goodman J.A. held that it was not necessary to determine whether the term “wilfully” applies both to the doing of the act and to the requirement that the act be done in the presence of one or more persons since the motor vehicle in the circumstances of this case was not a public place. The mere fact that a vehicle is parked in a lot to which the public has access is not in itself sufficient to make that vehicle a public place, considering that the vehicle was parked late at night at the edge of the lot considerable distance from any other vehicle and where the activity could only be discerned by someone looking into the vehicle from a short distance. Since the place in which the act was done in this case was a private place, subsec. (1)(a) did not apply. Osborne J.A. dissenting held that the Crown need only prove that the indecent act was done wilfully and since the act was done in a car parked in a public place the offence was made out.

**Requirement of moral turpitude** – Nudity in public is a separate offence and does not amount to an indecent act which for conviction requires a more active incident coupled with greater moral turpitude than nudity in public: *R. v. Beaupre* (1971), 7 C.C.C. (2d) 320 (B.C.S.C.).

In order for the act to be indecent there must be moral turpitude in some degree. An accused who, as a joke, ran through a football stadium while naked was acquitted of a charge under this section: *R. v. Springer* (1975), 24 C.C.C. (2d) 56, 31 C.R.N.S. 48 (Sask. Dist. Ct.).

Similarly, the accused was acquitted where he briefly exposed his bare buttocks in an attempt to be humorous: *R. v. Hecker* (1980), 58 C.C.C. (2d) 66 (Y. Terr. Ct.).

**Public place** – In *R. v. McEwen*, [1980] 4 W.W.R. 85 (Sask. Prov. Ct.) the Court, distinguishing *Hutt v. The Queen* (1978), 38 C.C.C. (2d) 418, 1 C.R. (3d) 164, [1978] 2 S.C.R. 476, held that an accused did an indecent act in a “public place” where he exposed his private parts to pedestrians at a crosswalk although he was inside his own car at the time. Similarly, *R. v. Figliuzzi* (1981), 59 C.C.C. (2d) 144, 21 C.R. (3d) 326 (Alta. Q.B.); *R. v. Wise* (1982), 67 C.C.C. (2d) 231, [1982] 4 W.W.R. 658 (B.C. Co. Ct.). Also see note on *R. v. Sloan*, *supra*.

An accused standing on his own front porch and exposing himself to the public may be convicted of the offence under para. (a). In the context of this subsection “public place” must be given a broad interpretation to include a doorway of a private house which, however, is exposed to public view: *R. v. Buhay* (1986), 30 C.C.C. (3d) 30 (Man. C.A.).

The requirement in subsec. (1)(a) that the act be performed in the presence of one or more persons is not made out where the act is merely observed by an unmonitored video camera nor by the fact that there was another participant in the act: *R. v. Follett* (1994), 91 C.C.C. (3d) 435, 120 Nfld. & P.E.I.R. 230 (Nfld. S.C.), affd 98 C.C.C. (3d) 493 (Nfld. C.A.), leave to appeal to S.C.C. refused 101 C.C.C. (3d) vi, 42 C.R. (4th) 408n.

### **NUDITY / Nude / Consent of Attorney General.**

**174. (1) Every one who, without lawful excuse,**

**(a) is nude in a public place, or**

**(b) is nude and exposed to public view while on private property, whether or not the property is his own,**

**is guilty of an offence punishable on summary conviction.**

**(2) For the purposes of this section, a person is nude who is so clad as to offend against public decency or order.**

**(3) No proceedings shall be commenced under this section without the consent of the Attorney General. R.S., c. C-34, s. 170.**

### **CROSS-REFERENCES**

The term "public place" is defined in s. 150. Attorney General is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. Related offences are: s. 163(2)(b), publicly exhibiting an indecent show; s. 167, immoral theatrical performance; s. 173, wilfully doing an indecent act; s. 175(1)(b), exposing an indecent exhibition.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

### **SYNOPSIS**

This section prohibits nudity in a public place, or a place which is exposed to the public, even if the accused is on private property. The accused may rely upon a lawful excuse for the behaviour.

Section 174(2) expands the usual definition of nudity to include being clothed so as to offend against public decency or order. In the absence of any greater specificity as to what offends public decency the courts have resorted to the standard used for obscenity, namely, contemporary Canadian standards of tolerance.

By virtue of subsec. (3), no one may be prosecuted for this summary conviction offence unless the Attorney General consents.

### **ANNOTATIONS**

**Application of provision** – Where the accused is completely naked in a public place without lawful excuse the offence under this section is committed whether or not the nudity offends against public decency or order. Subsection (2) covers the situation where the accused is partially clothed, by creating the legal fiction that such a person is "nude" when clad as to offend public decency or order, but this subsection does not import the requirement of proof of offence against public decency or order where the accused is totally naked: *R. v. Verrette* (1978), 40 C.C.C. (2d) 273, 85 D.L.R. (3d) 1, [1978] 2 S.C.R. 838 (9:0).

Notwithstanding the provision in s. 167 of the Code for the separate offence of appearing in an immoral or indecent performance in a theatre, an accused may be charged under this section since "public place" includes a theatre: *R. v. McCutcheon* (1977), 40 C.C.C. (2d) 555, 1 C.R. (3d) 39 (Que. C.A.).

This offence is not aimed at conduct such as swimming nude at an isolated beach,

even where the accused misjudges the loneliness of the beach: *R. v. Benolkin et al.* (1977), 36 C.C.C. (2d) 206 (Sask. Q.B.).

The mere fact that a female dancer is nude does not mean that her performance cannot be legitimate entertainment and therefore constitute a lawful excuse. The trial judge must, however, make this factual assessment in each case and a finding by the trial judge that the accused's dancing offended against public decency and order does not determine the issue of lawful excuse: *R. v. Zikman* (1990), 56 C.C.C. (3d) 430, 37 O.A.C. 277 (C.A.).

**Offending against public decency or order (subsec. (2))** – The requirement of offence against public decency or order in subsec. (2) applies where the accused is partially, albeit lightly, dressed as where she wears only a transparent veil since such person is not “nude” in the dictionary sense of wearing no clothes: *R. v. McCutcheon* (1977), 40 C.C.C. (2d) 555, 1 C.R. (3d) 39 (Que. C.A.). [Note: this case was decided before *R. v. Verrette*, *supra*, and portions of it must therefore be read subject to that case.]

Although the accused is partially clad so that subsec. (2) applies, the Crown need not adduce evidence as to what offends public decency. Rather, the trial Judge may make the finding that the manner of dress did offend public decency without such evidence: *R. v. Sidey* (1980), 52 C.C.C. (2d) 257 (Ont. C.A.).

The accused, a dancer in a tavern, was not so clad as to offend public decency where the evidence leads to the conclusion that the average adult in the community would tolerate such a performance at the time and place where it was staged: *R. v. Gray* (1982), 65 C.C.C. (2d) 353 (Ont. H.C.J.).

The test of public decency in subsec. (2) is one of the community standard of tolerance to and for the actions of the accused in the circumstances in which they occur: *R. v. Giambalvo* (1982), 70 C.C.C. (2d) 324, 39 O.R. (2d) 588 (C.A.).

**Attorney General's consent (subsec. 3)** – In exercising his power under subsec. (3) the Attorney-General is under no duty that can be enforced by the Courts to act fairly and is not required to afford the accused a hearing before deciding whether or not to consent to the prosecution: *Re Warren and The Queen* (1981), 61 C.C.C. (2d) 65, 22 C.R. (3d) 58 (Ont. H.C.J.).

The consent required by subsec. (3) may be endorsed on the face of the information and if done in that manner need not recite particulars of the charge: *Re R. and Willard* (1984), 15 C.C.C. (3d) 350 (Ont. H.C.J.).

## CAUSING DISTURBANCE, INDECENT EXHIBITION, LOITERING, ETC. / Evidence of peace officer.

### 175. (1) Every one who

- (a) not being in a dwelling-house, causes a disturbance in or near a public place,
  - (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
  - (ii) by being drunk, or
  - (iii) by impeding or molesting other persons,
- (b) openly exposes or exhibits an indecent exhibition in a public place,
- (c) loiters in a public place and in any way obstructs persons who are in that place, or
- (d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling-houses comprised in the building or structure have access as of right or by invitation, express or implied,



is guilty of an offence punishable on summary conviction.

(2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) was caused or occurred. R.S., c. C-34, s. 171; 1972, c. 13, s. 11; 1974-75-76, c. 93, s. 9.

#### CROSS-REFERENCES

The terms "dwelling house" and "peace officer" are defined in s. 2, "public place" in s. 150. Section 84 contains a definition of "firearm" for Part III which, however, may be a useful reference for this section. Related offences are: ss. 63 to 69, offences in relation to unlawful and riotous assemblies; s. 163(2)(b), exhibiting an indecent show; s. 167, indecent theatrical performances; s. 173, wilfully doing indecent act; s. 174, public nudity; s. 179, vagrancy; s. 180, common nuisance. Sections 30 and 31 authorize the use of force to prevent a breach of the peace and arrest for breach of the peace. The offence of discharging a firearm with intent is in s. 244.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section creates summary conviction offences in relation to a variety of activities which cause a disturbance, including fighting, exposing an indecent exhibition, loitering and other public-nuisance activities.

Under s. 175(1)(a) it must be shown that the accused did one of the listed acts, that the accused was not in a dwelling-house and that the accused's acts resulted in a disturbance. The resulting disturbance must be at or near a public place. Paragraphs (b) and (c) contain straightforward prohibitions against certain types of actions in public. Paragraph (d) prohibits certain types of conduct which disrupt persons in a dwelling-house. First, liability may be shown by proving that the accused discharged a firearm, or engaged in other disorderly conduct in a public place which resulted in disturbing the peace and quiet of those occupying a dwelling-house. Second, liability may be shown by proving that the accused, who was not an occupant of the dwelling-house, disturbed the peace and quiet of those in the dwelling by discharging a firearm or engaging in other disorderly conduct within any part of the building or structure comprising the dwelling. An additional element for this second type of liability is the necessity to prove that the occupants of two or more units of the dwelling had a right or invitation to have access to that portion of the structure within which the accused created the disturbance. An example of the latter situation would be a disturbance created in the garage of an apartment building.

To facilitate the proof of these offences s. 175(2) permits the trial court to draw an inference, from the evidence of a peace officer who may testify as to the reactions of the members of the public who observed the accused's conduct, as proof that a disturbance did result from the accused's acts. Such evidence is permitted even if the peace officer did not know the identity of the members of the public whose reactions he observed.

#### ANNOTATIONS

**Causing disturbance (Subsec. (1)(a)) / Proof of disturbance**—Paragraph (1)(a)(i) requires proof of an externally manifested disturbance of the public peace, in the sense of interference with the ordinary or customary use of the premises by the public. There may be direct evidence of such an effect or interference, or it may be inferred by the evidence of a police officer as to the conduct of a person or persons under subsec. (2). The disturbance may consist of the impugned act itself, as in the case of a fight, interfering

with the peaceful use of a barroom, or it may flow as a consequence of the impugned act, as where shouting and swearing produce a scuffle. An interference with the ordinary and customary conduct in or near the public place may consist of something as small as being distracted from one's work, but this interference must be present and must be externally manifested. The disturbance must be one which may reasonably have been foreseen in the particular circumstances of time and place: *R. v. Lohnes* (1992), 69 C.C.C. (3d) 289, 10 C.R. (4th) 125, [1992] 1 S.C.R. 167.

One may be convicted of an attempt to cause a disturbance: *R. v. Kennedy* (1973), 11 C.C.C. (2d) 263, 21 C.R.N.S. 251 (Ont. C.A.).

"Swear" should be given its modern meaning of "to use bad or profane or obscene language" and is not limited to invoking the Deity or something sacred in condemnation of a person or object: *R. v. Clothier* (1975), 13 N.S.R. (2d) 141 (N.S.S.C. App. Div.). *Contra: Enns v. The Queen* (1968), 5 C.R.N.S. 115, 66 W.W.R. 318 (Sask. Dist. Ct.).

In *R. v. Berry* (1980), 56 C.C.C. (2d) 99 (Ont. C.A.) the Court overruled *R. v. Goddard* (1971), 4 C.C.C. (2d) 396, 14 C.R.N.S. 179, [1971] 3 O.R. 517 (H.C.J.) and held that the offence under subsec. (1)(a)(iii) "by impeding" does not require proof of an affray, riot or unlawful assembly. The word "disturbance" is to be given its ordinary dictionary meaning.

It would seem that speaking normally into an electronic megaphone can constitute shouting within the meaning of para. (a)(i): *R. v. Reed* (1992), 76 C.C.C. (3d) 204 (B.C.C.A.).

**Exposing or exhibiting indecent exhibition (Para. (1)(b))** – The words "openly" and "exhibits" in para (1)(b) should be given meanings consistent with Parliament's intention in enacting the entire section, that is, to prevent acts which disturb the peace or interfere with the peaceful enjoyment of the street. Thus "openly" may be defined as "in an open manner without concealment so that all may see, hear or take cognizance in public" and "exhibit" may be defined as "to submit or to expose to view, to show, to display": *R. v. Bagu* (1981), 61 C.C.C. (2d) 355 (Ont. Prov. Ct.).

**Loitering (Para. (1)(c))** – The offence in para. (1)(c) is directed at a nuisance. To constitute the offence there must be evidence of obstruction in the sense of rendering impassable or difficult of passage. As well, the ordinary meaning of "loiter" is to hang idly about a place and does not embrace purposeful activity such as the conduct of a prostitute attempting to attract customers in circumstances falling short of soliciting as defined in s. 213: *R. v. Munroe* (1983), 5 C.C.C. (3d) 217, 34 C.R. (3d) 268 (Ont. C.A.). Similarly, *R. v. Gauvin* (1984), 11 C.C.C. (3d) 229 (Ont. C.A.), leave to appeal to S.C.C. refused November 13, 1984.

**Meaning of "dwelling-house"** – A beer parlour in a hotel is not part of a "dwelling-house" for the purposes of subsec. (1)(a). It is only those parts of the hotel kept or occupied as a residence which fall within the definition of dwelling-house in s. 2: *R. v. Garnot* (1979), 47 C.C.C. (2d) 355 (B.C.S.C.).

Although the patients' rooms in a hospital may constitute dwelling places, the television rooms and hallways to which the public have access are public places within the meaning of para. (1)(a): *R. v. Campbell* (1980), 22 C.R. (3d) 219 (Alta. Q.B.).

**Constitutional considerations** – The offence of causing a disturbance by swearing, although an infringement of freedom of expression under s. 2(b) of the Charter, is a reasonable limit on that freedom and the provision is therefore valid: *R. v. Lawrence* (1992), 74 C.C.C. (3d) 495, [1992] 5 W.W.R. 659, 3 Alta. L.R. (3d) 293 (Q.B.), affd without reference to the point (1993), 81 C.C.C. (3d) 159, 9 Alta. L.R. (3d) 347 (C.A.).

## OBSTRUCTING OR VIOLENCE TO OR ARREST OF OFFICIATING CLERGYMAN / Disturbing religious worship or certain meetings / *Idem*.

### 176. (1) Every one who

- (a) by threats or force, unlawfully obstructs or prevents or endeavours to obstruct or prevent a clergyman or minister from celebrating divine service or performing any other function in connection with his calling, or
- (b) knowing that a clergyman or minister is about to perform, is on his way to perform or is returning from the performance of any of the duties or functions mentioned in paragraph (a)
  - (i) assaults or offers any violence to him, or
  - (ii) arrests him on a civil process, or under the pretence of executing a civil process,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who wilfully disturbs or interrupts an assemblage of persons met for religious worship or for a moral, social or benevolent purpose is guilty of an offence punishable on summary conviction.

(3) Every one who, at or near a meeting referred to in subsection (2), wilfully does anything that disturbs the order or solemnity of the meeting is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 172.

#### CROSS-REFERENCES

The accused has an election as to mode of trial of the offence described in subsec. (1) pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498. The trial of the offences in subssecs. (2) and (3) is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section makes it an offence to interfere with religious services or worship and provides for punishment upon conviction for these offences.

Section 176(1) creates the indictable offence of obstructing or preventing a *clergyman* or minister from performing religious services or other religious functions. Subsection 1(a) prohibits the use of *threats or force* to attempt to achieve this aim.

Section 176(1)(b) creates a similar offence. The elements consist of doing one of the acts listed in sub-para. (i) or (ii), together with proof that the accused intended to do the act alleged and that the accused *knew* that the clergyman or minister was on the way to or from, or was about to perform religious duties. The maximum sentence for this offence is two years' imprisonment.

Subsections (2) and (3) create summary conviction offences involving *intentional disruption of religious worship* or meetings assembled for one of the purposes stated in subsec. (2). To prove the offence, it must be shown that the accused *wilfully* did actions which were disruptive or which were productive of disorder or interruption, and not merely that the acts caused upset among the assembled.

#### ANNOTATIONS

**Constitutional issues** – This section does not violate the guarantee to freedom of speech and religion in s. 2 of the Charter of Rights and Freedoms: *R. v. Reed* (1983), 8 C.C.C. (3d) 153 (B.C. Co. Ct.), affd 10 C.C.C. (3d) 573 (C.A.) and *R. v. Reed* (1985), 19 C.C.C. (3d) 180 (B.C.C.A.). [It should be noted that while the question of the inconsistency of subsec. (3) with the guarantees to religious freedom in the Bill of Rights and the Charter of Rights and Freedoms was raised in *Skoke-Graham et al. v. The Queen*, *infra*, the court having entered an acquittal on other grounds declined to deal with these issues.]

The offence created by subsec. (3) is *intra vires* Parliament being validly enacted under



the criminal law power: *Skoke-Graham et al. v. The Queen* (1985), 17 C.C.C. (3d) 289, 44 C.R. (3d) 289, [1985] 1 S.C.R. 106 (6:0).

**Subsec. (2)** – Where members of a congregation have assembled at the place of worship for Sunday service they have “met for religious worship” within the meaning of subsec. (2) although the service has not yet begun and an accused who at that time is using a loud hailer outside the place to condemn the beliefs of the worshippers may be convicted of the offence described in that subsection: *R. v. Reed, supra*.

**Subsec. (3)** – The offence under subsec. (3) requires proof of some activity in the nature of a disorder. The conduct must either be disorderly in itself or productive of disorder. It is not sufficient that the accused’s conduct produced annoyance, anxiety or emotional upset among the members of the assemblage meeting for religious worship, where the impugned acts, here kneeling to accept communion in violation of a diocesan directive, are brief, essentially passive and peaceful in nature and voluntarily desisted from upon request: *Skoke-Graham et al. v. The Queen, supra*.

Two people are an assemblage of persons within the meaning of subsec. (2) and a meeting for the purpose of subsec. (3) occurs when people meet for religious worship and includes the period prior to the formal ceremony: *R. v. Reed* (1994), 91 C.C.C. (3d) 481, 80 W.A.C. 180, 24 C.R.R. (2d) 163 (B.C.C.A.), leave to appeal to S.C.C. refused per S.C.C. bull. 3/3/93, p. 459-60.

While brief temporary annoyance would not be sufficient, the requisite element of “disturbs” is made out by deliberate continued annoyance constituting obstruction or partial obstruction of entrance to the place of worship: *R. v. Reed, supra*.

## TRESPASSING AT NIGHT.

**177.** Every one who, without lawful excuse, the proof of which lies on him, loiters or prowls at night on the property of another person near a dwelling-house situated on that property is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 173.

## CROSS-REFERENCES

The terms “dwelling-house” and “night” are defined in s. 2. While the term “property” is also defined in s. 2, the very broad definition in that provision appears unsuited to the context of this offence. Under s. 494(2), a property owner or person in lawful possession of property and anyone authorized by such person may arrest, without warrant, a person whom he finds committing a criminal offence on or in relation to that property. Reference should also be made to ss. 40 to 42 relating to use of force in defence of dwelling-house and other real property.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

## ANNOTATIONS

This section creates two offences of prowling and loitering. The essence of loitering is the conduct of someone who is wandering about apparently without precise destination and is conduct which essentially has nothing reprehensible about it, if it does not take place on private property where the loiterer has no business. Prowling, on the other hand, involves some notion of evil. The prowler does not act without a purpose: *R. v. Cloutier* (1991), 66 C.C.C. (3d) 149 (Que. C.A.). Also see: *R. v. McLean* (1970), 1 C.C.C. (2d) 277, 75 W.W.R. 157 (Alta. Mag. Ct.).

“Prowls” means to traverse stealthily in the sense of furtively, secretly, clandestinely or moving by imperceptible degrees. The Crown need not prove that the accused was looking

for an opportunity to carry out an unlawful purpose. It is not a lawful excuse within the

meaning of this section that the accused was trying to conceal himself following commission of a criminal offence: *R. v. Willis* (1987), 37 C.C.C. (3d) 184 (B.C. Co. Ct.).

This section does not create an unconstitutional reverse onus provision inconsistent with the guarantee to the presumption of innocence in s. 11(d) of the Canadian Charter of Rights and Freedoms: *R. v. Tassou* (1984), 16 C.C.C. (3d) 567 (Alta. Prov. Ct.).

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### OFFENSIVE VOLATILE SUBSTANCE.

**178. Every one other than a peace officer engaged in the discharge of his duty who has in his possession in a public place or who deposits, throws or injects or causes to be deposited, thrown or injected in, into or near any place,**

- (a) **an offensive volatile substance that is likely to alarm, inconvenience, discommode or cause discomfort to any person or to cause damage to property, or**
- (b) **a stink or stench bomb or device from which any substance mentioned in paragraph (a) is or is capable of being liberated,**

**is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 174.**

### CROSS-REFERENCES

The term "peace officer" is defined in s. 2, "public place" in s. 150 and possession is defined in s. 4(3).

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of common nuisance is in s. 180.

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### VAGRANCY / Punishment.

**179. (1) Every one commits vagrancy who**

- (a) **supports himself in whole or in part by gaming or crime and has no lawful profession or calling by which to maintain himself; or**
- (b) **having at any time been convicted of an offence under section 151, 152 or 153, subsection 160(3) or 173(2) or section 271, 272 or 273, or of an offence under a provision referred to in paragraph (b) of the definition "serious personal injury offence" in section 687 of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read before January 4, 1983, is found loitering in or near a school ground, playground, public park or bathing area.**

**(2) Every one who commits vagrancy is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 175; 1972, c. 13, s. 12; 1984, c. 40, s. 20; R.S.C. 1985, c. 27 (1st Supp.), s. 22; c. 19 (3rd Supp.), s. 8.**

### CROSS-REFERENCES

"Gaming" is not defined in this section but presumably refers to the offences described by Part VII.

Section 687 of the Criminal Code, R.S.C. 1970, c. C-34, as it read prior to January 4, 1983 defined "serious personal injury offence" as follows:

"(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency)"

Now also see s. 161 which makes it an offence to violate a prohibition order made against a sex offender.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

## SYNOPSIS

This section creates the summary conviction offence of *vagrancy*.

Section 179(1)(a) states that a person is guilty of vagrancy if that person has no visible, lawful means of support and the accused supports himself in part, or entirely, by gaming or crime.

Section 179(1)(b) states that a person is guilty of vagrancy if that person has been *convicted* of one of the offences specified in the paragraph and is found *loitering* in one of the listed *public places*. Loitering connotes hanging around for no valid purpose. It need not be shown that the accused had any particular intention beyond loitering in the prohibited location nor that the accused did any other act beyond being present.

## ANNOTATIONS

Subsection (1)(b) of this section violates s. 7 of the Charter and is of no force and effect: *R. v. Heywood*, [1994] 3 S.C.R. 761, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133.

## Nuisances

### COMMON NUISANCE / Definition.

**180. (1) Every one who commits a common nuisance and thereby**

**(a) endangers the lives, safety or health of the public, or**

**(b) causes physical injury to any person,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

**(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby**

**(a) endangers the lives, safety, health, property or comfort of the public; or**

**(b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada. R.S., c. C-34, s. 176.**

## CROSS-REFERENCES

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Related offences may be found in Part XI [wilful and forbidden act in relation to property]. Also note the intimidation offence in s. 423, explosive offences and duty in handling explosives in ss. 79 to 82, offences in relation to aircraft in ss. 76 to 78, sabotage in s. 52, careless handling of firearm in s. 86, duty to provide necessities in s. 215 and duty of person undertaking dangerous acts in ss. 216, 217.

## SYNOPSIS

The section creates the indictable offence of creating a *common nuisance*.

Subsection (2) sets out *what constitutes a common nuisance*. Firstly, it must be proven that the accused either did an unlawful act or failed to discharge a legal duty. Secondly, it must be proven that the accused's act or omission resulted in one of the ill-effects described in s. 180(2)(a) or (b).

The offence created in subsec. (1) requires that, in addition to establishing proof that a *common nuisance* occurred, it must be shown that the nuisance *resulted in the harm* described in paragraphs 180(1)(a) or (b). The maximum sentence for this offence is two years' imprisonment. As there is a substantial overlap between the two subsections, the



"additional" elements set out in subsec. (1) may be satisfied by the same evidence that brought the accused within the definition of common nuisance under subsec. (2).

#### ANNOTATIONS

A common nuisance must be directed to the public generally and a conviction under this section cannot be supported where the acts were directed to three individuals: *R. v. Schula* (1956), 115 C.C.C. 382, 23 C.R. 403 (Alta. S.C. App. Div.).

Section 216 imposed a legal duty on the accused, who knew he was infected with the AIDS virus, to not donate blood to the Red Cross and breach of this duty may found a conviction under this section: *R. v. Thornton*, [1993] 2 S.C.R. 445, 82 C.C.C. (3d) 530, 21 C.R. (4th) 215 (9:0).

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#### SPREADING FALSE NEWS.

**181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 177.**

#### CROSS-REFERENCES

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence has recently been used as an alternative to the hate propaganda provisions of the Code. Those provisions may be found in ss. 318 and 319.

#### ANNOTATIONS

This section violates the guarantee to freedom of expression under s. 2(b) of the Charter and is of no force and effect: *R. v. Zundel* (1992), 75 C.C.C. (3d) 449, 16 C.R. (4th) 1, [1992] 2 S.C.R. 731.

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#### DEAD BODY.

##### **182. Every one who**

- (a) neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or**
- (b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 178.**

#### CROSS-REFERENCES

The duty imposed by law, referred to in this section, presumably refers to provincial legislation which governs the burial of human remains.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

A related offence is found in s. 243 which makes it an offence to dispose of the dead body of a child with intent to conceal the fact that its mother has been delivered of it.

#### SYNOPSIS

This rarely used section creates two indictable offences relating to the *neglect or improper interference with a dead body*. The first offence is *neglecting to perform a duty* imposed by law or which the accused agrees to undertake in connection with burying a dead person.

The prosecution must prove that the accused did not have a *lawful excuse* for such neglect of the body.

The second offence is committed when an accused treats a dead body, buried or not, improperly, indecently or improperly interferes with it. Both offences under this section require proof that the accused knew that the body was dead. The maximum sentence is five years' imprisonment.

## ANNOTATIONS

**Para. (b)** – Although it would be a defence to this charge if the accused did not know that the body was dead if on the facts as he believed them he was acting lawfully and innocently, such a defence is not open to an accused who believing the person is alive is attempting to have intercourse with the body because if, as he thought, the woman was alive he was raping her there being no suggestion he thought he had her consent to the act: *R. v. Ladue*, [1965] 4 C.C.C. 264, 45 C.R. 287 (Y.T.C.A.).

A physical interference with the human remains is not a necessary element of the offence under para. (b) and it applies to offering indignities to monuments that mark human remains because to offer indignities to such monuments is to offer indignities to the remains themselves: *R. v. Moyer*, [1994] 2 S.C.R. 899, 92 C.C.C. (3d) 1, 32 C.R. (4th) 232.

## Part VI / INVASION OF PRIVACY

### Definitions

**DEFINITIONS** / “Authorization” / “Electro-magnetic, acoustic, mechanical or other device” / “Intercept” / “Offence” / “Private communication” / “public switched telephone network” / “radio-based telephone communication” / “Sell” / “Solicitor”.

**183. In this Part,**

“authorization” means an authorization to intercept a private communication given under section 186 or subsection 184.2(3), 184.3(6) or 188(2);

“electro-magnetic, acoustic, mechanical or other device” means any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

“intercept” includes listen to, record or acquire a communication or acquire the substance, meaning or purport thereof;

“offence” means an offence contrary to any conspiracy or attempt to commit or being an accessory after the fact in relation to an offence contrary to, or any counselling in relation to an offence contrary to section 47 (high treason), 51 (intimidating Parliament or a legislature), 52 (sabotage), 57(forgery, etc), 61 (sedition), 76 (hijacking), 77 (endangering safety of aircraft or airport), 78 (offensive weapons, etc., on aircraft), 78.1 (offences against maritime navigation or fixed platforms), 80 (breach of duty), 81 (using explosives), 82 (possessing explosive), 90 (possession of prohibited weapon), 95 (importing or exporting of prohibited weapon), 119 (bribery, etc.), 120 (bribery, etc.), 121 (fraud on government), 122 (breach of trust), 123 (municipal corruption), 132 (perjury), 139 (obstructing justice), 144 (prison breach), (163.1) (child pornography), 184 (unlawful interception), 191 (possession of intercepting device), 235 (murder), 264.1 (uttering threats), 267 (assault with a weapon or causing bodily harm), 268 (aggravated assault), 269 (unlawfully causing bodily harm), 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), 273 (aggravated sexual assault), 279 (kidnapping), 279.1 (hostage taking), 318

(advocating genocide), 344 (robbery), 346 (extortion), 347 (criminal interest rate), 348 (breaking and entering), 354 (possession of property obtained by crime), 356 (theft from mail), 367 (forgery), 368 (uttering forged document), 372 (false messages), 380 (fraud), 381 (using mails to defraud), 382 (fraudulent manipulation of stock exchange transactions), 424 (threat to commit offences against internationally protected person), 426 (secret commissions), 433 (arson), 434 (arson), 434.1 (arson), 435 (arson for fraudulent purpose), 449 (making counterfeit money), 450 (possession, etc., of counterfeit money), 452 (uttering, etc., counterfeit money), 462.31 (laundering proceeds of crime), subsection 145(1) (escape, etc.), 201(1) (keeping gaming or betting house), 212(1) (procuring) or 462.33(11) (acting in contravention of restraint order), or paragraph 163(1)(a) (obscene materials), 202(1)(e) (pool-selling, etc.) or 334(a) (theft in excess of \$1,000, etc.), s. 4 (trafficking), 5 (importing or exporting), 19.1 (possession of property obtained by certain offences) or 19.2 (laundering proceeds of certain offences) of the *Narcotic Control Act*, section 39 (trafficking), 44.2 (possession of property obtained by trafficking in controlled drugs), 44.3 (laundering proceeds of trafficking in controlled drugs), 48 (trafficking), 50.2 (possession of property obtained by trafficking in restricted drugs) or 50.3 (laundering proceeds of trafficking in restricted drugs) of the *Food and Drugs Act*, section 153 (false statements), 159 (smuggling), 163.1 (possession of property obtained by smuggling, etc.) or 163.2 (laundering proceeds of smuggling, etc.) of the *Customs Act*, sections 94.1 and 94.2 (organizing entry into Canada), 94.4 (disembarking persons at sea) and 94.5 (counselling false statements) of the *Immigration Act*, 1976, section 126.1 (possession of property obtained by excise offences), 126.2 (laundering proceeds of excise offences), 158 (unlawful distillation of spirits) or 163 (unlawful selling of spirits) or subsection 233(1) (unlawful packaging or stamping) or 240(1) (unlawful possession or sale of manufactured tobacco or cigars) of the *Excise Act*, section 198 (fraudulent bankruptcy) of the *Bankruptcy and Insolvency Act*, section 3 (spying) of the *Official Secrets Act*, section 13 (export or attempt to export), 14 (import or attempt to import), 15 (diversion, etc.), 16 (no transfer of permits), 17 (false information) or 18 (aiding and abetting) of the *Export and Import Permits Act*, or any other offence created by this Act for which an offender may be sentenced to imprisonment for five years or more or that is an offence mentioned in section 20 of the *Small Loans Act*, chapter S-11 of the *Revised Statutes of Canada*, 1970, that there are reasonable grounds to believe is part of a pattern of criminal activity planned and organized by a number of persons acting in concert;

**NOTE:** The definition "offence" amended 1995, c. 39, s. 140 (to come into force by order of the Governor in Council) by replacing the reference to "90 (possession of prohibited weapon), 95 (importing or exporting of prohibited weapon)," with a reference to "96 (possession of weapon obtained by commission of offence), 99 (weapons trafficking), 100 (possession for purpose of weapons trafficking), 102 (making automatic firearm), 103 (importing or exporting knowing it is unauthorized), 104 (unauthorized importing or exporting)".

**NOTE:** Definition "offence" amended 1996, Bill C-8, s. 66(a) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by striking out the reference to "section 4 (trafficking), 5 (importing or exporting), 19.1 (possession of property obtained by certain offences) of the *Narcotic Control Act*," and replacing it with a reference to "section 5 (trafficking), 6 (importing and exporting), 7 (production), 8 (possession of property obtained by designated substance offences) or 9 (laundering proceeds of designated substance offences) of the *Controlled Drugs and Substances Act*".

**NOTE:** Definition "offence" amended 1996, Bill C-8, s. 66(b) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may



change before receiving Royal Assent) by striking out the reference to “section 39 (trafficking), 44.2 (possession of property obtained by trafficking in controlled substances), 44.3 (laundering proceeds of trafficking in controlled substances), 48 (trafficking), 50.2 (possession of property obtained by trafficking in restricted drugs) or 50.3 (laundering proceeds of trafficking in restricted drugs) of the *Food and Drugs Act*,”.

“private communication” means any oral communication, or any telecommunication, that is made by an originator who is in Canada or is intended by the originator to be received by a person who is in Canada and that is made under circumstances in which it is reasonable for the originator to expect that it will not be intercepted by any person other than the person intended by the originator to receive it, and includes any radio-based telephone communication that is treated electronically or otherwise for the purpose of preventing intelligible reception by any person other than the person intended by the originator to receive it;

“public switched telephone network” means a telecommunication facility the primary purpose of which is to provide a land line-based telephone service to the public for compensation;

“radio-based telephone communication” means any radiocommunication within the meaning of the *Radiocommunication Act* that is made over apparatus that is used primarily for connection to a public switched telephone network;

“sell” includes offer for sale, expose for sale, have in possession for sale or distribute or advertise for sale;

“solicitor” means, in the Province of Quebec, an advocate or notary and, in any other province, a barrister or solicitor. 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 7; 1980-81-82-83, c. 125, s. 10; 1984, c. 21, s. 76; 1985, c. 27 (1st Supp.), ss. 7(2)(a), 23; R.S.C. 1985, c. 1 (2nd Supp.), s. 213; R.S.C. 1985, c. 1 (4th Supp.), s. 13; c. 29 (4th Supp.), s. 17; c. 42 (4th Supp.), s. 1; 1991, c. 28, s. 12; 1992, c. 27, s. 90; 1993, c. 7, s. 5; 1993, c. 25, s. 94; 1993, c. 40, s. 1; 1993, c. 46, s. 4.

## CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. The term “telecommunication” is defined in s. 35 of the Interpretation Act, R.S.C. c. I-21 as “any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electromagnetic system”. “Radio” is also defined in s. 35. Note that s. 3 provides that a description in parenthesis after a section number is inserted for convenience of reference only and is no part of the provision.

Related offences may be found in s. 326, theft of telecommunication service and s. 327, unlawful possession of device to obtain telecommunication facility.

This Part is just one aspect of a more or less comprehensive scheme for regulating surreptitious use of electronic devices by agents of the state. Also see s. 487.01 which provides for a general warrant which would cover surreptitious electronic surveillance, s. 492.1 which regulates the use of tracking devices and s. 492.2 which regulates the use of telephone number recorders. In addition, provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this Part.

The interception of private communications by the state constitutes a search or seizure for the purposes of s. 8 of the Charter of Rights and Freedoms and, therefore, in addition to the notes in this Part, see notes under s. 8 of the Charter.

At the time this Part was enacted, certain amendments to other federal statutes were made, in particular to the Crown Liability Act, R.S.C. 1985, c. C-50. Reference should also be made to the Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, which provides authority for authorizations in national security matters.

## SYNOPSIS

This section provides definitions which are used throughout Part VI of the Criminal Code dealing with intercepted private communications. The definition of "offence" contained in this section is pivotal because the offences contained in this list are the only offences which may form the basis of an application for an authorization to intercept private communications and a warrant for video surveillance under s. 487.01(5).

## ANNOTATIONS

**"Intercept"** [*Also see notes under s. 189(1), "Intercepted".*] – Surreptitious electronic surveillance constitutes a search or seizure within the meaning of s. 8 of the Charter of Rights and Freedoms: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 71 O.R. (2d) 575n.

The term "intercept", at least as used in s. 189, which deals with the admissibility of evidence, must be interpreted in context and in accordance with its primary dictionary meaning as an interference between the place of origination and the place of destination of the communication. Thus, there is no interception where the originator was simply mistaken as to the identity of the person to whom he was talking: *R. v. McQueen* (1975), 25 C.C.C. (2d) 262, [1975] 6 W.W.R. 604 (Alta. S.C.).

This part has no application to a communication which is merely overheard by a third party without the use of any mechanical or other device: *R. v. Beckner* (1978), 43 C.C.C. (2d) 356 (Ont. C.A.). *Contra: R. v. Boutilier and Melnick* (1976), 35 C.C.C. (2d) 555, 77 D.L.R. (3d) 291 (N.S.S.C.).

**"Private communication"** – For the purposes of this definition the "originator" of the private communication is the person who makes the remarks or series of remarks which the Crown seeks to adduce in evidence. Thus, if a person with a reasonable expectation of privacy, speaking in an electronically intercepted conversation, makes statements which the Crown seeks to use against him he has the protection of this Part: *R. v. Goldman* (1979), 51 C.C.C. (2d) 1, 13 C.R. (3d) 228 (S.C.C.) (8:1).

An obscene or threatening phone call is a private communication even where it is that call which forms the substance of the charge: *R. v. Dunn* (1975), 28 C.C.C. (2d) 538, 33 C.R.N.S. 299 (N.S. Co. Ct.).

A telephone call to a police switchboard in which the accused threatened the life of a member of that force is not a private communication. It would not be reasonable to expect that such a communication would not be listened to or recorded by a person other than the switchboard operator: *R. v. Monaghan* (1981), 60 C.C.C. (2d) 286, 22 C.R. (3d) (Ont. C.A.), affd 16 C.C.C. (3d) 576, [1985] 1 S.C.R. 176, 57 N.R. 76n (7:0).

To a similar effect is *R. v. Lubovac* (1989), 52 C.C.C. (3d) 551 (Alta. C.A.), where it was held that pager messages were not private communications, since the pager simply broadcast a message to those who may happen to hear or overhear it. It was also held that retrieval, by the police, of messages left by the accused's accomplice at a computer message centre was not a violation of s. 8 of the Charter. The police had obtained a number from an informer which enabled them to retrieve any messages which had been left by the accomplice. The informer had, in turn, been given the number from the accomplice. The accomplice had no reasonable expectation that his messages would be sent out or received in confidence. Also see *R. v. Nin* (1985), 34 C.C.C. (3d) 89 (Que. Ct. Sess.).

However, a communication over a cellular telephone is protected by the guarantee to protection against unreasonable search or seizure in s. 8 of the Charter. The issue under s. 8 is not whether there is a reasonable possibility that someone other than the intended recipient may overhear the conversation but whether it is reasonable for a person to expect that the police will not intercept and record his conversations over a cellular telephone without first obtaining a judicial authorization: *R. v. Solomon* (1993), 85 C.C.C. (3d) 496, [1993] R.J.Q. 1983 (Mun. Ct.).

It was held in *R. v. Cheung* (1995), 100 C.C.C. (3d) 441 (B.C.S.C.), that, at least in 1990, conversations over a cellular telephone were private communications. While a per-

son sending or receiving a call on a cellular telephone did face some risk of being overheard by someone who just happened to meet the combination of factors which matched a scanner to a call, the chance of someone, who set out to intercept the calls of a particular individual by scanner, to succeed in that venture was very small.

Use of a dial number recorder does not involve interception of a private communication. Communication in this section contemplates an exchange of information between persons: *R. v. Fegan* (1993), 80 C.C.C. (3d) 356, 21 C.R. (4th) 65, 13 O.R. (3d) 88 (C.A.) *Contra: R. v. Kutsak* (1993), 108 Sask. R. 241 (Q.B.). [Note that a warrant may now be obtained to install a dial number recorder pursuant to s. 492.2]

## CONSENT TO INTERCEPTION.

**183.1** Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of those persons is sufficient consent for the purposes of any provision of this Part. 1993, c. 40, s. 2.

## CROSS-REFERENCES

Consent to interception is relevant to s. 184 which creates the offence of interception of private communications and ss. 184.1 and 184.2 which authorize interception of private communications where one of the parties consents to the interception.

## *Interception of Communications*

### INTERCEPTION / Saving provision.

**184.** (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Subsection (1) does not apply to

- (a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;
- (b) a person who intercepts a private communication in accordance with an authorization or pursuant to section 184.4 or any person who in good faith aids in any way another person who the aiding person believes on reasonable grounds is acting with an authorization or pursuant to section 184.4;
- (c) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,
  - (i) if the interception is necessary for the purpose of providing the service,
  - (ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or
  - (iii) if the interception is necessary to protect the person's rights or property directly related to providing such service; or
- (d) an officer or servant of Her Majesty in right of Canada who engages in radio frequency spectrum management, in respect of a private communication intercepted by that officer or servant for the purpose of identifying, isolating or preventing an unauthorized or interfering use of a frequency or of a transmission. 1973-74, c. 50, s. 2; 1993, c. 40, s. 3.

(3) [*Repealed.* 1993, c. 40, s. 3.]

## CROSS-REFERENCES

The terms "electro-magnetic, acoustic, mechanical or other device", "intercept", "private commu-



nication" and "authorization" are defined in s. 183. The term "radio" is defined in s. 35 of the Interpretation Act, R.S.C. c. I-21. The term "wilfully" does not have a fixed meaning and must take its meaning from the context. Generally, however, it connotes an intention to bring about a proscribed consequence. See *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

Consent to interception is given an expanded meaning in s. 183.1.

This provision is fundamental to the scheme enacted by this Part. It makes unlawful the interception of private communications by the devices defined in s. 183, subject to certain narrow exceptions in subsec. (2). Those exceptions are interceptions pursuant to a normal "60-day" authorization obtained under s. 186, interceptions under the emergency "36-hour" authorization obtained under s. 188, unauthorized interceptions in exceptional circumstances as set out in s. 184.4 and consent interceptions. The other exceptions listed essentially concern interceptions incidental to the providing of the telephone service. An important incentive to compliance with the law, in addition to the penalties under this section, is that if the interception is not lawfully made by agents of the state then it is probably a violation of s. 8 of the Charter and therefore subject to exclusion under s. 24(2) of the Charter.

Separate offences have been created for interception of cellular telephone communications under ss. 184.5 and 193.1.

It is an offence under s. 191 to unlawfully have possession of any device designed primarily for the surreptitious interception of private communications. Under s. 193, it is an offence to unlawfully disclose an intercepted private communication.

Pursuant to s. 192, any device, by means of which the offence under this section was committed, may be ordered forfeited. As well, pursuant to s. 194, the court that convicts the accused of the offence under this section may make an order for punitive damages. The offence in this section can itself be the basis for an authorization to intercept private communications, by virtue of the definition of "offence" in s. 183. Under s. 195(3), the annual reports of the Solicitor General and Attorneys General are to set out the number of prosecutions under this section of officers or servants of the Crown.

The accused has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

## SYNOPSIS

This section makes it an *offence*, subject to a number of exceptions, to *intercept private communications by means of a specified device*, and provides for punishment upon conviction for this offence.

Subsection (1) creates the *indictable offence of unlawful interception*. The *device* used to intercept the private communication must be one listed in this section, as elaborated in the definition of such devices found in s. 183. The communication must be *private*, and this term is also defined in s. 183. The communication, must be *intercepted*, a defined term in s. 183. The act of the accused must be done *wilfully*, but no specific purpose beyond the interception need be shown. A person convicted under this subsection is liable to imprisonment for five years.

Subsection (2) provides a number of *exceptions to subsec. (1)*. Subsection (2)(a) states that subsec. (1) does not apply if one obtains the *consent* of either the *originator* or the *intended recipient* of the communication. The consent may be explicit or implied. Subsection (3) provides that if more than one person is the originator or is intended to receive the communication, the consent of one of the parties will be sufficient for this purpose.

Section 184(2)(b) creates an exception to liability under subsec. (1) if the communication was intercepted *in accordance with an authorization* or pursuant to s. 184.4. It also exempts a person acting in good faith who assists another in the interception in any way, if that person believes, on reasonable grounds, that the person doing the interception is acting in accordance with an authorization.

Section 184(2)(c) and (d) permit certain types of interceptions required to provide or

maintain the *service*, or quality control of a communication service or which are otherwise necessarily incidental to managing radio frequencies, if the interception is made by one of the specified categories of worker.

## ANNOTATIONS

**Subsec. (2)(a)** – The consent contemplated by this section is one which is voluntary in the sense that it is free from coercion and made knowingly in that the consensor must be aware of what he is doing and aware of the significance of his act and the use which the police may be able to make of the consent. However, the test employed in determining the admissibility of a confession made by an accused to a person in authority has no application. If the consent which the person gives is the one he intended and given as a result of his own decision and not under external coercion the fact that his motives for so doing are selfish and even reprehensible will not vitiate it. Coercion in this context means the use of intimidating conduct or force or threats of force by the police, but coercion does not arise merely because the consent is given as a result of promised or expected leniency or immunity from prosecution: *R. v. Goldman* (1979), 51 C.C.C. (2d) 1, 13 C.R. (3d) 228 (S.C.C.) (8:1).

A consent given by a police informer is valid and renders the interception lawful notwithstanding that the informer testifies at trial that he expected to be paid for his co-operation: *R. v. Playford* (1984), 17 C.C.C. (3d) 454 (Ont. H.C.J.) *revd* on other grounds 40 C.C.C. (3d) 142, 61 C.R. (3d) 101 (Ont. C.A.).

The Charter does not apply, where the interception was made by Bell Canada on its own in an attempt to identify the person who was using its services to make obscene and harassing telephone calls to its subscribers. Bell Canada was not an agent of the state: *R. v. Fegan* (1993), 80 C.C.C. (3d) 356, 21 C.R. (4th) 65, 13 O.R. (3d) 88 (C.A.).

An accused has standing to raise the violation of s. 8 of the Charter of Rights and Freedoms by reason of a consent interception between an alleged co-conspirator and an undercover police officer. The accused was entitled to have the evidence of this communication excluded pursuant to s. 24(2) of the Charter if to admit the evidence would bring the administration of justice into disrepute: *R. v. Montoute* (1991), 62 C.C.C. (3d) 481, 113 A.R. 95 (C.A.).

In using a dial number recorder, Bell Canada was not intercepting a “private communication”. In any event, such conduct undertaken in an attempt to identify a person making obscene and harassing telephone calls, was lawful within the meaning of this paragraph, Bell Canada being the intended recipient of the signal caused by the originator in dialing a particular telephone number: *R. v. Fegan, supra. Contra: R. v. Kutsak* (1993), 108 Sask. R. 241 (Q.B.). [Note: An authorization to use a dial number recorder may now be obtained under s. 492.2.]

**Subsec. (2)(c)** – In using a dial number recorder, Bell Canada was not intercepting a “private communication”. In any event, such conduct, undertaken in an attempt to identify a person making obscene and harassing telephone calls, was lawful within the meaning of this paragraph, being necessary to protect the person’s rights or property directly related to providing the telephone service within the meaning of subpara. (iii). The term “person” can refer to both the subscribers and Bell Canada: *R. v. Fegan, supra. Contra: R. v. Kutsak, supra.*

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## INTERCEPTION TO PREVENT BODILY HARM / Admissibility of intercepted communication / Destruction of recordings and transcripts / Definition of “agent of the state”.

**184.1 (1)** An agent of the state may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication if

(a) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception;

- (b) the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented to the interception; and
  - (c) the purpose of the interception is to prevent the bodily harm.
- (2) The contents of a private communication that is obtained from an interception pursuant to subsection (1) are inadmissible as evidence except for the purpose of proceedings in which actual, attempted or threatened bodily harm is alleged, including proceedings in respect of an application for an authorization under this Part or in respect of a search warrant or a warrant for the arrest of any person.
- (3) The agent of the state who intercepts a private communication pursuant to subsection (1) shall, as soon as is practicable in the circumstances, destroy any recording of the private communication that is obtained from an interception pursuant to subsection (1), any full or partial transcript of the recording and any notes made by that agent of the private communication if nothing in that private communication suggests that bodily harm, attempted bodily harm or threatened bodily harm has occurred or is likely to occur.
- (4) For the purposes of this section, “agent of the state” means
- (a) a peace officer; and
  - (b) a person acting under the authority of, or in cooperation with, a peace officer.
- 1993, c. 40, s. 4.

#### CROSS-REFERENCES

Consent to interception is given an expanded meaning in s. 183.1. Although “bodily harm” is not defined in this Part, reference might be made to the definition in s. 267. The terms “electro-magnetic, acoustic, mechanical or other device”, “intercept”, “private communication” are defined in s. 183. The term “peace officer” is defined in s. 2.

Since the interception under this section is made with consent of one of the parties, no offence is committed under s. 184. The purpose of this section is to make lawful, interceptions by agents of the state even though the interception is made without court authorization. Since the exception is relatively narrowly drawn, the expectation would be that the evidence would not be rendered inadmissible by ss. 8 and 24(2) of the Charter. In normal circumstances, the police would be required to obtain an authorization under s. 184.2. In the limited circumstances where evidence which was obtained under this section is sought to be admitted at a trial, the Crown must comply with the provisions of s. 189.

#### SYNOPSIS

This section permits interception of private communications by agents of the state [defined in subsec. (2)], although there is no court authorization. The section is narrowly focused and applies only where a party to the communication consents to the interception, the agent of the state believes on reasonable grounds that there is a risk of bodily harm to the person who consented, and the purpose of the interception is to prevent bodily harm. Thus, unlike the normal authorization provisions such as s. 186, the purpose of this section is not to obtain evidence. Thus, any evidence which is obtained is only admissible in certain limited circumstances set out in subsec. (2). Any recordings or notes which do not meet the requirements of subsec. (2) are to be destroyed.

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#### INTERCEPTION WITH CONSENT / Application for authorization / Judge to be satisfied / Content and limitation of authorization.

184.2 (1) A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3).



(2) An application for an authorization under this section shall be made by a peace officer, or a public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, *ex parte* and in writing to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, and shall be accompanied by an affidavit, which may be sworn on the information and belief of that peace officer or public officer or of any other peace officer or public officer, deposing to the following matters:

- (a) that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) the particulars of the offence;
- (c) the name of the person who has consented to the interception;
- (d) the period for which the authorization is requested; and
- (e) in the case of an application for an authorization where an authorization has previously been granted under this section or section 186, the particulars of the authorization.

(3) An authorization may be given under this section if the judge to whom the application is made is satisfied that

- (a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
- (b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
- (c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

(4) An authorization given under this section shall

- (a) state the offence in respect of which private communications may be intercepted;
- (b) state the type of private communication that may be intercepted;
- (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
- (d) contain the terms and conditions that the judge considers advisable in the public interest; and
- (e) be valid for the period, not exceeding sixty days, set out therein. 1993, c. 40, s. 4.

#### CROSS-REFERENCES

Consent to interception is given an expanded meaning in s. 183.1. The terms “electro-magnetic, acoustic, mechanical or other device”, “intercept”, “private communication” are defined in s. 183. The terms “peace officer” and “public officer” “provincial court judge” and “superior court judge” are defined in s. 2.

Since the interception under this section is made with consent of one of the parties and under an authorization, no offence is committed under s. 184. The purpose of this section is to deal with the implications of the decision of the Supreme Court of Canada in *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 74 C.R. (3d) 281 which had held that a consent interception by agents of the state, although not unlawful under s. 184, was still a violation of s. 8 of the Charter, unless there was prior judicial authorization. Where evidence which was obtained through execution of the authorization is sought to be admitted at a trial, the Crown must comply with the provisions of s. 189.

Note that provision is made for obtaining the authorization through means of telecommunication under s. 184.3 in much the same way that a telewarrant may be obtained for seizure of things by

search warrant. By virtue of s. 187, the material used on the application is to be kept secret and only disclosed in the circumstances set out in that section. The authorization may be executed anywhere in Canada in accordance with s. 188.1. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.

### SYNOPSIS

This section permits the police to obtain a court authorization where one of the parties to the communication consents to the interception. Because one of the parties has consented, the requirements for obtaining the authorization are not as strict as for obtaining an authorization for surreptitious interceptions under ss. 185 and 186. The grounds for obtaining the authorization under this section more closely resemble the grounds for obtaining an ordinary search warrant under s. 487 and the authorization may be obtained for any federal offence, not just those specified in s. 183. Subsection (4) sets out the terms of the authorization and provides *inter alia* that the authorization be valid only for a period not exceeding 60 days.

### ANNOTATIONS

Prior to the enactment of this section, the Supreme Court held that interception of private communications without a court authorization, even if with the consent of one of the parties to the communication, was an unreasonable search and seizure under s. 8 of the Charter: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 74 C.R. (3d) 281, [1990] 1 S.C.R. 30.

**APPLICATION BY MEANS OF TELECOMMUNICATION / Application / Recording / Oath / Alternative to oath / Authorization / Giving authorization / Giving authorization where telecommunication produces writing.**

184.3 (1) Notwithstanding section 184.2, an application for an authorization under subsection 184.2(2) may be made *ex parte* to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, by telephone or other means of telecommunication, if it would be impracticable in the circumstances for the applicant to appear personally before a judge.

(2) An application for an authorization made under this section shall be on oath and shall be accompanied by a statement that includes the matters referred to in paragraphs 184.2(2)(a) to (e) and that states the circumstances that make it impracticable for the applicant to appear personally before a judge.

(3) The judge shall record, in writing or otherwise, the application for an authorization made under this section and, on determination of the application, shall cause the writing or recording to be placed in the packet referred to in subsection 187(1) and sealed in that packet, and a recording sealed in a packet shall be treated as if it were a document for the purposes of section 187.

(4) For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(5) An applicant who uses a means of telecommunication that produces a writing may, instead of swearing an oath for the purposes of subsection (2), make a statement in writing stating that all matters contained in the application are true to the knowledge or belief of the applicant and such a statement shall be deemed to be a statement made under oath.

(6) Where the judge to whom an application is made under this section is satisfied that the circumstances referred to in paragraphs 184.2(3)(a) to (c) exist and that the circumstances referred to in subsection (2) make it impracticable for the applicant to appear personally before a judge, the judge may, on such terms and conditions, if

any, as are considered advisable, given an authorization by telephone or other means of telecommunication for a period of up to thirty-six hours.

(7) Where a judge gives an authorization by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

- (a) the judge shall complete and sign the authorization in writing, noting on its face the time, date and place at which it is given;
- (b) the applicant shall, on the direction of the judge, complete a facsimile of the authorization in writing, noting on its face the name of the judge who gave it and the time, date and place at which it was given; and
- (c) the judge shall, as soon as is practicable after the authorization has been given, cause the authorization to be placed in the packet referred to in subsection 187(1) and sealed in that packet.

(8) Where a judge gives an authorization by a means of telecommunication that produces a writing, the judge shall

- (a) complete and sign the authorization in writing, noting on its face the time, date and place at which it is given;
- (b) transmit the authorization by the means of telecommunication to the applicant, and the copy received by the applicant shall be deemed to be a facsimile referred to in paragraph (7)(b); and
- (c) as soon as is practicable after the authorization has been given, cause the authorization to be placed in the packet referred to in subsection 187(1) and sealed in that packet. 1993, c. 40, s. 4.

#### CROSS-REFERENCES

This section supplements s. 184.2 and allows for the obtaining of an authorization to intercept private communications with the consent of one of the parties by means of telecommunications. The procedure is similar to the telewarrant procedure in s. 487.1 and thus see notes under that section. The material used in the application is to be kept secret in accordance with the provisions of s. 187. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.

#### INTERCEPTION IN EXCEPTIONAL CIRCUMSTANCES.

**184.4** A peace officer may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where

- (a) the peace officer believes on reasonable grounds that the urgency of the situation is such that an authorization could not, with reasonable diligence, be obtained under any other provision of this Part;
- (b) the peace officer believes on reasonable grounds that such an interception is immediately necessary to prevent an unlawful act that would cause serious harm to any person or to property; and
- (c) either the originator of the private communication or the person intended by the originator to receive it is the person who would perform the act that is likely to cause the harm or is the victim, or intended victim, of the harm. 1993, c. 40, s. 4.

#### CROSS-REFERENCES

The terms “electro-magnetic, acoustic, mechanical or other device”, “intercept”, “private communication” are defined in s. 183. The term “peace officer” is defined in s. 2. An interception under this section is not unlawful by virtue of s. 184. The Crown must give notice of evidence obtained pursuant to this section in accordance with s. 189.

#### SYNOPSIS

This section authorizes warrantless interception of private communications in exigent



circumstances where an authorization could not be obtained with reasonable diligence, there are reasonable grounds to believe that the interception is necessary to prevent an unlawful act that would cause serious harm and one of the parties to the communication is the person who would commit the unlawful act or is the intended victim.

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**INTERCEPTION OF RADIO-BASED TELEPHONE COMMUNICATIONS / Other provisions to apply.**

**184.5 (1)** Every person who intercepts, by means of any electro-magnetic, acoustic, mechanical or other device, maliciously or for gain, a radio-based telephone communication, if the originator of the communication or the person intended by the originator of the communication to receive it is in Canada, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

**(2)** Section 183.1, subsection 184(2) and sections 184.1 to 190 and 194 to 196 apply, with such modifications as the circumstances require, to interceptions of radio-based telephone communications referred to in subsection (1). 1993, c. 40, s. 4.

**CROSS-REFERENCES**

The terms "electro-magnetic, acoustic, mechanical or other device", "intercept", and "radio-based telephone communication" are defined in s. 183. Under s. 193.1 it is an offence to disclose the contents of radio-based telephone communications subject to certain exceptions.

**SYNOPSIS**

This section helps to fill the gap created by several cases which had held under the predecessor legislation that cellular telephone conversations were not private communications. This section now creates an offence to intercept such communications where the interception was made for gain or maliciously. Subsection (2) then integrates such communications with the rest of this Part of the Code, allowing for the obtaining of authorizations and warrantless interceptions in the same way as for private communications.

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**ONE APPLICATION FOR AUTHORIZATION SUFFICIENT.**

**184.6** For greater certainty, an application for an authorization under this Part may be made with respect to both private communications and radio-based telephone communications at the same time. 1993, c. 40, s. 4.

**SYNOPSIS**

This section makes clear that applications may be made at the same time for authorization to intercept private communications and radio-based telephone [i.e. cellular] communications. Such authorizations might be obtained under s. 184.2 where one of the parties consent or under s. 186 where there is no consent by any of the parties. It is unclear whether the authorization to intercept both types of communications can be contained in the same document, although there is no apparent reason why it could not. One limitation on the scope of this section is that the ordinary s. 186 authorization cannot be obtained through the telewarrant procedure in s. 184.3.

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**APPLICATION FOR AUTHORIZATION / Extension of period for notification / Where extension to be granted / Where extension not granted.**

**185. (1)** An application for an authorization to be given under section 186 shall be made *ex parte* and in writing to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 and shall be signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of this section by

(a) the Solicitor General of Canada personally, if the offence under investigation is

one in respect of which proceedings, if any, may be instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or

(b) the Attorney General of a province personally, in any other case, and shall be accompanied by an affidavit, which may be sworn on the information and belief of a peace officer or public officer deposing to the following matters:

(c) the facts relied upon to justify the belief that an authorization should be given together with particulars of the offence,

(d) the type of private communication proposed to be intercepted,

(e) the names, addresses and occupations, if known, of all persons, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence, a general description of the nature and location of the place, if known, at which private communications are proposed to be intercepted and a general description of the manner of interception proposed to be used,

(f) the number of instances, if any, on which an application has been made under this section in relation to the offence and a person named in the affidavit pursuant to paragraph (e) and on which the application was withdrawn or no authorization was given, the date on which each application was made and the name of the judge to whom each application was made,

(g) the period for which the authorization is requested, and

(h) whether other investigative procedures have been tried and have failed or why it appears they are unlikely to succeed or that the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.

(2) An application for an authorization may be accompanied by an application, personally signed by the Attorney General of the province in which the application for the authorization is made or the Solicitor General of Canada if the application for the authorization is made by him or on his behalf, to substitute for the period mentioned in subsection 196(1) such longer period not exceeding three years as is set out in the application.

(3) Where an application for an authorization is accompanied by an application referred to in subsection (2), the judge to whom the applications are made shall first consider the application referred to in subsection (2) and where, on the basis of the affidavit in support of the application for the authorization and any other affidavit evidence submitted in support of the application referred to in subsection (2), the judge is of the opinion that the interests of justice warrant the granting of such application, he shall fix a period, not exceeding three years, in substitution for the period mentioned in subsection 196(1).

(4) Where the judge to whom an application for an authorization and an application referred to in subsection (2) are made refuses to fix a period in substitution for the period mentioned in subsection 196(1) or where the judge fixes a period in substitution therefor that is less than the period set out in the application referred to in subsection (2), the person appearing before the judge on the application for the authorization may withdraw the application for the authorization and thereupon the judge shall not proceed to consider the application for the authorization or to give the authorization and shall return to the person appearing before him on the application for the authorization both applications and all other material pertaining thereto. 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 8; 1993, c. 40, s. 5.

#### CROSS-REFERENCES

The terms "superior court of criminal jurisdiction", "peace officer" and "public officer" are defined in s. 2. The terms "offence", and "private communication" are defined in s. 183. While the

term "authorization" is defined in s. 183 to include an authorization under s. 186 and 188, it seems from the context that this section concerns an application for an authorization granted under s. 186. Prerequisites for applications for renewals of authorizations are set out in s. 186(6) and for emergency "36-hour" authorizations in s. 188. However, certain of the prerequisites in this section will be imported to the application under s. 188, in view of the lack of detail in the latter section. In addition, constitutional imperatives may require that some of the conditions in this section be imported into s. 188. By virtue of s. 187, the documents relating to an application under this section are confidential and placed in a sealed packet, which is kept in the custody of the court and not opened except pursuant to a judge's order or for the purpose of dealing with an application for a renewal. Other related provisions are as follows: s. 184, offence to unlawfully intercept private communications; s. 189, admissibility of evidence obtained through interceptions; s. 191, unlawful possession of devices for surreptitious interception; s. 193, unlawful disclosure of intercepted private communication; s. 194, provision for damages for unlawful interceptions; s. 195, report by Solicitor General of Canada and provincial Attorney General concerning applications for authorizations under this section.

Also see sections which provide for obtaining the following authorizations: s. 184.2 (consent interceptions); s. 487.01 (general warrant including video surveillance); s. 492.1 (tracking device); s. 492.2 (dial number recorder).

### SYNOPSIS

This section sets out the *procedure and criteria for granting authorization* to intercept private communications, and *permits extensions* of the period within which *notice* must be given to the person whose communications are intercepted (see s. 196(1)).

The introductory words in 185(1) set out certain procedural matters which apply to an application for an authorization. It provides that the application shall be made *ex parte* and *in writing*. The only judges who may grant such authorizations are of the *superior court of criminal jurisdiction* or a *judge as defined in s. 552*. Only the Attorney General, the Solicitor General or their *agents specially designated in writing* for the purpose may sign such applications. Section 185(1)(a) and (b) set out the offences, in respect of which the Solicitor General or the Attorney General may make such designations.

The written application must be accompanied by an *affidavit*, which may be *sworn on information and belief* by a peace officer or public officer. *Section 185(1)(c) to (h) specifies the information the affidavit must contain.*

Section 185(1)(c) dictates that the affidavit set out the *facts* which the application is based upon, including the *particulars of the offence*. Section 185(1)(d) requires that the affidavit state the *type of private communication* to be intercepted.

Section 185(1)(e) requires that the affidavit contain the following information: the identity of the *known persons* whose private communications are to be intercepted, a *general description* of the nature and location of the *place, if known*, where the private communications are to be intercepted and a *general description* of the *proposed manner of interception*. Note that, unlike the previous two requirements which must be satisfied only if known, the *description of the manner* of the interception *must* be given. The *person* whose private communications are to be intercepted is generally referred to as the *object of the interception*.

Section 185(1)(f) provides for the affidavit to give the *history of any prior applications*, including the details of any unsuccessful applications or applications which were withdrawn. Section 185(1)(g) states that the *period* for which the *authorization is sought* must be set out in the affidavit.

The final requirement is that the affidavit must state if *other investigative procedures have been tried and failed* or why they appear *unlikely to succeed* or why the matter is so *urgent* that it is *impractical* to pursue other means of investigation.

Section 185(2) to (5) provides that the *notice period* within which the object of the interception is to be notified (s. 196(1)) may be *extended on application* of the Attorney General or Solicitor General. It permits a judge issuing an authorization to grant such an



extension. Section 185(2) requires that either the Attorney General or Solicitor General must *personally sign* the application for this extension. The extension may be for up to *three years*. Subsection (3) requires that the judge considering the application for the authorization must first consider the application to extend notice under subsec. (2). The test to be applied by the judge, in granting the extension of notice, is that the *interests of justice* warrant the granting of it. However, subsec. (4) provides that, if the judge *declines to grant the application under subsection (2)*, the *applicant for the authorization may withdraw it*, in which event the judge shall not consider the application for an authorization and must return all *materials* relating to the application for the extension of the notice period under subsec. (2) and to the application for authorization to the applicant.

By virtue of s. 487.01(5), this section applies to general warrants to do video surveillance.

## ANNOTATIONS

**Jurisdiction of judge** – As offences under the Narcotic Control Act are ones in respect of which proceedings may be validly instituted at the instance of the Government of Canada and conducted by or on behalf of the Attorney-General of Canada (in view of *R. v. Hauser* (1979), 46 C.C.C. (2d) 481, [1979] 1 S.C.R. 984, 8 C.R. (3d) 89) an agent designated by the Solicitor-General of Canada may apply for an authorization in respect of such offences: *Cordes v. The Queen* (1979), 46 C.C.C. (2d) 46, [1979] 1 S.C.R. 1062, 10 C.R. (3d) 186 (7:0).

Since the definition of Attorney-General of Canada in s. 2, *supra*, is in respect *inter alia* to both proceedings under other Federal Acts and a conspiracy under this Act to commit an offence under another Federal Act, only the provincial Attorney-General has the power under para. (b) to designate an agent for applications in connection with the Criminal Code offences enumerated under this Part: *R. v. Hancock and Proulx* (1976), 30 C.C.C. (2d) 544, 36 C.R.N.S. 102 (B.C.C.A.).

**The grounds for the application (subsec. (1)(c))** – The prerequisite for the granting of the authorization, as set out in s. 186(1)(a), that the granting of the authorization be in the best interest of the administration of justice imports as a minimum requirement, consistent with s. 8 of the Charter of Rights and Freedoms, that the judge be satisfied that there are reasonable and probable grounds to believe that a particular offence or a conspiracy, attempt or incitement to commit it has been, or is being committed and that the authorization sought will afford evidence of that offence: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 71 O.R. (2d) 575n.

The failure of the officer to swear that he had reasonable and probable grounds to support his belief was not a fatal defect. What is required is disclosure of the facts relied upon to justify the belief that an authorization should be granted: *R. v. Bicknell* (1988), 41 C.C.C. (3d) 545 (B.C.C.A.).

**Type of communication to be intercepted (subsec. (1)(c))** – The affidavit must comply frankly, fully and fairly with the provisions of this section and the authorities must not try to conceal their true intention from the authorizing judge. In *R. v. Gill* (1980), 56 C.C.C. (2d) 169, 18 C.R. (3d) 390, 118 D.L.R. (3d) 618 (B.C.C.A.), it was held that the affidavit by “obfuscation” concealed or failed to reveal the clear intention of the police to intercept the face-to-face oral communications between certain persons who were to be placed in the same gaol cell and as a consequence failed to comply with subsec. (1)(c) and (e).

**Identification of “known” persons (subsec. (1)(e))** – A person is known within the meaning of subsec. (1)(e), if the police know of the existence of such person and have reasonable and probable grounds to believe that interception of her communications *may* assist. If the person meets both of those requirements then interception of her private communications cannot be lawfully made under a “basket clause” for unknown persons: *R. v. Chesson* (1988), 43 C.C.C. (3d) 353, 65 C.R. (3d) 193, [1988] 2 S.C.R. 148 (4:0).

In the subsequent case of *R. v. Duarte, supra*, the court accepted that the prerequisite that the granting of the authorization be in the best interest of the administration of justice in s. 186(1)(a) imported as a minimum requirement, consistent with s. 8 of the Charter of Rights and Freedoms, that the judge be satisfied that there are reasonable and probable grounds to believe that an offence has been or is being committed and that the authorization sought *will* afford evidence of that offence. Care should therefore be taken in the drafting of the affidavit to ensure that, in simply following the wording of para. (1)(e), the authorities do not adopt too low a test in setting out the grounds required by subsec. (1)(c) upon which the authorization may be granted.

An application may be made to intercept, pursuant to a "basket clause", private communications of persons who are both unknown and unidentified at the time of the application: *R. v. Samson* (1983), 9 C.C.C. (3d) 194, 36 C.R. (3d) 126, 44 O.R. (2d) 205 (Ont. C.A.).

**Necessity requirement (subsec. (1)(h))** – In *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.), rev'd on other grounds (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) the court adopted, as a guide to the interpretation of this paragraph and the requirement in s. 186(1)(b), the decision in *People v. Baris*, 500 N.Y.S. 2d 572 (A.D. 4 Dept., 1986), interpreting the similar requirement in Title III. In the latter case, it was noted that the police do not have to exhaust all possible steps before requesting a warrant to intercept private communications and wiretapping does not have to be the "last resort". The judge must, however, be apprised of the nature, progress and difficulties in the investigation to insure that wiretapping is more than just a "useful tool". Thus, it was held in *R. v. Morrison* (1989), 50 C.C.C. (3d) 353, 72 C.R. (3d) 332, 34 O.A.C. 50 (C.A.), that the trial judge properly held that the test was not whether use of wiretapping was a "last resort".

Mere conclusory statements of police officers, unsupported by facts, are not sufficient to meet the necessity requirement. The type of alternative investigatory techniques available will, however, depend on the nature of the offence. Relevant will be, for example, the place of the person in a drug distribution hierarchy and whether he has insulated himself from contact with strangers and the caution exercised by the subjects of the investigation: *R. v. Garofoli, supra*.

Whether or not the authorities, in order to meet the test of subsec. (1)(b), must show that all other investigative procedures have been utterly exhausted and that interception of private communications is a last resort, the court must at least be apprised of the nature, progress and difficulties in the investigation to ensure that interception of private communications is more than just a useful tool: *R. v. Smyk* (1993), 86 C.C.C. (3d) 63, 88 Man. R. (2d) 303, 51 W.A.C. 303 (C.A.).

The fact that the police have enough information to lay a charge is not a bar to obtaining an authorization where there are grounds for permitting the investigation to continue by means of intercepted communications as where there is a reasonable expectation that evidence of a further offence might also be obtained: *R. v. Paulson* (1995), 97 C.C.C. (3d) 344, 94 W.A.C. 217 (B.C.C.A.).

**Prior authorizations (subsec. (1)(f))** / [Also see cases noted under s. 186(6).] – On an application for a subsequent authorization in the same investigation there must be full and frank disclosure, but the requirements set out in s. 186(6) need not be complied with: *R. v. Moore*; *R. v. Bogdanich* (1993), 81 C.C.C. (3d) 161, 21 C.R. (4th) 387, 45 W.A.C. 253 (B.C.C.A.), aff'd 95 C.C.C. (3d) 288.

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**JUDGE TO BE SATISFIED** / Where authorization not to be given / Terms and conditions / Content and limitation of authorization / Persons designated / Renewal of authorization / Renewal.

**186. (1) An authorization under this section may be given if the judge to whom the application is made is satisfied**

- (a) that it would be in the best interests of the administration of justice to do so; and
  - (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
- (2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor's household has been or is about to become a party to an offence.
- (3) Where an authorization is given in relation to the interception of private communications at a place described in subsection (2), the judge by whom the authorization is given shall include therein such terms and conditions as he considers advisable to protect privileged communications between solicitors and clients.
- (4) An authorization shall
- (a) state the offence in respect of which private communications may be intercepted;
  - (b) state the type of private communication that may be intercepted;
  - (c) state the identity of the persons, if known, whose private communications are to be intercepted, generally describe the place at which private communications may be intercepted, if a general description of that place can be given, and generally describe the manner of interception that may be used;
  - (d) contain such terms and conditions as the judge considers advisable in the public interest; and
  - (e) be valid for the period, not exceeding sixty days, set out therein.
- (5) The Solicitor General of Canada or the Attorney General, as the case may be, may designate a person or persons who may intercept private communications under authorizations.
- (6) Renewals of an authorization may be given by a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 on receipt by him of an *ex parte* application in writing signed by the Attorney General of the province in which the application is made or the Solicitor General of Canada or an agent specially designated in writing for the purposes of section 185 by the Solicitor General of Canada or the Attorney General, as the case may be, accompanied by an affidavit of a peace officer or public officer deposing to the following matters:
- (a) the reason and period for which the renewal is required,
  - (b) full particulars, together with times and dates, when interceptions, if any, were made or attempted under the authorization, and any information that has been obtained by any interception, and
  - (c) the number of instances, if any, on which, to the knowledge and belief of the deponent, an application has been made under this subsection in relation to the same authorization and on which the application was withdrawn or no renewal was given, the date on which each application was made and the name of the judge to whom each such application was made,
- and supported by such other information as the judge may require.
- (7) A renewal of an authorization may be given if the judge to whom the application is made is satisfied that any of the circumstances described in subsection (1) still



obtain, but no renewal shall be for a period exceeding sixty days. 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 9; 1993, c. 40, s. 6.

#### CROSS-REFERENCES

The reference to “judge” is a judge referred to in s. 185, being a judge of the superior court of criminal jurisdiction or a judge as defined in s. 552. The terms “solicitor”, “intercept”, “private communication” and “offence” are defined in s. 183. Attorney General is defined in s. 2. Procedure for obtaining an emergency “36-hour” authorization is set out in s. 188. The documents used on an application are confidential and must be dealt with in accordance with s. 187. Other related provisions are as follows: s. 184, offence to unlawfully intercept private communications [*i.e.*, *inter alia*, not in accordance with an authorization]; s. 189, admissibility of evidence obtained through interceptions; s. 191, unlawful possession of devices for surreptitious interception; s. 193, unlawful disclosure of intercepted private communication; s. 194, provision for damages for unlawful interceptions; s. 195, reports by Solicitor General of Canada and provincial Attorney General concerning applications for authorizations under this section.

As to the impact of the Charter on the admissibility of evidence, also see notes under s. 189.

Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section. The interception of “consent” interceptions may be authorized under s. 184.2. Also see s. 487.01 which makes this section applicable to obtaining a general warrant to conduct surreptitious video surveillance, s. 492.1 which regulates the use of tracking devices and s. 492.2 which regulates the use of telephone number recorders.

Authorizations may be executed anywhere in Canada in accordance with s. 188.1.

#### SYNOPSIS

This section sets out the *criteria which a judge is to apply* when considering whether to grant a request for an authorization to intercept private communications. It also sets out what must be contained in an authorization, and *who may intercept* private communications pursuant to an authorization. In addition, it provides for the *renewal of an authorization*.

Subsection (1) provides two conditions which must be met before a judge may issue an authorization. The first condition is that the interception must be in the *best interests of the administration of justice*. In addition, s. 186(1)(b) requires that the judge be satisfied of the *necessity of this means of investigation*. This requirement parallels the contents of the affidavit in support of the application as set out in s. 185(1)(h).

Subsections (2) and (3) impose *strict limits* on when an authorization may be given in connection with the *home or office of a solicitor* or any *other place ordinarily used by solicitors for the purpose of consulting with their clients*. Before such an authorization may be issued, the judge must be satisfied that there are *reasonable grounds to believe* that the *solicitor*, or any of the other categories of people specified in subsec. (2) (generally those who have a close personal or business tie to the lawyer), *has been or is about to be a party to an offence*. As with all references to “offence” in this Part, it is limited to those offences listed in s. 183. Subsection (3) provides that, if such an authorization is granted, the judge *must impose terms and conditions to protect privileged conversations* between solicitors and clients. A typical condition which is imposed is that such authorizations be “live monitored”, *i.e.*, listened to by an officer whenever communications are intercepted to ensure that no solicitor-client communications are unintentionally intercepted.

Subsection (4) sets out the *terms which must appear in all authorizations* and also provides a general power, in s. 186(4)(d), to impose *other terms and conditions* which the judge considers advisable in the *public interest*. Section 186(4)(a) requires that the *offence* in respect of which the authorization is given be stated. Section 186(4)(b) mandates that the *type of private communication that may be intercepted* be stated. Section 186(4)(c) parallels the requirements for the affidavit in support of the application set out in s. 185(1)(e) which deal with the *identity of the persons* whose communications are to be intercepted

and a *description of the place and manner* of the interception. The final condition which must appear in the authorization is the *period for which it is valid, not exceeding 60 days*.

Section 186(5) permits the Solicitor General or the Attorney General to designate *who may make the authorized intercept*.

Subsection (6) deals with *renewal of authorizations*. The procedure set out for renewals parallels that in s. 185 dealing with initial applications, including that they be made *ex parte* and be supported by an *affidavit*. Section 186(6)(c) parallels s. 185(1)(f). The additional requirements relate to full disclosure of the reasons for the renewal and the interceptions made to date under the original authorization. In addition, the applicant must provide whatever other information the judge hearing the application may require. The *criteria* to be applied in deciding whether to *grant a renewal* are set out in subsec. (7). If the conditions set out in subsec. (1) still obtain, the judge *may grant the renewal for no more than 60 days*.

## ANNOTATIONS

**Subsec. (1)(a)** – Surreptitious electronic surveillance constitutes a search or seizure within the meaning of s. 8 of the Charter of Rights and Freedoms: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 71 O.R. (2d) 575n.

In *R. v. Duarte, supra*, the court accepted that the prerequisite that the granting of the authorization be in the best interest of the administration of justice imported as a minimum requirement, consistent with s. 8 of the Charter of Rights and Freedoms, that the judge be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of that offence.

Hearsay statements of an informer may provide reasonable and probable grounds to justify the granting of an authorization to intercept private communications. A tip from an informer by itself, however, is insufficient to establish reasonable and probable grounds. The reliability of the tip is to be assessed by recourse to the totality of the circumstances. The court will look to a variety of factors including the degree of detail of the tip, the informer's source of knowledge, and any *indicia* of the informer's reliability such as past performance or confirmation from other investigative sources. The results of the interception cannot, however, *ex post facto* provide evidence of the reliability of the information: *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) (5:2).

**Subsec. (1)(b)** – See notes under heading **Necessity requirement (subsec. (1)(h))** in s. 185.

**Subsec. (2), (3) / Interception of solicitor-client communications** – In seeking to admit private communications intercepted pursuant to an authorization there is no burden on the Crown to prove this subsection has not been breached: *R. v. Lyons et al.* (1979), 52 C.C.C. (2d) 113 (B.C. Co. Ct.).

A police cell block where lawyers were permitted to consult with their clients was nevertheless held not to be a place ordinarily used by a solicitor for the purpose of consultation with clients. Use of the cells in this manner constituted an unusual or extraordinary use: *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.), affd 5 C.C.C. (3d) 538, 149 D.L.R. (3d) 710 (C.A.).

**Subsec. (3)** – This subsection does not require that the Judge impose conditions if he does not consider them advisable: *R. v. Chambers* (1983), 9 C.C.C. (3d) 132, 37 C.R. (3d) 128 (B.C.C.A.), affd 26 C.C.C. (3d) 353, 52 C.R. (3d) 394, [1986] 2 S.C.R. 29.

**Subsec. (4) / Contents of authorization / The offence (para. (a))** – The purpose of this requirement is to demonstrate, on the face of the authorization, that the judge has exercised his jurisdiction within the limits described in s. 183 and thus a simple generic state-

ment of the offence, in this case "murder" and "conspiracy to commit murder", is sufficient: *R. v. Mathurin* (1978), 41 C.C.C. (3d) 263 (Que. C.A.).

**Basket clause (para. (c))** – In a case involving consideration of the former s. 178.13(2)(c) it was held that an authorization providing for the interception of the private communications of a certain named person and that "such interceptions" may be made at certain addresses does not authorize the interception of the communications of other unnamed persons at those addresses. It was clear from the wording of the clause that it was not intended to operate as a "basket clause" so as to authorize the interception of conversations of unknown persons at those addresses: *R. v. Douglas* (1977), 33 C.C.C. (2d) 395 (Ont. C.A.).

An authorization simply authorizing the interception of conversations of certain named persons and "other persons as yet unknown who may become identified within the time limit of this authorization" did not sufficiently comply with the former s. 178.13(2) in so far as it purported to authorize the interception of private communications of unknown persons. Nor was this defect cured by inclusion in the authorization of the standard clause authorizing the installation of electromagnetic and other devices. This clause was not a description of the manner of interception within the meaning of that subsection: *R. v. Badovinac* (1977), 34 C.C.C. (2d) 65 (Ont. C.A.).

A "basket clause" must identify the class of persons who are to be intercepted and may not simply delegate that function to the police by identifying the unknown persons who may be intercepted as persons of whom there are reasonable and probable grounds to believe that the interception of their private communications may assist the investigation of any of the offences named in the order. This wording, virtually identical to s. 185(1)(e) simply vests a discretion in the police to determine who may be intercepted: *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137, 44 C.R. (3d) 150 (Ont. C.A.), affd 39 C.C.C. (3d) 575, 60 C.R. (3d) 107 N.R. 316 (S.C.C.) 7:0.

To be named in the authorization as a known person, the existence of that person must be known to the police and must be one the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence. If at the time the police apply for an authorization a person meets these criteria she will be a known person and therefore if her communications are to be admitted, she must be named in the authorization as a target for interception: *R. v. Chesson* (1988), 43 C.C.C. (3d) 353, 65 C.R. (3d) 193, [1988] 2 S.C.R. 148 (4:0).

**Place of interception (para. (c))** – A clause in an authorization purporting to authorize the interception of a named person's communications without any limitation as to place is invalid: *R. v. Riich et al.* (1982), 69 C.C.C. (2d) 289, 37 A.R. 614 (C.A.) affd 16 C.C.C. (3d) 191n, [1984] 2 S.C.R. 333 *sub nom.* *R. v. Brese et al.* (7:0). Similarly, *Grabowski v. The Queen* (1985), 22 C.C.C. (3d) 449, 22 D.L.R. (4th) 725 (S.C.C.) (7:0) where it was held that a clause was invalid which authorized interception of the private communications of named persons and unknown persons provided for by the "basket clause" at any place where such persons could be found. As it stood, the authorization contained no limitations as to persons or place or interception. However, the authorization was severable and the offending clause relating to interception at unspecified locations could be excluded.

A clause in an authorization may validly provide for interception of private communications at places resorted to by the named targets. Inclusion of such a clause does not, *per se*, infringe s. 8 of the Charter. The judge can properly find that there are reasonable and probable grounds for believing that evidence will be obtained as to the commission of the offence with respect to certain classes of places. Further, there is no requirement that the authorization include the most specific description possible, and thus a general resort to a clause was sufficient to include pay telephones resorted to by the targets. However, in some circumstances interceptions at pay telephones may violate s. 8. Thus, in this case, although prior to seeking the first of several authorizations, it was known to



the police that the named targets resorted to public telephones, there was nothing in the authorizations to indicate that such telephones were to be wire-tapped nor that the slightest consideration was given to protection of the public interest by imposing conditions as contemplated by para. (d). At a minimum, where it is intended to intercept pay telephones pursuant to a resort to a clause, the authorization should provide that conversations at a public telephone not be intercepted unless there are reasonable and probable grounds for believing that the target was using the telephone at the time that the device was activated: *R. v. Thompson* (1990), 59 C.C.C. (3d) 225, [1990] 6 W.W.R. 481 (S.C.C.) (4:2).

An automobile is a “place” within the meaning of this subsection: *R. v. Papalia* (1988), 43 C.C.C. (3d) 129, 65 C.R. (3d) 226, [1988] 2 S.C.R. 137 (4:0).

**Description of manner of interception (para. (c))** – It was held in *Re Glesby et al. and The Queen* (1982), 66 C.C.C. (2d) 332, 135 D.L.R. (3d) 524 (Man. Q.B.), affd 70 C.C.C. (2d) 148, [1982] 5 W.W.R. 351, *sub nom. Re Diamond and The Queen* (C.A.) that an authorization complied with the present subsec. (2)(c) as to generally describing the manner of interception where it authorized the police to “intercept or cause to be intercepted private communications as hereunder specified and for such purposes to take all steps as are reasonably necessary to install, make use of, monitor and remove any electro-magnetic, acoustic, mechanical and other device as may be required to implement this authorization”.

An authorization complies with the requirement in para. (c) as to description of the manner of interception although that description authorizes the use of any electromagnetic, acoustic, mechanical or other device which in the opinion of the police is required to investigate the offence: *R. v. Lawrence* (1988), 40 C.C.C. (3d) 192n, 63 C.R. (3d) 398, [1988] 1 S.C.R. 619.

**Surreptitious entry** – It is implied in the authorization that the police officer may make a surreptitious entry into private premises to install a device such as a radio transmitter where such entry is necessary to implement the authorization and the authorizing judge has not included in the authorization any limitations on or prohibition of such entry. However, the judge in the exercise of his supervisory jurisdiction should designate the procedures, devices and conditions which are necessary in the public interest: *Lyons et al. v. The Queen* (1984), 15 C.C.C. (3d) 417, [1985] 2 W.W.R. 1, [1984] 2 S.C.R. 633 (4:2); *Reference re an Application for an Authorization* (1984), 15 C.C.C. (3d) 466, [1985] 2 W.W.R. 193, [1984] 2 S.C.R. 697 (4:2).

However, the guarantee to protection against unreasonable search and seizure in s. 8 of the Charter requires that, with respect to private residences, the authorizing judge should consider what conditions, if any, are required in the public interest. In order to ensure that the authorizing judge has at least considered these matters, the authorization should, at minimum, refer specifically to each place that is a private residence and designate the type of devices that may be employed. In the absence of express mention of a private residence in the authorization, and hence this minimal protection, the safeguards provided by the judicial role are illusory. Surreptitious entry of a private dwelling which has not been specifically mentioned in the authorization is unreasonable and contrary to s. 8 of the Charter. Evidence obtained pursuant to such an entry may be excluded under s. 24(2) of the Charter: *R. v. Thompson*, *supra*.

**Other terms and conditions (para. (d))** – Failure to include a clause in an authorization imposing a duty on police to minimize interception of irrelevant conversations is not a violation of the guarantee to protection against unreasonable search or seizure in s. 8 of the Charter: *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) (5:2).

**Period of time (para. (e))** – The authorization to comply with para. (e) may state merely that it is valid for a period not exceeding a certain number of days commencing on a specified date. It need not set out a specific number of identifiable days to be valid: *R. v.*

*Murphy and Holme* (1982), 69 C.C.C. (2d) 152 (B.C.C.A.), leave to appeal to S.C.C. refused 43 N.R. 450n.

A statement in the preamble of the authorization to the effect that interception was to be by "electronic" means was an adequate description of the manner of interception: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

**Severance** – An authorization is severable and an offending clause relating to interception at unspecified locations, a clause which was never resorted to, may be severed and the balance of the authorization upheld: *Grabowski v. The Queen*, *supra*.

Where, however, the good and bad parts of the authorization are so interwoven that they cannot be separated, then it is not possible to sever the valid portions of the authorization from the invalid portion and the trial court has no power to amend the authorization so as to place a limit on the places where the interception of communications of unknown persons could have been made: *R. v. Braithwaite* (1986), 30 C.C.C. (3d) 348, 72 A.R. 227 (C.A.).

**Review of validity of authorization** – Since a wiretap constitutes a search or seizure within the meaning of s. 8 of the Charter, statutory provisions authorizing interception of private communications must conform to the minimum constitutional requirements demanded by s. 8 of the Charter. Thus, before granting an authorization, a judge must be satisfied that the granting of the authorization is in the best interests of the administration of justice. This requires that the judge be satisfied by affidavit that there are reasonable and probable grounds to believe that a specified crime has been or is being committed and that the interception of the private communications in question will afford evidence of the crime. In addition, the applicant must meet the requirements of subsec. (1)(b) with respect to the unavailability of other investigative procedures. The statutory requirements of subsec. (1)(a) are identical to the constitutional requirements. The review to determine compliance with the statutory minimum requirements and hence the minimum constitutional requirements is to be conducted by the trial judge rather than a judge of the court which granted the authorization. The judge conducting the review must hear evidence and submissions as to whether the interception constitutes an unreasonable search and seizure. Since this is an issue as to the admissibility of evidence, it is an issue which may be raised at trial. Applications for review should be made to the trial judge. If the judge concludes that the minimum statutory conditions set out in subsec. (1)(a) have not been complied with then the search is not authorized by law and is unlawful. The judge should not, however, review the authorization *de novo* and should not substitute his view for that of the authorizing judge. If based on the record which was before the authorizing judge as amplified on the review, the trial judge concludes that the authorizing judge could have granted the authorization then he should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are not prerequisites to a review but merely relevant factors, their sole impact being to determine whether there continues to be any basis for the decision of the authorizing judge: *R. v. Garofoli*, *supra*.

Even though the accused may not have been directly incriminated by conversations recorded pursuant to an authorization, where incriminating remarks made by other individuals during the conversations would be admissible as evidence against the accused under the co-conspirators exception to the rule against hearsay, then it would seem that the accused has standing to challenge the validity of the authorization: *R. v. Durette*, [1994] 1 S.C.R. 469, 88 C.C.C. (3d) 1, 28 C.R. (4th) 1.

Errors in the information presented to the authorizing judge, whether advertent or even fraudulent, are only factors to be considered in deciding whether or not to set aside the authorization. The trial judge should examine the information in the affidavit which was independent of the evidence found to be misleading to determine whether there was sufficient reliable information to support an authorization: *R. v. Bisson*, [1994] 3 S.C.R. 1097, 94 C.C.C. (3d) 94, 65 Q.A.C. 241.

**Cross-examination of deponent of affidavit** – While the accused has no right to cross-examine the deponent of the affidavit, the trial judge should grant leave to cross-examine where he is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as, for example, the existence of reasonable and probable grounds. The test previously applied by most of the lower courts, refusing to permit counsel for the accused to cross-examine the deponent of the affidavit unless there was *prima facie* proof of a deliberate falsehood or reckless disregard for the truth in respect of statements in the affidavit and that this false statement is necessary to the finding that there were grounds for granting the authorization, was too strict. Cross-examination will be limited by the trial judge to questions that are directed to establish that there was no basis upon which the authorization could have been granted. With respect to confidential informers, there is no right to cross-examine. The informer is not a witness and cannot be identified, unless the accused brings himself within the exception which permits disclosure of the informer's identity where the accused's innocence is at stake: *R. v. Garofoli*, *supra*.

Where the actual deponent of the affidavit had only a limited role in the investigation, the accused should be permitted to cross-examine the sub-affiant police officers who were actively involved in the investigation and provided the deponent with the information used for the affidavit: *R. v. Pasaluko* (1992), 77 C.C.C. (3d) 190 (B.C.S.C.).

**Subsec. (5) / [Designation of persons who may intercept]** – A designation by the provincial Attorney General is valid notwithstanding it is not expressly limited to offences within provincial jurisdiction (*i.e.*, Code offences). A designation in general terms will be construed as being so limited: *R. v. Miller and Thomas* (No. 2) (1975), 28 C.C.C. (2d) 115 (B.C. Co. Ct.). Furthermore, this subsection does not mean that interceptions may only be made by designated interceptors: *R. v. Miller and Thomas* (No. 3) (1975), 28 C.C.C. (2d) 118 (B.C. Co. Ct.).

If an interceptor is named in the authorization and described as a person designated by the Attorney-General, the presumption of regularity applies and the Crown is not required to prove the designation in the absence of evidence to indicate some irregularity: *R. v. Shaw* (1983), 4 C.C.C. (3d) 348, 45 N.B.R. (2d) 21 (C.A.).

Where authority to intercept was given to a particular commanding officer or persons acting under his authority then the right to intercept would include a person acting within the scope or ambit of the general authority conferred upon him by his commanding officer. Such person need not be specifically and personally authorized by the commanding officer: *R. v. Vransky, Zikan and Dvorak* (1979), 46 C.C.C. (2d) 14 (Ont. C.A.).

Where the authorization names a certain interceptor and “any person acting under his authority” it is incumbent on the Crown to establish that the persons participating in the interceptions were in fact acting under his authority. On the other hand, interceptions recorded automatically at times when the equipment was not being monitored are admissible: *R. v. Shaw*, *supra*.

**Subsec. (6), (7) / [Renewals]** – A renewal may only extend the time of the original authorization. It may not extend or modify the terms of the original authorization by including, for example, a person not provided for in the original authorization: *R. v. Badovinac*, *supra*. Nor may the renewal change the address of the place of interception: *R. v. Dass* (1979), 47 C.C.C. (2d) 194, 8 C.R. (3d) 224 (Man. C.A.), leave to appeal refused Dec. 13, 1979.

Where, however, it is apparent that the second order was intended to be both a renewal of the original authorization and a new authorization it may properly include persons not included in the original authorization: *R. v. Vransky, Zikan and Dvorak* (1979), 46 C.C.C. (2d) 14 (Ont. C.A.), application for leave to appeal to S.C.C. dismissed May 6, 1980.



Where the authorities seek to intercept the private communications of more targets than they may apply for a fresh authorization with respect to all of the proposed targets. There is no requirement that a renewal be obtained with respect to the persons named in the original authorization: *R. v. Thompson, supra*.

Further, where the authorities do obtain a second authorization, which includes additional persons and places, they do not have to comply with the provisions of subsec. (6) and thus do not have to disclose all of the details of each and every piece of incriminating evidence known to the authorities. The material in support of the fresh authorization should, however, include a full, fair and frank disclosure of relevant intercepted private communications obtained up to the time of the second authorization: *R. v. Moore*; *R. v. Bogdanich* (1993), 81 C.C.C. (3d) 161, 21 C.R. (4th) 387, 45 W.A.C. 253 (B.C.C.A.), affd [1995] 1 S.C.R. 756, 95 C.C.C. (3d) 288, 38 C.R. (4th) 44.

**MANNER IN WHICH APPLICATION TO BE KEPT SECRET / Exception / Opening for further application / Opening on order of judge / Opening on order of trial judge / Order for destruction of documents / Order of judge / Idem / Editing of copies / Accused to be provided with copies / Original documents to be returned / Deleted parts.**

187. (1) All documents relating to an application made pursuant to any provision of this Part are confidential and, subject to subsection (1.1), shall be placed in a packet and sealed by the judge to whom the application is made immediately on determination of the application, and that packet shall be kept in the custody of the court in a place to which the public has no access or in such other place as the judge may authorize and shall not be dealt with except in accordance with subsections (1.2) to (1.5).

(1.1) An authorization given under this Part need not be placed in the packet except where, pursuant to subsection 184.3(7) or (8), the original authorization is in the hands of the judge, in which case that judge must place it in the packet and the facsimile remains with the applicant.

(1.2) The sealed packet may be opened and its contents removed for the purpose of dealing with an application for a further authorization or with an application for renewal of an authorization.

(1.3) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet.

(1.4) A judge or provincial court judge before whom a trial is to be held and who has jurisdiction in the province in which an authorization was given may order that the sealed packet be opened and its contents removed for the purpose of copying and examining the documents contained in the packet if

- (a) any matter relevant to the authorization or any evidence obtained pursuant to the authorization is in issue in the trial; and
- (b) the accused applies for such an order for the purpose of consulting the documents to prepare for trial.

(1.5) Where a sealed packet is opened, its contents shall not be destroyed except pursuant to an order of a judge of the same court as the judge who gave the authorization.

(2) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to section 185 or subsection 186(6) or 196(2) may only be made after the Attorney General or the Solicitor General by

whom or on whose authority the application for the authorization to which the order relates was made has been given an opportunity to be heard.

(3) An order under subsection (1.2), (1.3), (1.4) or (1.5) made with respect to documents relating to an application made pursuant to subsection 184.2(2) or section 184.3 may only be made after the Attorney General has been given an opportunity to be heard.

(4) Where a prosecution has been commenced and an accused applies for an order for the copying and examination of documents pursuant to subsection (1.3) or (1.4), the judge shall not, notwithstanding those subsections, provide any copy of any document to the accused until the prosecutor has deleted any part of the copy of the document that the prosecutor believes would be prejudicial to the public interest, including any part that the prosecutor believes could

- (a) compromise the identity of any confidential informant;
- (b) compromise the nature and extent of ongoing investigations;
- (c) endanger persons engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used; or
- (d) prejudice the interests of innocent persons.

(5) After the prosecutor has deleted the parts of the copy of the document to be given to the accused under subsection (4), the accused shall be provided with an edited copy of the document.

(6) After the accused has received an edited copy of a document, the prosecutor shall keep a copy of the original document, and an edited copy of the document and the original document shall be returned to the packet and the packet resealed.

(7) An accused to whom an edited copy of a document has been provided pursuant to subsection (5) may request that the judge before whom the trial is to be held order that any part of the document deleted by the prosecutor be made available to the accused, and the judge shall order that a copy of any part that, in the opinion of the judge, is required in order for the accused to make full answer and defence and for which the provision of a judicial summary would not be sufficient, be made available to the accused. 1973-74, c. 50, s. 2, R.S.C. 1985, c. 27 (1st Supp.), s. 24; 1993, c. 40, s. 7.

#### CROSS-REFERENCES

Note that s. 24 of the Access to Information Act, R.S.C. 1985, c. A-1 provides that the head of a government institution shall refuse to disclose any record requested under that Act that contains information, the disclosure of which is restricted by or pursuant to this section.

#### SYNOPSIS

This section sets out the manner in which certain documents relating to applications under this Part are to be kept confidential. Subject to subsec. (1.1), all documents are to be placed in a sealed packet and kept in the custody of the court. By virtue of subsec. (1.1), the authorization itself is not placed in the packet except in the case of the telecommunication procedure under s. 184.3 in which case the authorization is placed in the sealed packet and the facsimile remains with the applicant.

The other provisions of this section deal with the circumstances in which the sealed packet can be opened and the material used on the application disclosed. Under subsec. (1.2), the packet may be opened for the purpose of a renewal or further authorization. Under subsec. (1.3), a judge may permit the packet to be opened and the contents copied and examined. Similarly, the trial judge, under subsec. (1.4), may permit the packet to be opened and the contents copied and examined where application is made by the accused for the purpose of preparing for trial and any matter relevant to the authoriza-

tion or any evidence obtained pursuant to the authorization is "in issue" in the trial. These applications must be made upon notice to the Attorney General.

Subsections (4) to (7) then set out the editing procedure. In summary Crown counsel will first edit the material to remove information, the disclosure of which would be prejudicial to the public interest. The accused is then provided with the edited copy. The accused, however, may apply to the trial judge for an order that portions which were deleted be disclosed to the accused. The further disclosure order will be made where the judge is of the opinion that the additional material is necessary in order for the accused to make full answer and defence and where provision of a "judicial summary" of the deleted material would not be sufficient. This process roughly tracks the decisions of the Supreme Court of Canada in *Dersch v. Canada (Attorney General)* (1990), 60 C.C.C. (3d) 132, 80 C.R. (3d) 299, [1991] 1 W.W.R. 231 and *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317. The former decision had held under the predecessor legislation that, as a result of the enactment of the Charter of Rights and Freedoms, the accused had the right to access to the sealed packet in order to make full answer and defence. The latter decision had laid out a procedure for editing the affidavit and is noted below and noted under s. 186 in reference to the right to cross-examine the deponent of the affidavit.

## ANNOTATIONS

**NOTE:** The cases noted under this section were decided under the predecessor legislation but were considered to be of assistance in applying this legislation.

**Access to sealed packet** – An application for access to the sealed packet may be made to a superior court judge prior to the preliminary inquiry. That judge may also edit the affidavit. Where, however, the accused claims that he needs access to the identity of a secret informer then that issue will probably have to be determined by the trial judge: *R. v. Giannakopoulos* (1991), 66 C.C.C. (3d) 541, 82 Alta. L.R. (2d) 243 (Q.B.).

The right to full disclosure requires that an accused, against whom wiretap evidence is to be adduced, have access to an edited copy of the affidavit in the sealed packet prior to electing his mode of trial. At this initial stage, the affidavit is to be edited by Crown counsel since only the trial judge has the power to make the final determination as to what material should be edited from the affidavit: *R. v. Aranda* (1992), 69 C.C.C. (3d) 420 (Ont. Ct. (Gen. Div.)).

Where there is likely no affidavit in the sealed packet because the application was brought on an emergency basis pursuant to s. 188 the accused is entitled to cross-examine the person upon whose submissions the order was granted: *R. v. Graves et al.* (1987), 31 C.C.C. (3d) 552 (N.S.S.C.).

**Editing of affidavit** – If the Crown can support the authorization on the basis of the material as edited then the authorization is confirmed. If, however, the editing renders the authorization insupportable then the Crown may apply to have the trial judge consider as much of the excised material as is necessary to support the authorization. The trial judge should accede to such a request only if satisfied that the accused is sufficiently aware of the nature of the excised material to challenge it in argument or by evidence. In this respect, a judicial summary of the excised material should be provided if it will fulfil that function: *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) (5:2).

When determining whether the contents of a wiretap affidavit should be disclosed to an accused, full disclosure should be the rule, subject to certain exceptions based upon overriding public interests which may justify non-disclosure. It was improper to edit out material which had already been disclosed in earlier proceedings arising out of the same investigation. Since it is only confidential information that should be edited, the affidavits as edited at the earlier trial should have been the starting point in this case. It was also an error to excise not only information which might tend to identify informers but information obtained from informers and others and material characterized merely as



commentary, summary or opinion. The discretion to determine what editing is required to ensure that the public interest is protected does not include the power to edit material whose continued confidentiality clearly is not justified by any of the public interest concerns: *R. v. Durette*, [1994] 1 S.C.R. 469, 88 C.C.C. (3d) 1, 28 C.R. (4th) 1.

**Appeal or review of decision refusing or granting access** – No appeal lies to the Court of Appeal from the decision of the authorizing judge refusing an application to open the sealed packet so as to prepare to review and set aside the authorization: *Re Meltzer and The Queen* (1986), 29 C.C.C. (3d) 266 (B.C.C.A.); *affd* on other grounds 49 C.C.C. (3d) 453 (S.C.C.); *R. v. Kumar* (1987), 35 C.C.C. (3d) 477 (Sask. C.A.), leave to appeal to S.C.C. refused [1987] 1 S.C.R. ix, 79 N.R. 395, 58 Sask. R. 80n.

**APPLICATIONS TO SPECIALLY APPOINTED JUDGES / Authorizations in emergency / Certain interceptions deemed not lawful / Definition of “Chief Justice” / Inadmissibility of evidence.**

188. (1) Notwithstanding section 185, an application made under that section for an authorization may be made *ex parte* to a judge of a superior court of criminal jurisdiction, or a judge as defined in section 552, designated from time to time by the Chief Justice, by a peace officer specially designated in writing, by name or otherwise, for the purposes of this section by

- (a) the Solicitor General of Canada, if the offence is one in respect of which proceedings, if any, may be instituted by the Government of Canada and conducted by or on behalf of the Attorney General of Canada, or
- (b) the Attorney General of a province, in respect of any other offence in the province,

if the urgency of the situation requires interception of private communications to commence before an authorization could, with reasonable diligence, be obtained under section 186.

(2) Where the judge to whom an application is made pursuant to subsection (1) is satisfied that the urgency of the situation requires that interception of private communications commence before an authorization could, with reasonable diligence, be obtained under section 186, he may, on such terms and conditions, if any, as he considers advisable, give an authorization in writing for a period of up to thirty-six hours.

(3) [*Repealed*. 1993, c. 40, s. 8.]

(4) In this section, “Chief Justice” means

- (a) in the Province of Ontario, the Chief Justice of the Ontario Court;
- (b) in the Province of Quebec, the Chief Justice of the Superior Court;
- (c) in the Provinces of Nova Scotia and British Columbia, the Chief Justice of the Supreme Court, Trial Division;
- (d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen’s Bench;
- (e) in the Provinces of Prince Edward Island and Newfoundland, the Chief Justice of the Supreme Court, Trial Division; and
- (f) in the Yukon Territory and the Northwest Territories, the judge of the Supreme Court with the earliest date of appointment to the court in question.

**NOTE:** Subsec. (4)(f) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

- (f) in the Yukon Territory, the Northwest Territories and Nunavut, the judge of the Supreme Court with the earliest date of appointment to the court in question.

(5) The trial judge may deem inadmissible the evidence obtained by means of an interception of a private communication pursuant to a subsequent authorization

given under this section, where he finds that the application for the subsequent authorization was based on the same facts, and involved the interception of the private communications of the same person or persons, or related to the same offence, on which the application for the original authorization was based. 1973-74, c. 50, s. 2; 1974-75-76, c. 19, s. 1; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (1st Supp.), s. 25; c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 10; 1992, c. 1, s. 58; 1992, c. 51, s. 35; 1993, c. 28, s. 78; 1993, c. 40, s. 8.

#### CROSS-REFERENCES

The terms "intercept", "offence" and "private communication" are defined in s. 183. "Peace officer" and "superior court of criminal jurisdiction" are defined in s. 2.

The procedure for applying for and granting of a normal "60-day" authorization is dealt with in ss. 185 and 186. Admissibility of evidence obtained as a result of execution of the authorization is dealt with in s. 189. The unlawful interception offence in s. 184 would not apply to a person acting under an authorization granted under this section by virtue of s. 184(2)(b).

Authorizations may be executed anywhere in Canada in accordance with s. 188.1. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.

#### SYNOPSIS

This section authorizes *emergency applications* for *authorizations to be issued to a designated judge* and sets out an *evidentiary rule* regarding the *admission of such evidence* at trial.

Section 188(1) permits such applications to be made *ex parte* by a peace officer to a judge designated by the Chief Justice of a province, if the *urgency of the situation* requires that an *interception be made before* one could, *with reasonable diligence*, bring an application in accordance with s. 186. "Chief Justice" is defined in s. 188(4). The *peace officer* bringing the application must be *designated in writing* by either the Attorney General or the Solicitor General (depending on whose behalf the application is made) *for the purpose of this section*. Subsection (2) provides that, if the *judge is satisfied* that the *urgency* of the situation requires that the interception should begin before a conventional application could, with reasonable diligence, be made, he *may* issue a written authorization. This type of authorization can *last for a maximum of 36 hours* and may contain whatever *terms and conditions* the judge deems advisable.

Subsection (5) gives a *trial judge the discretion to exclude* evidence of private communications intercepted under a *subsequent emergency authorization* under certain circumstances. The circumstances triggering the discretion are that the *judge finds* that the *subsequent authorization* was based on the *same facts*, and involved the *same targeted persons or the same offence*, as the *first application* for an authorization was based upon.

#### ANNOTATIONS

To comply with the requirements of s. 8 of the Charter of Rights, the information which forms the basis for the application under this section must be made on oath or affirmation, or *semble*, the informant must undertake to confirm the information under oath. It may also be that s. 8 requires that the process relating to the obtaining of the authorization includes some form of memorializing or recording the gist of the sworn allegations: *R. v. Galbraith* (1989), 49 C.C.C. (3d) 178, 70 C.R. (3d) 392 (Alta. C.A.). *Folld R. v. Laudicina* (1990), 53 C.C.C. (3d) 281, 41 C.R.R. 142 (Ont. H.C.J.).

The certificate referred to in subsec. (3) may be given at the same time as the authorization is granted and based on the same material: *R. v. Laudicina, supra*.

#### EXECUTION OF AUTHORIZATIONS / Execution in another province.

188.1 (1) Subject to subsection (2), the interception of a private communication authorized pursuant to section 184.2, 184.3, 186 or 188 may be carried out anywhere in Canada.

(2) Where an authorization is given under section 184.2, 184.3, 186 or 188 in one province but it may reasonably be expected that it is to be executed in another province and the execution of the authorization would require entry into or upon the property of any person in the other province or would require that an order under section 487.02 be made with respect to any person in that other province, a judge in the other province may, on application, confirm the authorization and when the authorization is so confirmed, it shall have full force and effect in that other province as though it had originally been given in that other province. 1993, c. 40, s. 9.

#### CROSS-REFERENCES

The various orders referred to in this section are the authorizations to intercept with consent of one of the parties [ss. 184.2 and 184.3]; the normal 60-day order for surreptitious interception [s. 186] and the emergency 36-hour authorization [s. 188]. This section also applies to general warrants to conduct video surveillance under s. 487.01(5).

#### SYNOPSIS

This section reverses case law under the predecessor legislation which had held that a judge in one province could not grant an authorization to intercept private communications in another province. By virtue of subsec. (1), the authorization may be carried out anywhere in Canada. The only caveat is that, pursuant to subsec. (2), if it will be necessary to enter private property in the other province or to obtain an assistance order under s. 487.02, then the authorization must be confirmed in the other province. It is unclear what material, other than the authorization, needs to be placed before the judge in the other province.

#### NO CIVIL OR CRIMINAL LIABILITY.

**188.2** No person who acts in accordance with an authorization or under section 184.1 or 184.4 or who aids, in good faith, a person who he or she believes on reasonable grounds is acting in accordance with an authorization or under one of those sections incurs any criminal or civil liability for anything reasonably done further to the authorization or to that section. 1993, c. 40, s. 9.

#### Notice of intention to produce evidence / Privileged evidence.

**189.** (1) to (4) [*Repealed*. 1993, c. 40, s. 10.]

(5) The contents of a private communication that is obtained from an interception of the private communication pursuant to any provision of, or pursuant to an authorization given under, this Part shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of the intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting out full particulars of the private communication, where evidence of the private communication will be given *viva voce*; and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

(6) Any information obtained by an interception that, but for the interception, would have been privileged remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege. 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 10; 1993, c. 40, s. 10.

#### CROSS-REFERENCES

The terms “intercept” and “private communication” are defined in s. 183. Section 190 makes provision for the giving of further particulars of the private communication that is intended to be



adduced in evidence. The notice requirement in subsec. (5) of this section is distinct from the requirements of s. 196 which requires the Attorney General or Solicitor General to give notice to a person who has been the target of an interception pursuant to an authorization.

## SYNOPSIS

This section imposes *notice and disclosure requirements* which must be complied with *before evidence* of lawfully intercepted private communications *may be received* in evidence. The accused must receive *reasonable notice of the intention to introduce* such evidence along with either a *transcript* of the intercepted private communications or a statement setting out the full particulars of the communication (depending on how it is intended that the evidence be adduced) *and* details of the place, date, time of, and parties to, the communication (if known).

Subsection (6) *protects the character* of intercepted otherwise *privileged communications* by providing that such evidence is inadmissible without the consent of the person who enjoys the privilege.

## ANNOTATIONS

Many of the annotations under this section have been removed, consequent upon the amendment of this section to remove the automatic exclusionary rule for unlawfully intercepted private communications. Nevertheless, where private communications have been unlawfully intercepted then there will likely be a violation of s. 8 of the Charter. It has previously been held that a search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins* (1987), 33 C.C.C. (3d) 1, 56 C.R. (3d) 193 [1987] 1 S.C.R. 265. In considering whether the particular interception was lawful, reference should be made to the notes under ss. 184 to 186 which authorize interceptions and to the notes under this section which deal with circumstances in which the interception has been lawfully made. If the search or seizure of the evidence is unlawful and unreasonable then the evidence is subject to exclusion if the conditions in s. 24(2) of the Charter have been fulfilled. Reference should also be made to the notes under ss. 8 and 24(2) of the Charter, *infra*.

**Meaning of "intercepted"** – "Intercepted" means an interference by a third party between the place of origin and the place of destination of the communication and does not include the situation where there are only two people involved although the originator is mistaken as to the identity of the party receiving the communication: *R. v. McQueen* (1975), 25 C.C.C. (2d) 262, [1975] 6 W.W.R. 604 (Alta. S.C. App. Div.). *Contra: R. v. Bengert et al.* (1978), 47 C.C.C. (2d) 457, 15 C.R. (3d) 7 (B.C.S.C.).

Eavesdropping by a police officer as to the private conversation between two accused in a prison cell constitutes the interception of a private communication within the meaning of this section: *R. v. Boutilier and Melnick* (1976), 35 C.C.C. (2d) 555, 76 D.L.R. (3d) 291 (N.S.S.C. T.D.). *Contra: R. v. Beckner* (1978), 43 C.C.C. (2d) 356 (Ont. C.A.) where it was held that Part VI has no application where the conversation is merely overheard by a third party without the use of any mechanical or other device. Similarly, where the recipient of the conversation testifies as to its contents, the provisions of this Part have no application: *R. v. Gamble and Nichols* (1978), 40 C.C.C. (2d) 415 (Alta. S.C. App. Div.).

**Unlawful interception** – Evidence of private communications, intercepted by the police with the consent of one of the parties to the communication but without an authorization, violates s. 8 of the Charter of Rights and Freedoms and the evidence will be inadmissible if its admission would bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter. Where, however, the police acted in good faith, in reasonable reliance on what they understood the law to be as set out in s. 184(2)(a), then the evidence should be admitted: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 71 O.R. (2d) 575n.

Where the evidence of the intercepted communication was inadmissible against the co-conspirator by reason of a violation of the Charter of Rights and Freedoms then it was not admissible against the accused. Where the Crown seeks to rely on the co-conspirators exception to the hearsay rule, there is a threshold condition that the tendered evidence be admissible against the person who actually made the statements in question: *R. v. Montoute* (1991), 62 C.C.C. (3d) 481, 113 A.R. 95 (C.A.).

**Meaning of “lawfully made”** – The interception of an accused’s communication is not lawfully made where the accused was not named in the authorization, and being known to the police at the time of the application for the authorization could not therefore be covered by a “basket clause” for unknown persons. Such person’s private communications are not admissible even if she is in communication with a named person: *R. v. Chesson* (1988), 43 C.C.C. (3d) 353, 65 C.R. (3d) 193, [1988] 2 S.C.R. 148 (4:0).

If the trial judge, in conducting a review of the sufficiency of the affidavit in support of the application for an authorization, concludes that the minimum statutory conditions set out in s. 186(1)(a) have not been complied with then the search is not authorized by law and is unlawful. *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, 80 C.R. (3d) 317 (S.C.C.) (5:2).

While inclusion of a general “resort to” clause in an authorization and interception of conversations at places resorted to by the named targets is lawful under the authorization, the manner in which the authorization was executed may be a violation of s. 8 of the Charter. Thus, where pay telephones were wiretapped in the absence of reasonable and probable grounds for believing that a target was using the telephone at the time then there was a violation of s. 8 and evidence obtained as a result of such interceptions may be inadmissible under s. 24(2) of the Charter: *R. v. Thompson* (1990), 59 C.C.C. (3d) 225, [1990] 2 S.C.R. 1111, 73 D.L.R. (4th) 596 (4:2).

**Proof of compliance with and validity of authorization** – Where an authorization permits interception of private communications at places resorted to by the targets, there must be extrinsic evidence that the target person resorted to the particular location. Identification of the target person’s voice from the interception cannot alone be sufficient to comply with the authorization. The level of evidence required is that which would lead the police to believe on reasonable and probable grounds that a person will resort to a particular location. Resorting to a particular location can be established through a previously lawfully authorized interception. Merely placing a wiretap on public telephones because of their proximity to where one of the targets was staying would not be sufficient evidence to act upon. An interception at a place, for which sufficient evidence did not exist that it was a place resorted to by the target, would be unlawful: *R. v. Thompson*, *supra*.

Where the authorization fails to describe the place at which the private communication of named persons may be intercepted, where such a description must be given as required by s. 186(4)(c), then interceptions made pursuant to such an authorization are not lawfully made: *R. v. Blacquiere et al.* (1980), 57 C.C.C. (2d) 330, 28 Nfld. & P.E.I.R. 336 (P.E.I.S.C.).

Interceptions of private communications pursuant to an authorization which permits installation of a device in a motor vehicle is not rendered unlawful by reason of the fact that the device used is attached to the vehicle’s battery: *R. v. Chesson* (1988), 43 C.C.C. (3d) 353, 65 C.R. (3d) 193, [1988] 2 S.C.R. 148: (4:0).

Where there is a clear dividing line between the good and bad parts of an authorization so that they are not so interwoven that they cannot be separated but are actually separate authorizations given in the same order, the court can divide the order, preserve the valid portion which then forms the authorization: *Grabowski v. The Queen* (1985), 22 C.C.C. (3d) 449, 22 D.L.R. (4th) 725 (S.C.C.) (7:0).

**Subsec. (5) [Notice] / Persons entitled to notice** – On a joint trial all the accused must be served with the notice prescribed by this subsection not merely those accused who

were the subject of the interception: *R. v. Viscount et al.* (1977), 37 C.C.C. (2d) 533 (Ont. Co. Ct.).

A co-accused has the right to notice of another accused's intention to adduce the contents of intercepted communications during the course of their joint trial: *R. v. Proudfoot* (1995), 102 C.C.C. (3d) 260, 102 W.A.C. 241 *sub nom.* *R. v. Steel*, 34 Alta. L.R. (3d) 426 (C.A.).

It was held in *R. v. Nygaard and Schimmens* (1989), 51 C.C.C. (3d) 417, 72 C.R. (3d) 257, [1990] 1 W.W.R. 1 (S.C.C.) (8:1), that this section applies where Crown counsel sought to cross-examine a defence witness on intercepted private communications which she had with the accused. The effect of the cross-examination substantially undermined the alibi evidence given by this witness and in reality the private communications were used as evidence against the accused. Accordingly it was necessary for the Crown to prove that subsec. (5) has been complied with.

**Notice given at preliminary inquiry** – A notice given prior to the preliminary inquiry remains valid for all subsequent proceedings including a trial on a preferred indictment where the accused is discharged at the preliminary hearing: *R. v. Welsh and Iannuzzi* (No. 6), *supra*.

The fact that the intercepted private communication was introduced at the accused's preliminary hearing does not satisfy the specific notice provisions of this subsection: *R. v. Dunn* (1975), 28 C.C.C. (2d) 538, 33 C.R.N.S. 299 (N.S. Co. Ct.).

**Transcript (para. (a))** – A "transcript" within the meaning of this subsection need not be absolutely word perfect nor need it be certified by a Court stenographer: *R. v. Dunn et al.* (1977), 36 C.C.C. (2d) 495, 38 C.R.N.S. 383 (Sask. C.A.), *affd* 52 C.C.C. (2d) 127n, [1979] 2 S.C.R. 1012 *sub nom.* *Yee v. The Queen*.

This subsection is complied with where the transcript is in one of the official languages even where the conversation was in another language: *R. v. Ma, Ho and Lai* (1975), 28 C.C.C. (2d) 16 (B.C. Co. Ct.); *R. v. Johnny and Billy* (1981), 62 C.C.C. (2d) 33 (B.C.S.C.), *affd* 5 C.C.C. (3d) 538, 149 D.L.R. (3d) 710 (C.A.).

The requirement of a "transcript" is satisfied by giving the accused a copy of the actual tape recording: *R. v. Dass* (1977), 39 C.C.C. (2d) 465 (Man. Q.B.).

While it is the tapes themselves which constitute the evidence which should be and must be considered by the jury, it is nonetheless appropriate, in many instances, that transcripts not only be read while the tapes are being played but also be retained by the jury during their deliberations. Examples of cases where the trial judge might properly exercise his discretion are where the tape is in a foreign language or where the communications are lengthy or numerous. Where, however, the jury is permitted to retain the transcripts, there must be instructions by the trial judge that it is the tapes which constitute the evidence and the necessary equipment must be made available so that the jury may listen to the tapes during their deliberations. A police officer who has listened to the tapes may give evidence as to the identification of the voices reproduced and may, as well, tender a transcript which he has prepared and which he testifies accurately represents the conversations heard on the tape. The officer can, of course, be cross-examined both on voice identification and accuracy of the transcripts and it would be open to the defence to tender a witness who also has listened to the tapes and prepared a transcript setting out an alternate interpretation. The two transcripts could then go to the jury: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 25 O.A.C. 321 (C.A.).

While a police officer who has prepared a transcript of the conversations may not be an "expert" on voice identification, it was open to the trial judge to point out to the jury the greater opportunities the officer had for identification, provided the jury was clearly told that they were not bound to accept the officer's opinion: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

**Contents of notice (para. (b))** – This subsection was complied with where the accused was served with copies of the transcripts showing time, date, telephone number and par-



ties to the conversation and told that the transcripts could be used at trial, and where his solicitor was given written notice of intention which also contained details of the date, place and parties to the conversations: *R. v. Schmitke and Mudry* (1981), 60 C.C.C. (2d) 180 (B.C.C.A.).

The words “if known” in subpara. (b) modify the entire phrase “time, place and date of the private communication and the parties thereto” and therefore only if the time, place and date are known need those particulars be given. Where, however, the evidence establishes that the police did have this information but did not supply it to the accused, the taped conversation is inadmissible: *R. v. Allen* (No. 4) (1979), 47 C.C.C. (2d) 55 (Ont. H.C.J.).

Identification of the place of the interception requires the prosecution to inform the accused of the location of the two telephones at the opposite ends of the communication, where they are known. Thus, where the police knew the location of the pay telephone from which a call was made it should have been identified in the notice: *R. v. Morello* (1987), 40 C.C.C. (3d) 278, 83 A.R. 75 (Alta. C.A.).

**Additional disclosure** – A trial Judge has a discretion to require the Crown to produce for the defence tapes in addition to those which it intends to adduce as part of its case where it is in the interests of justice to do so, as where the additional tapes might affect the interpretation to be given to the interceptions being introduced by the Crown: *R. v. Lyons* (1982), 69 C.C.C. (2d) 318, 140 D.L.R. (3d) 223 (B.C.C.A.).

The accused should be given access to the logs of interceptions made pursuant to an earlier authorization in which he was not named where this is necessary to assist the accused in establishing that the subsequent authorization was not lawfully granted: *R. v. Young et al.* (1986), 26 C.C.C. (3d) 96 (B.C. Co. Ct.).

**Subsec. (6) [Privilege]** – This subsection renders inadmissible intercepted private communications between the accused husband and his wife where the wife could not be a competent or compellable witness at the instance of the Crown. The privilege attaching to husband and wife communications is not destroyed where the communication is obtained by an interception within the meaning of this Part: *R. v. Jean and Piesinger* (1979), 46 C.C.C. (2d) 176, 7 C.R. (3d) 338 (Alta. S.C. App. Div.), appeal dismissed 51 C.C.C. (2d) 192n, [1980] 1 S.C.R. 400, 20 A.R. 360; *Lloyd and Lloyd v. The Queen* (1981), 64 C.C.C. (2d) 169, 31 C.R. (3d) 157, [1981] 2 S.C.R. 645 (6:3).

While this subsection preserves privileges which are recognized at law, although the conversations have been intercepted pursuant to an authorization, the police informer privilege had no application so as to exclude conversations between the accused, a former police informer, and his co-accused a police officer. To be protected by the privilege, the actions of the informer must relate to his function as a police informer. On the evidence accepted by the trial judge in this case, the conduct and communications between the accused and other parties had nothing to do with the accused's function as an informer. The evidence showed that the accused was acting in his own interests and that of his co-accused. The fact that the accused was a police informer did not give him licence to commit criminal offences solely in his own interests: *R. v. Hiscock*; *R. v. Sauv * (1992), 46 Q.A.C. 263 (C.A.).

## FURTHER PARTICULARS.

**190.** Where an accused has been given notice pursuant to subsection 189(5), any judge of the court in which the trial of the accused is being or is to be held may at any time order that further particulars be given of the private communication that is intended to be adduced in evidence. 1973-74, c. 50, s. 2.

## CROSS-REFERENCES

The term “private communication” is defined in s. 183.

The particulars referred to in this section should not be confused with particulars ordered by a court under s. 587 to supplement an information or indictment.

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**POSSESSION, ETC. / Exemptions / Terms and conditions of licence.**

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**191. (1)** Every one who possesses, sells or purchases any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**(2)** Subsection (1) does not apply to

- (a)** a police officer or police constable in possession of a device or component described in subsection (1) in the course of his employment;
- (b)** a person in possession of such a device or component for the purpose of using it in an interception made or to be made in accordance with an authorization;
- (b.1)** a person in possession of such a device or component under the direction of a police officer or police constable in order to assist that officer or constable in the course of his duties as a police officer or police constable;
- (c)** an officer or a servant of Her Majesty in right of Canada or a member of the Canadian Forces in possession of such a device or component in the course of his duties as such an officer, servant or member, as the case may be; and
- (d)** any other person in possession of such a device or component under the authority of a licence issued by the Solicitor General of Canada.

**(3)** A licence issued for the purpose of paragraph (2)(d) may contain such terms and conditions relating to the possession, sale or purchase of a device or component described in subsection (1) as the Solicitor General of Canada may prescribe. 1973-74, c. 50, s. 2; R.S.C. 1985, c. 27 (1st Supp.), s. 26.

**CROSS-REFERENCES**

The terms "authorization", "electro-magnetic, acoustic, mechanical or other device", "intercept", "private communication" and "sell" are defined in s. 183. Possession is defined in s. 4(3). "Canadian Forces" is defined in s. 2 and police officer and police constable are within the definition of "peace officer" in s. 2. Under s. 193 it is an offence to unlawfully disclose an intercepted private communication.

Pursuant to s. 192, any device by means of which the offence under this section was committed may be ordered forfeited. The offence in this section can itself be the basis for an authorization to intercept private communications, by virtue of the definition of "offence" in s. 183. Related offences are the interception offence in s. 184 and the disclosure offence in s. 193.

The accused has an election as to mode of trial of the offence described in subsec. (1) pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

**NOTE:** By virtue of s. 487.01(5) the offence and exceptions in this section also apply to video surveillance in circumstances where persons have a reasonable expectation of privacy.

**SYNOPSIS**

Section 191 makes it an *indictable offence* to do any of the specified things in relation to *any of the devices* listed (which may be used to *surreptitiously intercept private communications*). The prohibited devices include not only any electromagnetic, acoustic, mechanical device, but extend also to *any other device or component* thereof, if its *design makes it useful primarily* for the *surreptitious interception of private communications*. It must be shown that the accused *knew* of the *nature or abilities* of the device or component. The wide-ranging description of the prohibited activities with such devices is *possessing, sell-*

*ing, or purchasing.* The penalty upon conviction is a maximum of two years' imprisonment.

Subsection (2) provides a series of *exceptions to liability under subsec. (1)*. Subsection (2)(a) to (c) exclude the operation of subsec. (1) to certain *classes of persons*, generally police officers, those carrying out lawful interceptions, those working under the direction of the police, or members of the Canadian forces. Such possession by the police or Canadian forces members must generally be in the course of their employment. Section 191(2)(d) exempts those who *hold licences to possess such devices* from criminal liability under subsec. (1). These licences are *issued by the federal Solicitor General* and may contain, pursuant to subsec. (3), terms and conditions.

## ANNOTATIONS

A radio receiver tuned to a police band is not a device prohibited by this section where the evidence shows that the police are aware that members of the public have receivers capable of intercepting their communications. In such circumstances it could not be said that the device was intercepting "private communications" as those words are defined by s. 183: *R. v. Pitts* (1975), 29 C.C.C. (2d) 150 (Ont. Co. Ct.).

Similarly, *R. v. Comeau* (1984), 11 C.C.C. (3d) 61, 37 C.R. (3d) 286 (N.B.C.A.), where it was held that the use of codes by the police to disguise the broadcasts while showing an intention that they only be understood by the police was insufficient to produce any reasonable expectation that the broadcasts would not be intercepted. The originators would still expect many persons to continue to "listen" to the broadcasts.

## FORFEITURE / Limitation.

**192. (1) Where a person is convicted of an offence under section 184 or 191, any electro-magnetic, acoustic, mechanical or other device by means of which the offence was committed or the possession of which constituted the offence, on the conviction, in addition to any punishment that is imposed, may be ordered forfeited to Her Majesty whereupon it may be disposed of as the Attorney General directs.**

**(2) No order for forfeiture shall be made under subsection (1) in respect of telephone, telegraph or other communication facilities or equipment owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of that person by means of which an offence under section 184 has been committed if that person was not a party to the offence. 1973-74, c. 50, s. 2.**

## CROSS-REFERENCES

The terms "electro-magnetic, acoustic, mechanical or other device", are defined in s. 183. "Attorney-General" is defined in s. 2. A party to an offence is defined by ss. 21 and 22.

In addition to the penalties set out in ss. 184 and 191 and the order under this section, a court that convicts an accused of the s. 184 offence or an offence under s. 193 may make an award of punitive damages under s. 194.

## SYNOPSIS

This section authorizes the *forfeiture of any device* which was the *means of committing an offence* for which the accused has been convicted under s. 184 (unlawful interception of private communications) or s. 191 (unlawful possession, etc., of such devices). Such an order may be made *upon sentencing, in addition to any other punishment*. The section provides that the device is to be turned over to Her Majesty, and the Attorney General may then direct how it will be disposed of.

Subsection (2) *exempts* from such order, the *listed equipment owned by a person who is involved in providing telephone services* (and other specified lawful activities) to the public. However, the exception only applies if the owner was *not a party to the offence*.



## DISCLOSURE OF INFORMATION / Exemptions / Publishing of prior lawful disclosure.

193. (1) Where a private communication has been intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or  
 (b) discloses the existence thereof,  
 is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication

- (a) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which the person may be required to give evidence on oath;
- (b) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;
- (c) in giving notice under section 189 or furnishing further particulars pursuant to an order under section 190;
- (d) in the course of the operation of
  - (i) a telephone, telegraph or other communication service to the public, or
  - (ii) a department or an agency of the Government of Canada,
 if the disclosure is necessarily incidental to an interception described in paragraph 184(2)(c) or (d);
- (e) where disclosure is made to a peace officer or prosecutor in Canada or to a person or authority with responsibility in a foreign state for the investigation or prosecution of offences and is intended to be in the interests of the administration of justice in Canada or elsewhere; or
- (f) where the disclosure is made to the Director of the Canadian Security Intelligence Service or to an employee of the Service for the purpose of enabling the Service to perform its duties and functions under section 12 of the *Canadian Security Intelligence Service Act*.

(3) Subsection (1) does not apply to a person who discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or who discloses the existence of a private communication where that which is disclosed by him was, prior to the disclosure, lawfully disclosed in the course of or for the purpose of giving evidence in proceedings referred to in paragraph (2)(a). 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 11; 1984, c. 21, s. 77; R.S.C. 1985, c. 30 (4th Supp.), s. 45; 1993, c. 40, s. 11.

## CROSS-REFERENCES

The terms "authorization", "electro-magnetic, acoustic, mechanical or other device", "intercept", "private communication" and "sell" are defined in s. 183. "Peace officer" is defined in s. 2. As to cases on the meaning of consent, see notes under s. 184. As to the meaning of "lawfully intercepted", reference should be made to the exception in s. 184(2) to the unlawful interception offence. The term "wilfully" does not have a fixed meaning and must take its meaning from the context. Generally, however, it connotes an intention to bring about a proscribed consequence. See *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.).

Pursuant to s. 194, the court that convicts the accused of the offence under this section may make an order for punitive damages. Under s. 195(3), the annual report of the Solicitor General and

Attorneys General are to set out the number of prosecutions under this section of officers or servants of the Crown.

The accused has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Note that s. 24 of the Access to Information Act, R.S.C. 1985, c. A-1 provides that the head of a government institution shall refuse to disclose any record requested under that Act that contains information, the disclosure of which is restricted by or pursuant to this section.

## SYNOPSIS

This section makes it an indictable offence to *disclose* certain information *pertaining to intercepted private communications*, subject to certain exceptions.

The offence created by subsec. (1) contains three elements. First, the interception must have been *made by one of the devices* listed, and it must have been done *without the consent* of either the originator or the person intended to receive it. (Thus, only interceptions made lawful pursuant to s. 183.1 are excluded by this aspect of s. 193.) Second, there must be *no express consent* of such persons to use information or disclose its contents or meaning as set out in s. 193(1)(a) or to disclose its existence. Third, the *actions of the accused* must be proven to be *wilful*. The maximum punishment for this offence is two years.

Section 193(2)(a) and (c) and subsec. (3) are *exceptions* to subsec. (1) and apply generally to the use of such information in relation to *evidence being given in proceedings or procedural matters* in relation to such proceedings. Section 193(2)(c) complements ss. 189 and 190, which require certain information to be disclosed in order to provide additional information to the accused. Section 193(2)(b) and (e) relate to *law enforcement and prosecutorial needs* and permit *disclosure of lawfully intercepted private communications* to assist in the investigation or prosecution of offences. In the case of the exception under s. 193(2)(e), there is the additional requirement that the disclosure be intended to be *in the interests of the administration of justice*. As this paragraph also authorizes disclosure to foreign police and prosecutors, the reference to the administration of justice may refer to its benefit in Canada or elsewhere. Section 193(2)(d) complements s. 184(2)(c) and (d) and exempts disclosure which is necessarily incidental to interceptions described in those paragraphs which basically relate to running and servicing public telephone or other communications services or monitoring them. Disclosure to *employees of the Canadian Security Intelligence Service (CSIS)* for the purpose of carrying out its duties as specified is also exempted from liability under subsection (1). Subsection (3) exempts persons who disclose information which has already been lawfully disclosed in court proceedings.

## ANNOTATIONS

**Subsec. (1)** – The essence of this offence is the making known to another person the existence of an unlawfully intercepted private communication. It is irrelevant that the tape recordings given to the other person were of such poor quality that the voices on it were not discernible, so long as the existence of the unlawful interception was revealed: *R. v. Simm* (1976), 31 C.C.C. (2d) 322, 71 D.L.R. (3d) 732 (Alta. S.C.T.D.).

In one of the few successful prosecutions under this section the court held that the system which the accused had installed in his office and adjoining boardroom fell under the prohibition in subsec. (1). The system allowed for the surreptitious interception of private conversations in both rooms through use of hidden microphones and interception of private conversations of anyone using the accused's telephone. The accused's own testimony that he wished to use the devices to ascertain if unauthorized persons were making use of his office or boardroom constituted an admission that they would be used for surreptitious interceptions: *R. v. McLelland* (1986), 30 C.C.C. (3d) 134 (Ont. C.A.).

**Subsec. (2)** – A witness required to testify at a public inquiry established by the provincial Government and to disclose the contents of an intercepted private communication

comes within the exception in this subsection: *Re Royal Commission Of Inquiry Into Activities Of Royal American Shows Inc.* (1977), 39 C.C.C. (2d) 22, [1977] 5 W.W.R. 592 (Laycraft, J. Com'r).

The protection afforded by this subsection also extends to civil proceedings over which the province has jurisdiction and the words "for the purpose of giving evidence" would protect the production of the tape recording prior to trial: *Tide Shore Logging Ltd. v. Commonwealth Ins. Co.* (1979), 47 C.C.C. (2d) 215, 9 C.R. (3d) 237 (B.C.S.C.).

Either para. (a) or (b) of this subsection permits defence counsel to cross-examine a Crown witness on intercepted private communications even if the lawfulness of the interception has not been established. In particular, as regards para. (b), the phrase "any criminal investigation" is not limited to a police investigation but would include the investigation carried out by counsel in the course of cross-examination at a trial: *R. v. Lessard (No. 3)* (1986), 33 C.C.C. (3d) 569 (Que. S.C.).

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#### **DISCLOSURE OF INFORMATION RECEIVED FROM INTERCEPTION OF RADIO-BASED TELEPHONE COMMUNICATIONS / Other provisions to apply.**

**193.1 (1) Every person who wilfully uses or discloses a radio-based telephone communication or who wilfully discloses the existence of such a communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, if**

- (a) the originator of the communication or the person intended by the originator of the communication to receive it was in Canada when the communication was made;
- (b) the communication was intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of the communication or of the person intended by the originator to receive the communication; and
- (c) the person does not have the express or implied consent of the originator of the communication or of the person intended by the originator to receive the communication.

**(2) Subsections 193(2) and (3) apply, with such modifications as the circumstances require, to disclosures of radio-based telephone communications. 1993, c. 40, s. 12.**

#### **CROSS-REFERENCES**

The terms "electro-magnetic, acoustic, mechanical or other device", "intercept", and "radio-based telephone communication" are defined in s. 183. The interception of radio-based telephone communications is itself an offence under s. 184.5 if the interception was done maliciously or for gain. No such limitation applies to the offence created by this section. Disclosure is permitted, however, with the consent of one of the parties or if any of the exemptions in s. 193(2) or (3) apply. Thus, see the synopsis and notes under s. 193.

#### **SYNOPSIS**

This section makes it an indictable offence to disclose certain information pertaining to intercepted radio-based telephone communications [e.g. cellular phones] if one of the parties to the communication was in Canada, the communication was intercepted by means of an electro-magnetic, acoustic, mechanical or other device without the consent of one of the parties and the disclosure was not consented to. Disclosure is permitted where any of the conditions set out in s. 193(2) or (3) apply.

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**DAMAGES / No damages where civil proceedings commenced / Judgment may be registered / Moneys in possession of accused may be taken.**

**194. (1) Subject to subsection (2), a court that convicts an accused of an offence under section 184, 184.5, 193 or 193.1 may, on the application of a person aggrieved,**



at the time sentence is imposed, order the accused to pay to that person an amount not exceeding five thousand dollars as punitive damages.

(2) No amount shall be ordered to be paid under subsection (1) to a person who has commenced an action under Part II of the *Crown Liability Act*.

(3) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(4) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where there is a dispute respecting ownership of or right of possession to those moneys by claimants other than the accused. 1973-74, c. 50, s. 2; 1993, c. 40, s. 13.

#### CROSS-REFERENCES

In addition to an order under this section, where a person is convicted of an offence under s. 184 or 191, any electro-magnetic, acoustic, mechanical or other device, by means of which the offence was committed or the possession of which constituted the offence, may be ordered forfeited to the Crown.

An order under this section may be appealed under Part XXI as a sentence appeal.

#### SYNOPSIS

This section permits a court, which convicts a person of an offence under s. 184 (unlawful interception) or s. 193 (unlawful possession, etc., of devices), to order *punitive damages* be awarded to a person aggrieved by the offence. The order is only to be made *on application by the aggrieved person* and must be made at the *time of sentencing*. The *maximum amount* of such an order is \$5000. If there is no dispute about the ownership or right of possession (by persons other than the accused), funds located in the possession of the accused at the time of his arrest may be used to satisfy an order made under subsec. (1). If the amount of damages awarded is not paid forthwith, subsec. (3) permits the order to be *treated as if it were a civil judgment* for enforcement purposes.

Subsection (2) prohibits money being paid under this section to a person who has begun an action under Part II of the *Crown Liability Act*.

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#### ANNUAL REPORT / Information respecting authorizations / Other information / Report to be laid before Parliament / Report by Attorneys General.

195. (1) The Solicitor General of Canada shall, as soon as possible after the end of each year, prepare a report relating to

- (a) authorizations for which he and agents to be named in the report who were specially designated in writing by him for the purposes of section 185 made application, and
- (b) authorizations given under section 188 for which peace officers to be named in the report who were specially designated by him for the purposes of that section made application,

and interceptions made thereunder in the immediately preceding year.

(2) The report referred to in subsection (1) shall, in relation to authorizations and interceptions made thereunder, set out

- (a) the number of applications made for authorizations;
- (b) the number of applications made for renewal of authorizations;
- (c) the number of applications referred to in paragraphs (a) and (b) that were granted, the number of those applications that were refused and the number of

- applications referred to in paragraph (a) that were granted subject to terms and conditions;
- (d) the number of persons identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
    - (i) an offence specified in the authorization,
    - (ii) an offence other than an offence specified in the authorization but in respect of which an authorization may be given, and
    - (iii) an offence in respect of which an authorization may not be given;
  - (e) the number of persons not identified in an authorization against whom proceedings were commenced at the instance of the Attorney General of Canada in respect of
    - (i) an offence specified in such an authorization,
    - (ii) an offence other than an offence specified in such an authorization but in respect of which an authorization may be given, and
    - (iii) an offence other than an offence specified in such an authorization and for which no such authorization may be given,
 and whose commission or alleged commission of the offence became known to a peace officer as a result of an interception of a private communication under an authorization;
  - (f) the average period for which authorizations were given and for which renewals thereof were granted;
  - (g) the number of authorizations that, by virtue of one or more renewals thereof, were valid for more than sixty days, for more than one hundred and twenty days, for more than one hundred and eighty days and for more than two hundred and forty days;
  - (h) the number of notifications given pursuant to section 196;
  - (i) the offences in respect of which authorizations were given, specifying the number of authorizations given in respect of each of those offences;
  - (j) a description of all classes of places specified in authorizations and the number of authorizations in which each of those classes of places was specified;
  - (k) a general description of the methods of interception involved in each interception under an authorization;
  - (l) the number of persons arrested whose identity became known to a peace officer as a result of an interception under an authorization;
  - (m) the number of criminal proceedings commenced at the instance of the Attorney General of Canada in which private communications obtained by interception under an authorization were adduced in evidence and the number of those proceedings that resulted in a conviction; and
  - (n) the number of criminal investigations in which information obtained as a result of the interception of a private communication under an authorization was used although the private communication was not adduced in evidence in criminal proceedings commenced at the instance of the Attorney General of Canada as a result of the investigations.
- (3) The report referred to in subsection (1) shall, in addition to the information referred to in subsection (2), set out
- (a) the number of prosecutions commenced against officers or servants of Her Majesty in right of Canada or members of the Canadian Forces for offences under section 184 or 193; and
  - (b) a general assessment of the importance of interception of private communications for the investigation, detection, prevention and prosecution of offences in Canada.
- (4) The Solicitor General of Canada shall cause a copy of each report prepared by

him under subsection (1) to be laid before Parliament forthwith on completion thereof, or if Parliament is not then sitting, on any of the first fifteen days next thereafter that Parliament is sitting.

(5) The Attorney General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to

- (a) authorizations for which he and agents specially designated in writing by him for the purposes of section 185 made application, and
- (b) authorizations given under section 188 for which peace officers specially designated by him for the purposes of that section made application, and interceptions made thereunder in the immediately preceding year setting out, with such modifications as the circumstances require, the information described in subsections (2) and (3). 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 11.1; R.S.C. 1985, c. 27 (1st Supp.), s. 27.

#### CROSS-REFERENCES

The term “authorization” is defined in s. 183. “Peace officer”, “Canadian Forces”, and “Attorney General” are defined in s. 2.

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#### WRITTEN NOTIFICATION TO BE GIVEN / Extension of period for notification / Where extension to be granted / Application to be accompanied by affidavit.

196. (1) The Attorney General of the province in which an application under subsection 185(1) was made or the Solicitor General of Canada if the application was made by or on behalf of the Solicitor General of Canada shall, within ninety days after the period for which the authorization was given or renewed or within such other period as is fixed pursuant to subsection 185(3) or subsection (3) of this section, notify in writing the person who was the object of the interception pursuant to the authorization and shall, in a manner prescribed by regulations made by the Governor in Council, certify to the court that gave the authorization that the person has been so notified.

(2) The running of the ninety days referred to in subsection (1), or of any other period fixed pursuant to subsection 185(3) or subsection (3) of this section, is suspended until any application made by the Attorney General or the Solicitor General to a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 for an extension or a subsequent extension of the period for which the authorization was given or renewed has been heard and disposed of.

(3) Where the judge to whom an application referred to in subsection (2) is made, on the basis of an affidavit submitted in support of the application, is satisfied that

- (a) the investigation of the offence to which the authorization relates, or
- (b) a subsequent investigation of an offence listed in section 183 commenced as a result of information obtained from the investigation referred to in paragraph (a),

is continuing and is of the opinion that the interests of justice warrant the granting of the application, the judge shall grant an extension, or a subsequent extension, of the period, each extension not to exceed three years.

(4) An application pursuant to subsection (2) shall be accompanied by an affidavit deposing to

- (a) the facts known or believed by the deponent and relied on to justify the belief that an extension should be granted; and
- (b) the number of instances, if any, on which an application has, to the knowledge or belief of the deponent, been made under that subsection in relation to the particular authorization and on which the application was withdrawn or the



application was not granted, the date on which each application was made and the judge to whom each application was made. 1973-74, c. 50, s. 2; 1976-77, c. 53, s. 12; R.S.C. 1985, c. 27 (1st Supp.), s. 28; 1993, c. 40, s. 14.

## REGULATIONS: PROTECTION OF PRIVACY REGULATIONS

2. For the purposes of subsection 196(1) of the *Criminal Code*, the Attorney General of a province who gave a notice required to be given by that subsection, or the Solicitor General of Canada where the notice was given by him, shall certify to the court that issued the authorization that such notice was given by filing with a judge of the court a certificate signed by the person who gave the notice specifying

- (a) the name and address of the person who was the object of the interception;
- (b) the date on which the authorization and any renewal thereof expired;
- (c) if any delay for the giving of notice was granted under section 196 or subsection 185(3) of the *Criminal Code*, the period of such delay; and
- (d) the date, place and method of the giving of the notice.

3. [Revoked. SOR/81-859.]

4. A certificate filed pursuant to section 2 shall be treated as a confidential document, shall be placed in a packet, sealed by the judge with whom it is filed and kept with the packet sealed pursuant to section 187 of the *Criminal Code* that relates to the authorization to which the certificate relates. C.R.C. 1978, c. 440; SOR/81-859, *Can. Gaz. pt. Ii*, 26/10/81, p. 3153.

## CROSS-REFERENCES

The terms "Attorney General", "peace officer", "public officer" and "superior court of criminal jurisdiction" are defined in s. 2. The documents relating to an application under subsec. (2) are to be kept confidential in accordance with s. 187.

## SYNOPSIS

Section 196 provides that those persons, whose private communications have been intercepted pursuant to an authorization, be notified that *they have been the object of such an interception*.

Subsection (1) requires the Attorney General or the Solicitor General (depending on who made the application for the authorization) to provide the notification *within 90 days* after the period for which the authorization was given or renewed, unless an order was made varying such period; (the period of time for giving notice may be altered by an order under s. 185(3) or 196(3)). The notice must be *in writing* but it need not tell the person the contents or the details of the authorization. After notice is given, the person who gave the notice must *certify to the court issuing the authorization that the notice has been given*. The Governor in Council may pass regulations providing for the contents of such certification.

Subsections (2) to (4) permit an *application to be made to a judge, before the period for the giving of notice has run, to extend the period for up to three years*. A subsequent application for the extension of such period may be made. The application may be brought by either the Attorney General or the Solicitor General, depending on whose behalf the application for the authorization is made. The same types of judges, who are authorized by this Part to grant authorizations under s. 185, may extend the notice. An application to extend the time for notice must be accompanied by an *affidavit sworn on the basis of information and belief of a peace or public officer*. The running of the 90 days or any other period is suspended once the application for an extension is made, until the application can be heard and disposed of. Subsection (4) sets out the required contents of such an affidavit which include (in addition to information regarding prior applications for authorization – whether successful, withdrawn or refused) the *facts which the deponent relies upon* for support that the notice period should be extended. Subsection (3) spells out the *criteria to be applied by the judge* hearing such an application. The affidavit must

first satisfy the judge that either: (a) the *investigation of an offence* to which the authorization relates; or (b) subsequent investigation for an offence listed in s. 183, obtained as a result of the investigation noted in (a), is *continuing*. Finally, the judge must be of the opinion that the *interests of justice warrant* the granting of the application. If these conditions are met, the judge *must* fix an extended period, of *less than three years*, for the notice to be given.

## ANNOTATIONS

Subsection (1) is complied with merely by notifying the person that he was the object of an interception. The person has no right to any wider notification such as receipt of a copy of the authorization: *Re Zaduk and The Queen* (1978), 38 C.C.C. (2d) 349 (Ont. H.C.J.), affd (1979), 46 C.C.C. (2d) 327, 98 D.L.R. (3d) 133 (Ont. C.A.).

The Crown, having informed the accused that they were not the targets of any wiretap investigation in relation to the charges for which they were then being tried, had no obligation to disclose whether or not the accused were named as targets in any other authorizations. Before the Crown would be required to disclose this information, the defence must meet a threshold test of showing some basis which would enable the presiding judge to conclude that there is in existence material which is potentially relevant: *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225, 36 C.R. (4th) 201.

## Part VII / DISORDERLY HOUSES, GAMING AND BETTING

### Interpretation

DEFINITIONS / “bet” / “common bawdy-house” / “common betting house” / “common gaming house” / “disorderly house” / “game” / “gaming equipment” / “keeper” / “place” / “prostitute” / “public place” / Exception / Onus / Effect when game partly played on premises.

#### 197. (1) In this Part

“bet” means a bet that is placed on any contingency or event that is to take place in or out of Canada, and without restricting the generality of the foregoing, includes a bet that is placed on any contingency relating to a horse-race, fight, match or sporting event that is to take place in or out of Canada;

“common bawdy-house” means a place that is

- (a) kept or occupied, or
- (b) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

“common betting house” means a place that is opened, kept or used for the purpose of

- (a) enabling, encouraging or assisting persons who resort thereto to bet between themselves or with the keeper, or
- (b) enabling any person to receive, record, register, transmit or pay bets or to announce the results of betting;

“common gaming house” means a place that is

- (a) kept for gain to which persons resort for the purpose of playing games, or
- (b) kept or used for the purpose of playing games
  - (i) in which a bank is kept by one or more but not all of the players,
  - (ii) in which all or any portion of the bets on or proceeds from a game is paid, directly or indirectly, to the keeper of the place,
  - (iii) in which, directly or indirectly, a fee is charged to or paid by the players for

the privilege of playing or participating in a game or using gaming equipment, or

- (iv) in which the chances of winning are not equally favourable to all persons who play the game, including the person, if any, who conducts the game;

“disorderly house” means a common bawdy-house, a common betting house or a common gaming house;

“game” means a game of chance or mixed chance and skill;

“gaming equipment” means anything that is or may be used for the purpose of playing games or for betting;

“keeper” includes a person who

- (a) is an owner or occupier of a place,
- (b) assists or acts on behalf of an owner or occupier of a place,
- (c) appears to be, or to assist or act on behalf of an owner or occupier of a place,
- (d) has the care or management of a place, or
- (e) uses a place permanently or temporarily, with or without the consent of the owner or occupier thereof;

“place” includes any place, whether or not

- (a) it is covered or enclosed,
- (b) it is used permanently or temporarily, or
- (c) any person has an exclusive right of user with respect to it;

“prostitute” means a person of either sex who engages in prostitution;

“public place” includes any place to which the public have access as of right or by invitation, express or implied.

(2) A place is not a common gaming house within the meaning of paragraph (a) or subparagraph (b)(ii) or (iii) of the definition “common gaming house” in subsection (1) while it is occupied and used by an incorporated genuine social club or branch thereof, if

- (a) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof; and
- (b) no fee is charged to persons for the right or privilege of participating in the games played therein other than under the authority of and in accordance with the terms of a licence issued by the Attorney General of the province in which the place is situated or by such other person or authority in the province as may be specified by the Attorney General thereof.

(3) The onus of proving that, by virtue of subsection (2), a place is not a common gaming house is on the accused.

(4) A place may be a common gaming house notwithstanding that

- (a) it is used for the purpose of playing part of a game and another part of the game is played elsewhere;
- (b) the stake that is played for is in some other place; or
- (c) it is used on only one occasion in the manner described in paragraph (b) of the definition “common gaming house” in subsection (1), if the keeper or any person acting on behalf of or in concert with the keeper has used another place on another occasion in the manner described in that paragraph. R.S., c. C-34, s. 179; 1972, c. 13, s. 13; 1980-81-82-83, c. 125, s. 11; R.S.C. 1985, c. 27 (1st Supp.), s. 29.

#### CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. The gaming, betting



and lottery offences are found in ss. 201 to 209; bawdy house and prostitution offences in ss. 210 to 213.

## SYNOPSIS

Section 197(1) provides exhaustive definitions for a number of terms which are used in several sections throughout Part VII of the Criminal Code. The definition of “common gaming house” in subsec. (1) must be read together with subsec. (2) which provides a number of exceptions to the definition.

Section 197(3) provides that the onus of proving that the house comes within one of the exclusions within s. 197(2) is upon the accused.

Section 197(4) clarifies and extends the meaning of *common gaming house*. It is aimed at foreclosing methods of avoiding conviction by the use of techniques such as using a number of different locations for a “floating crap game”.

## ANNOTATIONS

“bet” – “Bets” or “betting” under the Criminal Code do not have the same connotation as found in civil law of contract, and there are other considerations in determining illegal betting: *R. v. Benwell et al.* (1972), 9 C.C.C. (2d) 158, [1972] 3 O.R. 906 (2:1) (C.A.), affd 10 C.C.C. (2d) 503 (S.C.C.).

“common bawdy-house” / [Also see notes under s. 210] – The words “kept or occupied” or “resorted to” connote a frequent or habitual use of the premises for the purpose of prostitution: *Patterson v. The Queen*, [1968] 2 C.C.C. 247, 3 C.R.N.S. 23 (S.C.C.) (5:0). In that case Spence, J., summarized the type of evidence from which the Court has found that the prohibited nature of the premises was established, as follows:

*first*, there has been actual evidence of the continued and habitual use of the premises for prostitution . . .

*secondly*, there has been evidence of the reputation in the neighbourhood of the premises as a common bawdy-house, or,

*thirdly*, there has been evidence of such circumstances as to make the inference that the premises were resorted to habitually as a place of prostitution, a proper inference for the Court to draw from such evidence.

To establish a place as a common bawdy-house it is not necessary to prove specifically that acts of prostitution or intercourse took place on the premises: *R. v. Sorko*, [1969] 4 C.C.C. 241 (B.C.C.A.).

The “practice of prostitution” does not require actual sexual intercourse, nor need there be physical contact between the customer and the performer. Prostitution merely requires proof that the woman offered her body for lewdness or for the purposes of the commission of an unlawful act in return for payment. The act of offering one’s self as a participant in acts of indecency for the sexual gratification of another is sufficient: *R. v. Tremblay* (1991), 68 C.C.C. (3d) 439, 41 Q.A.C. 241, [1991] R.J.Q. 2766 (C.A.), revd on other grounds [1993] 2 S.C.R. 932, 84 C.C.C. (3d) 97 (3:2).

In determining whether an act is indecent, the community standard of tolerance test should be applied. The court must take into account the degree of harm which might flow from the conduct which is said to be indecent. What the community will tolerate will vary with the place in which the acts take place and the composition of the audience. It was open to the judge to find that this standard was not exceeded by the conduct of a customer and performer masturbating in each other’s presence in a private room and where there is no physical contact. In doing so, the judge could rely upon evidence of an expert, charging practices by the police and a report to Parliament by a Commission of Inquiry: *R. v. Tremblay*, [1993] 2 S.C.R. 932, 84 C.C.C. (3d) 97, 23 C.R. (4th) 98 (3:2).

A hotel may be found to be a common bawdy-house notwithstanding not every room is used for purposes of prostitution where evidence is led that during a two-week period,

on over 100 occasions, prostitutes were seen to be bringing their customers to the hotel and to a certain floor of the hotel: *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.).

Evidence that on two occasions on the same night employees of a massage parlour offered to perform indecent acts with customers was insufficient to establish the premises were habitually resorted to for such acts and there being no other evidence of habitual use the accused were acquitted of the offence contrary to s. 210: *R. v. Ikeda and Widjaja* (1978), 42 C.C.C. (2d) 145, 3 C.R. (3d) 382 (Ont. C.A.).

**"common betting house"** / [Also see notes under s. 201] – Use of a hotel room on only one occasion will not come within this definition which requires proof that the activity is frequent or habitual in nature. While the word "opened" may have a very wide meaning it must take its meaning from the context, in this case the words "kept or used" which have been held to require proof of a frequent or habitual use: *R. v. Grainger* (1978), 42 C.C.C. (2d) 119 (Ont. C.A.).

**"common gaming house"** / [Also see notes under s. 201] – In *Rockert v. The Queen* (1978), 38 C.C.C. (2d) 438, 81 D.L.R. (3d) 759, [1978] 2 S.C.R. 704 (7:2), it was held that premises which are used on only one occasion do not fall within either para. (a) or (b) of this definition. The words "kept" and "resort" in para. (a) connote frequent or habitual activity, as does "kept" in para. (b). The word "used" in para. (b) means "that is made use of" and requires a practice of employing the premises in the prohibited manner or at least a practice consisting of more than one use or occasion. Following this decision, subsec. (4) was amended to add para. (c) to that subsection with the result that, in some cases, in the circumstances therein described, a single use of premises may nevertheless suffice to constitute the premises a common gaming house.

A place to which persons who have paid a membership fee resort nightly to play rummy and at which the accused sells refreshments comes within para. (a) of the definition notwithstanding the membership fee is devoted to a *bona fide* soccer club (which however was not incorporated under subsec. (2)) where the accused kept the proceeds from the refreshment sales and was clearly carrying on a business for gain: *R. v. Karavasilis* (1980), 54 C.C.C. (2d) 530 (Ont. C.A.).

In addition to proof of the elements in the definition in para. (a) the Crown must prove as an element of the offence of gaming that the participants had the chance of both winning and losing money or money's worth. Thus, possible outcomes must be a result, direct or indirect, of wagering or hazarding a stake prior to or during the game. Where no money changed hands between the players, this element of gaming is not made out merely because it is customary for the loser of the card game to pay for the refreshments. The players in such circumstances were not putting up a stake on the outcome of the game but had merely found a convenient way for taking turns at who would purchase drinks which would normally be consumed: *Di Pietro and Di Pietro v. The Queen* (1986), 25 C.C.C. (3d) 100, 50 C.R. (3d) 266, [1986] 1 S.C.R. 250 (7:0), approving *R. v. Irwin et al.* (1982), 1 C.C.C. (3d) 212, 39 O.R. (2d) 314 (C.A.).

In this case, a scheme devised by the accused, in which persons purchased memberships in a club which purchased provincial government lottery tickets, constituted keeping a common gaming house. A portion of the fee was used to pay the accused's expenses and the other portion was used to purchase the tickets. The accused guaranteed that each group would have a certain number of winning combinations or he would give a refund. This was more than a group of persons getting together to purchase tickets and play a lottery. Rather, it was a new game of chance. It was a game played for a consideration and in accordance with rules developed by the accused. Under the accused's scheme, he and each of the members stood the chance of both winning and losing money or money's worth. The requisite element of wagering was therefore made out: *R. v. Herger* (1991), 4 O.R. (3d) 359 (C.A.).

**"game"** – In *Ross, Banks and Dyson v. The Queen* [1969] 1 C.C.C. 1, 4 C.R.N.S. 233

(S.C.C.), it was held (by four Judges to one) following the rule of literal interpretation in the absence of ambiguity that the word “mixed” in this definition implies no indication of the proportions of chance and skill and therefore bridge is a game within this subsection.

A carnival operation where the patrons toss coins at glasses and other vessels, winning the glass or vessel on which the coin lands, is a game within the meaning of this definition: *R. v. Touzin and Touzin* (1979), 49 C.C.C. (2d) 183, 11 C.R. (3d) 90 (Que. C.A.).

**“keeper”** – It was held in *R. v. Kerim*, [1963] 1 C.C.C. 233, [1963] S.C.R. 124, 39 C.R. 390 (3:2), that not every person who falls within this definition as a “keeper” keeps a common gaming house. Rather, there must be some act of participation in the wrongful use of the place. Presumably, this reasoning would apply to the other keeping offences, keeping a common betting house and keeping a common bawdy house. [Note: While this decision would seem to render this definition redundant, it is suggested that, in any of the keeping offences, it must be proved as a minimum that the person fell within the definition of keeper in this section and also committed some act as indicated by the court in *Kerim*. Some of the difficulty in interpretation of this section appears to be as a result of its derivation from s. 229(3) of the 1927 Code, which enacted a presumption that a person was a keeper of a disorderly house if he or she “appears, acts or behaves” as, *inter alia*, the person having the care, government, or management of the premises.]

While it has been held that, for premises to be considered a common gaming house, there must be evidence of frequent or habitual use: *Rockert v. The Queen*, *supra*, it is not necessary to prove that the person charged with keeping the common gaming house acted as such frequently or habitually, particularly in light of para. (e) of this definition which refers to a permanent or temporary use of the place: *R. v. Lamolinara* (1989), 53 C.C.C. (3d) 250 (Que. C.A.).

**Social club exemption [subsec. (2)]** – It was held in *R. v. MacDonald*, [1966] 2 C.C.C. 307 (S.C.C.) (5:0), that a branch of the Royal Canadian Legion was not entitled to the social club exemption where bingo was carried out on a large scale and on a daily basis. The court held that this was not an “occupation and use by a *bona fide* social club”. However, following that decision, this subsection was substantially amended so that the activities carried on in that case might fall within this exemption, provided that the requisite licence was obtained and complied with.

A gaming house, which falls within the definition of “common gaming house” in para. (b)(i), being a place kept or used for the purpose of playing games in which a bank is kept by one or more but not all of the players, is not entitled to the exemption in this subsection: *R. v. Pon Chung and Mow Chong Social Club*, [1965] 2 C.C.C. 331, [1965] 1 O.R. 583 (Ont. C.A.).

The social club’s “*bona fides*” is not lost merely because some of the avowed objects of the club were not carried out: *R. v. Pon Chung and Mow Chong Social Club*, *supra*.

## Presumptions

**PRESUMPTIONS / Conclusive presumption from slot machine / Definition of “slot machine”.**

### 198. (1) In proceedings under this Part,

- (a) evidence that a peace officer who was authorized to enter a place was wilfully prevented from entering or was wilfully obstructed or delayed in entering is, in the absence of any evidence to the contrary, proof that the place is a disorderly house;
- (b) evidence that a place was found to be equipped with gaming equipment or any device for concealing, removing or destroying gaming equipment is, in the



absence of any evidence to the contrary, proof that the place is a common gaming house or a common betting house, as the case may be;

- (c) evidence that gaming equipment was found in a place entered under a warrant issued pursuant to this Part, or on or about the person of anyone found therein, is, in the absence of any evidence to the contrary, proof that the place is a common gaming house and that the persons found therein were playing games, whether or not any person acting under the warrant observed any persons playing games therein; and
- (d) evidence that a person was convicted of keeping a disorderly house is, for the purpose of proceedings against any one who is alleged to have been an inmate or to have been found in that house at the time the person committed the offence of which he was convicted, in the absence of any evidence to the contrary, proof that the house was, at that time, a disorderly house.

(2) For the purpose of proceedings under this Part, a place that is found to be equipped with a slot machine shall be conclusively presumed to be a common gaming house.

- (3) In subsection (2), “slot machine” means any automatic machine or slot machine
- (a) that is used or intended to be used for any purpose other than vending merchandise or services, or
  - (b) that is used or intended to be used for the purpose of vending merchandise or services if
    - (i) the result of one of any number of operations of the machine is a matter of chance or uncertainty to the operator,
    - (ii) as a result of a given number of successive operations by the operator the machine produces different results, or
    - (iii) on any operation of the machine it discharges or emits a slug or token,
- but does not include an automatic machine or slot machine that dispenses as prizes only one or more free games on that machine. R.S., c. C-34, s. 180; 1974-75-76, c. 93, s. 10.

#### CROSS-REFERENCES

The terms “gaming equipment”, “disorderly house”, “common gaming house” and “common betting house” are defined in s. 197. The term “peace officer” is defined in s. 2. The offences relating to gaming house, betting house and bawdy house are set out in ss. 201 and 210 respectively. The warrant referred to in para. (1)(c) is issued under s. 199.

Wilful obstruction of a peace officer in the execution of duty is an offence under s. 129(a).

#### SYNOPSIS

Section 198 creates a number of presumptions relating to a number of different offences under this Part.

Section 198(3) exhaustively defines “slot machines”. Section 198(2) creates an *irrebuttable presumption* that a place found to contain a slot-machine shall be presumed to be a common gaming house.

#### ANNOTATIONS

**Subsec. (1)(a)** – The bare fact that the officer was delayed in entering the premises is not sufficient to invoke this presumption: *R. v. McEwan and Lee* (1932), 59 C.C.C. 75, [1933] 1 D.L.R. 398 (Alta. S.C. App. Div.) distinguishing *Theirlynck v. The King* (1931), 56 C.C.C. 156, [1931] S.C.R. 478 (5:0).

**Subsec. (1)(b)** – Evidence that a place is found to be equipped with “gaming equipment” which, however, is not, or may not, be used for betting is not proof that the place was a “common betting house”, notwithstanding the definition of “gaming equipment”

in s. 197 as anything that is or may be used for the purpose of playing games or for betting: *R. v. Ruskoff, Marbella and Damore* (1979), 45 C.C.C. (2d) 504 (Ont. C.A.).

Twenty-five cent pieces being used to play the game “heads or tails” came within the definition of “gaming equipment” in s. 197 and thus the presumption in this subsection is applicable: *R. v. Lefrancois* (1981), 63 C.C.C. (2d) 380 (Que. C.A.).

**Subsec. (1)(d)** – The presumption in this subsection infringes ss. 7 and 11(d) of the Charter and is of no force and effect: *R. v. Janoff* (1991), 68 C.C.C. (3d) 454, [1991] R.J.Q. 2427, 41 Q.A.C. 147 (C.A.).

**Subsec. (2)** – While the Courts have held that where a charge although laid under s. 201 could have been laid under s. 206(1)(f) or (g) the accused may nevertheless rely on the exhibition or fair exemption in s. 206(3), the special relationship which slot-machines bear to common gaming houses by virtue of this subsection must make s. 201 the governing section where such machines are involved and an accused is not entitled to invoke the provisions of s. 206(3): *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R. 644 (Alta. S.C. App. Div.).

It was held in *R. v. Shisler* (1990), 53 C.C.C. (3d) 531 (Ont. C.A.), that the conclusive presumption created by this subsection is of no force and effect being inconsistent with the presumption of innocence as guaranteed by s. 11(d) of the Charter.

**Subsec. (3)** – While the amendment of this subsection, so as to deprive the Crown of reliance on the presumption in a case involving a slot machine such as a pinball machine which only gives free games or prizes, would not necessarily foreclose a conviction under s. 201 if the operation otherwise came within the definition of “common gaming house” in s. 197, it was held in *R. v. Zippilli* (1980), 54 C.C.C. (2d) 481 (Ont. C.A.) that a place equipped with such games is not within that definition. “Gaming” requires an element of wagering which is absent in the mere playing of a pinball game for amusement.

A “pull-ticket” vending machine falls within the definition in para. (b) where although it always dispenses a ticket it is a matter of chance or uncertainty whether the operator of the machine receives a valuable or worthless ticket: *Charity Vending Ltd. v. Alberta (Gaming Commission)* (1988), 45 C.C.C. (3d) 455 (Alta. C.A.).

## Search

**WARRANT TO SEARCH / Search without warrant, seizure and arrest / Disposal of property seized / When declaration or direction may be made / Conversion into money / Telephones exempt from seizure / Exception.**

**199. (1)** A justice who is satisfied by information on oath that there are reasonable grounds to believe that an offence under section 201, 202, 203, 206, 207 or 210 is being committed at any place within the jurisdiction of the justice may issue a warrant authorizing a peace officer to enter and search the place by day or night and seize anything found therein that may be evidence that an offence under section 201, 202, 203, 206, 207 or 210, as the case may be, is being committed at that place, and to take into custody all persons who are found in or at that place and requiring those persons and things to be brought before that justice or before another justice having jurisdiction, to be dealt with according to law.

**(2)** A peace officer may, whether or not he is acting under a warrant issued pursuant to this section, take into custody any person whom he finds keeping a common gaming house and any person whom he finds therein, and may seize anything that may be evidence that such an offence is being committed and shall bring those persons and things before a justice having jurisdiction, to be dealt with according to law.

**(3)** Except where otherwise expressly provided by law, a court, judge, justice or pro-

vincial court judge before whom anything that is seized under this section is brought may declare that the thing is forfeited, in which case it shall be disposed of or dealt with as the Attorney General may direct if no person shows sufficient cause why it should not be forfeited.

(4) No declaration or direction shall be made pursuant to subsection (3) in respect of anything seized under this section until

- (a) it is no longer required as evidence in any proceedings that are instituted pursuant to the seizure; or
- (b) the expiration of thirty days from the time of seizure where it is not required as evidence in any proceedings.

(5) The Attorney General may, for the purpose of converting anything forfeited under this section into money, deal with it in all respects as if he were the owner thereof.

(6) Nothing in this section or in section 489 authorizes the seizure, forfeiture or destruction of telephone, telegraph or other communication facilities or equipment that may be evidence of or that may have been used in the commission of an offence under section 201, 202, 203, 206, 207 or 210 and that is owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of that person.

(7) Subsection (6) does not apply to prohibit the seizure, for use as evidence, of any facility or equipment described in that subsection that is designed or adapted to record a communication. R.S., c. C-34, s. 181; 1994, c. 44, s. 10.

#### CROSS-REFERENCES

The terms "justice", "peace officer", "day", "night" and "Attorney General" are defined in s. 2.

Section 29 sets out duties of persons executing a warrant and, *inter alia*, the officer must have it with him, where it is feasible to do so, and produce it when requested to do so.

As to the use of force generally in enforcement of the law, see ss. 25, 26, 27 and 31.

Warrants in relation to the offences described in this section could also be obtained pursuant to ss. 487 and 487.1. The declaration of forfeiture under subsec. (3) may be appealed as a sentence appeal under Part XXI or Part XXVII, as the case may be.

#### SYNOPSIS

Section 199 creates search, seizure and forfeiture provisions relating to the offences within Part VII listed in s. 199(1). In addition it authorizes taking into custody persons found within the places searched.

Section 199(1) permits a justice who is satisfied by information on oath that there are reasonable grounds to believe that one of the offences listed in the subsection (all "vice"-type offences) is being committed at a place, to issue a warrant authorizing the search of the place. It allows the search to take place day or night and gives the police authority to detain any person or thing found on the premises and then to bring them before a justice.

Section 199(2) permits a police officer who enters a *common gaming house* to detain the *keeper* of the house and all those who are *found* in the house, and to seize all things within the house. There is no requirement that the police have a warrant to enter or seize property from the *common gaming house* at the time the seizures are made under this subsection.

It should be noted that s. 199(6) adds certain restrictions to what may be seized by warrant under this section or s. 489. These restrictions deal basically with communication facilities and equipment.

Section 199(7) permits the seizure of items otherwise included within subsec. (6) if the



item is designed or adapted to record conversations and it is seized for evidentiary purposes.

Section 199(3) creates a broad discretion in judicial officers to direct that whatever is seized be forfeited. It appears that the onus is upon the person who seeks to avoid forfeiture to “show sufficient cause” why it *should not be forfeited*. The Attorney General controls how items ordered seized are to be dealt with, including requiring that they be disposed of as directed. Section 199(5) gives the Attorney General the same powers as the owner to convert a forfeited item into money. Section 199(4) provides certain time-limits within which an item seized is not to be the subject of a declaration or direction.

## ANNOTATIONS

**Forfeiture** – For forfeiture of seized funds it is not necessary that the Crown prove their identity with the specific proven offence: *R. v. Owens* (1971), 5 C.C.C. (2d) 125, [1972] 1 O.R. 341 (Ont. C.A.).

A declaration for forfeiture may be made only after a hearing in conformity with the provisions of this section, notice of which has been given to all interested parties: *R. v. Tobin* (1982), 69 C.C.C. (2d) 137, 37 Nfld. & P.E.I.R. 182 (Nfld. S.C.T.D.).

A forfeiture order may be made under this section at the conclusion of the trial of an accused for an offence under s. 201. Subsection (4) does not require that the Court await the outcome of any appeal proceedings before making the declaration: *R. v. Anderson and Blackie* (1983), 10 C.C.C. (3d) 183 (B.C.C.A.).

Items, such as money, which may be evidence of the gaming-house offence may be seized from the keeper under subsec. (2) and declared forfeited under subsec. (3) although he is not on the premises at the time of the execution of the warrant: *R. v. Anderson and Blackie*, *supra*.

A forfeiture order may be made under subsec. (3), where the gaming equipment was seized pursuant to a search warrant issued under s. 487: *R. v. Harb* (1994), 88 C.C.C. (3d) 204, 129 N.S.R. (2d) 123 (C.A.).

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200. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 30.]

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## Gaming and Betting

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KEEPING GAMING OR BETTING HOUSE / Person found in or owner permitting use.

201. (1) Every one who keeps a common gaming house or common betting house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is found, without lawful excuse, in a common gaming house or common betting house, or
- (b) as owner, landlord, lessor, tenant, occupier or agent, knowingly permits a place to be let or used for the purposes of a common gaming house or common betting house,

is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 185.

## CROSS-REFERENCES

The terms “keeper”, “common gaming house” and “common betting house” are defined in s. 197(1) and (4). The exemptions for genuine social clubs is set out in s. 197(2). Section 198 sets out certain presumptions which aid in proof that premises are a common gaming house or common betting house. In particular, note s. 198(2) and (3) respecting slot machines. Sections 204 and 207 enact certain exemptions respecting gaming and betting. While s. 206 enacts exemptions for certain

kinds of gaming and lotteries, those sections do not in specific terms exempt an accused from liability under this section. Accordingly, the reach of those exemptions is uncertain, see cases below in particular respecting the **Agricultural fair exemption**. Related offences are found in s. 203, placing bets on behalf of others; s. 206, lotteries and games of chance; s. 209, cheating at play.

The offence in subsec. (1) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant for video surveillance under s. 487.01(5) and falls within the definition of “enterprise crime offence” in s. 462.3 for the purposes of Part XII.2. As regards special search and seizure powers in relation to gaming houses and betting houses, see s. 199.

The offence in subsec. (1) is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). The trial of the offences in subsec. (2) are conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offences in subsec. (2) are as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

## SYNOPSIS

This section creates offences in relation to *keeping a common gaming or betting house*.

Section 201(1) makes it an indictable offence to *keep* such a premises. The maximum punishment upon conviction is two years' imprisonment.

Section 201(2) creates two summary conviction offences. Paragraph (2)(a) makes it an offence for an accused to be a *found in* at a *common gaming house* or *common betting house*. It must be shown that the accused had *no lawful excuse* for being present in such a premises.

Section 201(2)(b) prohibits *permitting* a place to be used as a *common gaming house* or a *common betting house* if the accused is in the capacity of an owner, landlord, tenant, occupier or agent. It must be shown that the accused *knew* the use being made of the place and permitted it to occur.

## ANNOTATIONS

**Meaning of “keeps”** / [Also see notes under heading “Keeper” in s. 197] – Not every person who falls within the definition of “keeper” within s. 197 “keeps” a common gaming house. To constitute that offence there must be some act of participation in the wrongful use of the place. Thus the accused who was the owner of the premises and rented them out to various charitable organizations but who in no way participated in the promotion, organization or operation of the games was acquitted of this charge. The fact that he operated a refreshment stand for the patrons of the games which was entirely independent of the activities of the organization renting the premises is immaterial. The accused in such circumstances may, however, come within the offence in subsec. (2)(b): *R. v. Kerim*, [1963] 1 C.C.C. 233, [1963] S.C.R. 124, 39 C.R. 390 (3:2).

*R. v. Kerim*, *supra*, was distinguished and the accused's conviction upheld where the accused leased the premises, provided cards and score pads and sold refreshments, notwithstanding there was no “rake-off”. The accused had involved himself in the use of the premises to such an extent that he was participating in the illegal use. His own activities in providing the accommodation and facilities and selling the refreshments made the premises a common gaming house: *R. v. Karavasilis* (1980), 54 C.C.C. (2d) 530 (Ont. C.A.).

Where the game's rules do not preclude some or all of its players from having equal opportunity to becoming its banker and that position does not confer some advantage

over the players then the banker cannot be said to be the keeper of a common gaming house: *R. v. Monroe* (1970), 1 C.C.C. (2d) 68, 74 W.W.R. 373 (B.C.C.A.).

**Common gaming house** / [Also see notes under s. 197] – In *Rockert et al. v. The Queen* (1978), 38 C.C.C. (2d) 438, 81 D.L.R. (3d) 759, [1978] 2 S.C.R. 704 (7:2), it was held that premises which are used on only one occasion do not fall within either para. (a) or (b) of the definition of common gaming house in s. 197(1). However, following this decision, subsec. (4) of s. 197 was amended to add para. (c) to that subsection with the result that in some cases, in the circumstances therein described, a single use of premises may nevertheless suffice to constitute the premises a common gaming house.

**Common betting house** / [Also see notes under s. 197] – Use of premises on one occasion will not constitute such premises a common betting house as defined in s. 197: *R. v. Grainger* (1978), 42 C.C.C. (2d) 119 (Ont. C.A.).

The recording of bets, let alone proof of the method of recording, is not an ingredient of keeping a common betting house and there need not even be direct evidence of the accused having received a bet. It is enough that premises were kept by the accused for the purpose of enabling any person to receive bets: *Silvestro v. The Queen*, [1965] 2 C.C.C. 253, [1965] S.C.R. 155 (3:2).

**Agricultural fair exemptions** – Notwithstanding there is no exemption clause for offences charged under this section, if the charge could have been laid under s. 206(1)(f) or (g) and the accused can bring himself within the exemption clause in s. 206(3) (games operated at an exhibition or fair) the accused is entitled to the protection of any exemption set out in that subsection: *R. v. Andrews and five others* (1975), 28 C.C.C. (2d) 450, 32 C.R.N.S. 358 (Sask. C.A.). Also see *R. v. Beasley* (1936), 65 C.C.C. 337, [1936] 2 D.L.R. 377 (Ont. C.A.). But see: *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R. 644 (Alta. S.C. App. Div.) where slot machines are involved; noted under s. 198(2), *supra*.

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## BETTING, POOL-SELLING, BOOK-MAKING, ETC. / Punishment.

### 202. (1) Every one commits an offence who

- (a) uses or knowingly allows a place under his control to be used for the purpose of recording or registering bets or selling a pool;
- (b) imports, makes, buys, sells, rents, leases, hires or keeps, exhibits, employs or knowingly allows to be kept, exhibited or employed in any place under his control any device or apparatus for the purpose of recording or registering bets or selling a pool, or any machine or device for gambling or betting;
- (c) has under his control any money or other property relating to a transaction that is an offence under this section;
- (d) records or registers bets or sells a pool;
- (e) engages in book-making or pool-selling, or in the business or occupation of betting, or makes any agreement for the purchase or sale of betting or gaming privileges, or for the purchase or sale of information that is intended to assist in book-making, pool-selling or betting;
- (f) prints, provides or offers to print or provide information intended for use in connection with book-making, pool-selling or betting upon any horse-race, fight, game or sport, whether or not it takes place in or outside of Canada or has or has not taken place;
- (g) imports or brings into Canada any information or writing that is intended or is likely to promote or be of use in gambling, book-making, pool-selling or betting on a horse-race, fight, game or sport, and where this paragraph applies it is immaterial
  - (i) whether the information is published before, during or after the race, fight, game or sport, or



- (ii) whether the race, fight, game or sport takes place in Canada or elsewhere, but this paragraph does not apply to a newspaper, magazine or other periodical published in good faith primarily for a purpose other than the publication of such information;
  - (h) advertises, prints, publishes, exhibits, posts up, or otherwise gives notice of any offer, invitation or inducement to bet on, to guess or to foretell the result of a contest, or a result of or contingency relating to any contest;
  - (i) wilfully and knowingly sends, transmits, delivers or receives any message by radio, telegraph, telephone, mail or express that conveys any information relating to book-making, pool-selling, betting or wagering, or that is intended to assist in book-making, pool-selling, betting or wagering; or
  - (j) aids or assists in any manner in anything that is an offence under this section.
- (2) Every one who commits an offence under this section is guilty of an indictable offence and liable
- (a) for a first offence, to imprisonment for not more than two years;
  - (b) for a second offence, to imprisonment for a term not more than two years and not less than fourteen days; and
  - (c) for each subsequent offence, to imprisonment for not more than two years and not less than three months. R.S., c. C-34, s. 186; 1974-75-76, c. 93, s. 11.

#### CROSS-REFERENCES

The terms "bet", "gaming equipment", and "place" are defined in s. 197.

The offence in para. (1)(e) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant for video surveillance by reason of s. 487.01(5), and the offences in this section fall within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2. As regards special search and seizure powers in relation to gaming houses and betting houses, see s. 199. Sections 204 and 207 enact certain exemptions respecting gaming and betting. While s. 206 enacts exemptions for certain kinds of gaming and lotteries, that section does not, in specific terms, exempt an accused from liability under this section. Accordingly, the reach of those exemptions is uncertain, see cases noted under heading **Agricultural fair exemption**, under s. 201.

The offence in subsec. (2) is a pure indictable offence, but by virtue of s. 553 it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Where the prosecution seeks the higher penalty prescribed by subsec. (2)(b) or (c), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. Note that no reference to the prior conviction may be made in the information by virtue of s. 664.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 206, offences in relation to lotteries and games of chance; s. 209, cheating at play.

#### SYNOPSIS

This section creates indictable offences prohibiting betting, pool selling, bookmaking, importing equipment to engage in any of these activities, and other similar illicit gambling activities. It also provides for punishment upon conviction for such offences. To determine the scope of liability under this section it is necessary to read it together with s. 204 which provides for a number of exemptions.

Section 202(1) creates a number of specific prohibitions set out in paras. (a), (b), (d) to (i), which spell out the prohibited acts and in the case of certain paragraphs also spell out the mental element. One such paragraph is para. (i) which specifies certain actions such

as sending, transmitting, delivering or receiving any message by one of the means specified in the paragraph which is related to bookmaking, pool-selling, or wagering, or that is intended to assist in such activity. It must be shown that the accused's actions were both wilful and done knowingly.

Section 202(1)(c) and (j) create broad offences which extend the liability created by the more specific paragraphs. Section 202(1)(c) makes it an offence for the accused to have control over any money or property relating to a transaction prohibited by this subsection. Similarly subsec. (1)(j) makes it an offence to aid or assist in any manner anything which is otherwise an offence under subsec. (1). It must be shown that the accused knew that the acts assisted in the commission of the other offence created by the subsection but it does not appear that it must be shown that the accused's purpose was to assist.

Section 202(2) creates an escalating punishment scale based on the number of prior offences for which the accused has been convicted.

## ANNOTATIONS

**Subsec. (1)(b)** – The accused's honest but mistaken belief that the devices were legal even where such belief is the result of reasonable inquiries made of Customs officials is no defence to this charge, by virtue of s. 19: *R. v. Potter* (1978), 39 C.C.C. (2d) 538, 3 C.R. (3d) 154 (P.E.I.S.C.).

To obtain a conviction for the offence under subsec. (1)(b), the Crown was required to prove that the accused kept devices in a place under her control, that the devices were gambling devices, and that the accused knew that the devices were gambling devices and knowingly kept them. Gambling or gaming must, as well, involve a chance of gain and a risk of loss. The Crown, however, was not required to show that the machines were actually used for the purpose of gambling: *R. v. Kent*, [1994] 3 S.C.R. 133, 92 C.C.C. (3d) 344, 33 C.R. (4th) 319.

**Subsec. (1)(d)** – The registering or recording must be of the bookmaker's, not the bettor's, record of bets: *R. v. Michael* (1974), 18 C.C.C. (2d) 282, [1974] 5 W.W.R. 749 (Alta. S.C. App. Div.).

**Subsec. (1)(e)** – The keeper of a common betting house is one who does something for the purpose of aiding and abetting other persons to engage in the business or occupation of betting and thus he may be convicted of the offence under this section: *Silvestro v. The Queen*, [1965] 2 C.C.C. 253, [1965] S.C.R. 155 (3:2).

The term "bookmaking" is not limited to horse races. A bookmaker is one who engages in the occupation of taking bets or negotiating bets and the keeping of accounts, regardless of whether the bet is on a horse-race or is more general in scope. Thus, bookmaking describes an enterprise, the business of taking bets and of keeping accounts: *R. v. Decome* (1991), 63 C.C.C. (3d) 460, [1991] R.J.Q. 618 (C.A.).

The accused's scheme in which persons purchased memberships in a club which purchased provincial government lottery tickets did not amount to pool-selling or selling a pool. The scheme was not one in which the participants or members bet with one another and one or more of the members or participants won, as is usually the case in pool-betting or pool-selling. Rather the members shared equally in the winnings: *R. v. Herger* (1991), 4 O.R. (3d) 359 (C.A.).

**Subsec. (1)(f)** – The Crown was not required to prove that the British football pools, which were the source of the information provided or conveyed by the accused, were illegal pools in England: *R. v. Ede* (1993), 84 C.C.C. (3d) 447n, 63 O.A.C. 319 (C.A.).

## PLACING BETS ON BEHALF OF OTHERS.

### 203. Every one who

- (a) places or offers or agrees to place a bet on behalf of another person for a consideration paid or to be paid by or on behalf of that other person,

- (b) engages in the business or practice of placing or agreeing to place bets on behalf of other persons, whether for a consideration or otherwise, or
  - (c) holds himself out or allows himself to be held out as engaging in the business or practice of placing or agreeing to place bets on behalf of other persons, whether for a consideration or otherwise,
- is guilty of an indictable offence and liable
- (d) for a first offence, to imprisonment for not more than two years,
  - (e) for a second offence, to imprisonment for not more than two years and not less than fourteen days, and
  - (f) for each subsequent offence, to imprisonment for not more than two years and not less than three months. R.S., c. C-34, s. 187; 1974-75-76, c. 93, s. 11.

## CROSS-REFERENCES

The term "bet" is defined in s. 197.

Section 204 enacts certain exemptions respecting betting, for offences under ss. 201 and 202, but not this section. Section 206 enacts exemptions for certain kinds of gaming but does not, in specific terms, exempt an accused from liability under this section. Accordingly, the reach of those exemptions is uncertain, see cases noted under heading **Agricultural fair exemption**, under s. 201. The exemption in s. 207 would, however, apply to conduct otherwise within this section.

The offences under this section are pure indictable offences, but, by virtue of s. 553, are offences over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Where the prosecution seeks the higher penalty prescribed by para. (e) or (f), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. Note that no reference to the prior conviction may be made in the information by virtue of s. 664.

## SYNOPSIS

Section 203 prohibits the activities of the actions of "bookies" and other off-track betting schemes and sets out a schedule of available sentences based on whether the accused is a repeat offender.

Section 203(a) makes it an indictable offence to *place a bet* for another in exchange for *consideration*. The offence is also stated to encompass *offers* or *agreements* to place the bet. The consideration may be received either at the time of the act described or it may be agreed that the consideration may be received at a later time.

Section 203(b) makes it an indictable offence to engage in the business or practice of either placing or agreeing to place bets, whether or not for consideration.

Section 203(c) makes it an indictable offence to hold oneself out to be a "bookie", or allow oneself to be so held out.

## ANNOTATIONS

This section, which was first introduced following the decision of the Ontario Court of Appeal in *R. v. Gruhl And Brennan*, [1970] 1 C.C.C. 104, 4 D.L.R. (3d) 583, has been amended from time to time and liability extended as various off-track betting schemes have come before the Courts. Thus, cases such as *R. v. Williams and Adams* (1970), 2 C.C.C. (2d) 476, [1971] 1 W.W.R. 722 (Alta. S.C. App. Div.), affd 3 C.C.C. (2d) 91n, [1971] S.C.R. vi (5:0) and *R. v. Benwell et al.* (1972), 9 C.C.C. (2d) 158, [1972] 3 O.R. 906 (2:1) (C.A.), affd 10 C.C.C. (2d) 503, [1973] S.C.R. vi (9:0), decided before the enactment of subsecs. (b) and (c) must be read with care.



EXEMPTION / Presumption / Operation of pari-mutuel system / Supervision of pari-mutuel system / Percentage that may be deducted and retained / Percentage that may be deducted and retained / Stopping of betting / Regulations / Approvals / Idem / 900 metre zone / Contravention / Definition of “association”.

**204. (1) Sections 201 and 202 do not apply to**

- (a) any person or association by reason of his or their becoming the custodian or depository of any money, property or valuable thing staked, to be paid to
  - (i) the winner of a lawful race, sport, game or exercise,
  - (ii) the owner of a horse engaged in a lawful race, or
  - (iii) the winner of any bets between not more than ten individuals;
- (b) a private bet between individuals not engaged in any way in the business of betting;
- (c) bets made or records of bets made through the agency of a pari-mutuel system on running, trotting or pacing horse-races if
  - (i) the bets or records of bets are made on the race-course of an association in respect of races conducted at that race-course or another race-course in or out of Canada, and, in the case of a race conducted on a race-course situated outside Canada, the governing body that regulates the race has been certified as acceptable by the Minister of Agriculture and Agri-Food or a person designated by that Minister pursuant to subsection (8.1) and that Minister or person has permitted pari-mutuel betting in Canada on the race pursuant to that subsection, and
  - (ii) the provisions of this section and the regulations are complied with.

(1.1) For greater certainty, a person may, in accordance with the regulations, do anything described in section 201 or 202, if that person does it for the purposes of legal pari-mutuel betting.

(2) For the purposes of paragraph (1)(c), bets made, in accordance with the regulations, in a betting theatre referred to in paragraph (8)(e), or by telephone calls to the race-course of an association or to such a betting theatre, are deemed to be made on the race-course of the association.

(3) No person or association shall use a pari-mutuel system of betting in respect of a horse-race unless the system has been approved by and its operation is carried on under the supervision of an officer appointed by the Minister of Agriculture and Agri-Food.

(4) Every person or association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, whether or not the person or association is conducting the race-meeting at which the race is run, shall pay to the Receiver General in respect of each individual pool of the race and each individual feature pool one-half of one per cent, or such greater fraction not exceeding one per cent as may be fixed by the Governor in Council, of the total amount of money that is bet through the agency of the pari-mutuel system of betting.

(5) Where any person or association becomes a custodian or depository of any money, bet or stakes under a pari-mutuel system in respect of a horse-race, that person or association shall not deduct or retain any amount from the total amount of money, bets or stakes unless it does so pursuant to subsection (6).

(6) An association operating a pari-mutuel system of betting in accordance with this section in respect of a horse-race, or any other association or person acting on its behalf, may deduct and retain from the total amount of money that is bet through the agency of the pari-mutuel system, in respect of each individual pool of each race or each individual feature pool, a percentage not exceeding the percentage prescribed by the regulations plus any odd cents over any multiple of five cents in the amount

calculated in accordance with the regulations to be payable in respect of each dollar bet.

(7) Where an officer appointed by the Minister of Agriculture and Agri-Food is not satisfied that the provisions of this section and the regulations are being carried out in good faith by any person or association in relation to a race-meeting, he may, at any time, order any betting in relation to the race-meeting to be stopped for any period that he considers proper.

(8) The Minister of Agriculture and Agri-Food may make regulations

- (a) prescribing the maximum number of races for each race-course on which a race meeting is conducted, in respect of which a pari-mutuel system of betting may be used for the race meeting or on any one calendar day during the race meeting, and the circumstances in which the Minister of Agriculture and Agri-Food or a person designated by him for that purpose may approve of the use of that system in respect of additional races on any race-course for a particular race meeting or on a particular day during the race meeting;
- (b) prohibiting any person or association from using a pari-mutuel system of betting for any race-course on which a race meeting is conducted in respect of more than the maximum number of races prescribed pursuant to paragraph (a) and the additional races, if any, in respect of which the use of a pari-mutuel system of betting has been approved pursuant to that paragraph;
- (c) prescribing the maximum percentage that may be deducted and retained pursuant to subsection (6) by or on behalf of a person or association operating a pari-mutuel system of betting in respect of a horse-race in accordance with this section and providing for the determination of the percentage that each such person or association may deduct and retain;
- (d) respecting pari-mutuel betting in Canada on horse-races conducted on a race-course situated outside Canada; and
- (e) authorizing pari-mutuel betting and governing the conditions for pari-mutuel betting, including the granting of licences therefor, that is conducted by an association in a betting theatre owned or leased by the association in a province in which the Lieutenant Governor in Council, or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, has issued a licence to that association for the betting theatre.

(8.1) The Minister of Agriculture and Agri-Food or a person designated by that Minister may, with respect to a horse-race conducted on a race-course situated outside Canada,

- (a) certify as acceptable, for the purposes of this section, the governing body that regulates the race; and
- (b) permit pari-mutuel betting in Canada on the race.

(9) The Minister of Agriculture and Agri-Food may make regulations respecting

- (a) the supervision and operation of pari-mutuel systems related to race meetings, and the fixing of the dates on which and the places at which an association may conduct such meetings;
- (b) the method of calculating the amount payable in respect of each dollar bet;
- (c) the conduct of race-meetings in relation to the supervision and operation of pari-mutuel systems, including photo-finishes, video patrol and the testing of bodily substances taken from horses entered in a race at such meetings, including, in the case of a horse that dies while engaged in racing or immediately before or after the race, the testing of any tissue taken from its body;
- (d) the prohibition, restriction or regulation of
  - (i) the possession of drugs or medicaments or of equipment used in the administering of drugs or medicaments at or near race-courses, or

- (ii) the administering of drugs or medicaments to horses participating in races run at a race meeting during which a pari-mutuel system of betting is used; and
  - (e) the provision, equipment and maintenance of accommodation, services or other facilities for the proper supervision and operation of pari-mutuel systems related to race meetings, by associations conducting those meetings or by other associations.
- (9.1) For the purposes of this section, the Minister of Agriculture and Agri-Food may designate, with respect to any race-course, a zone that shall be deemed to be part of the race-course, if
- (a) the zone is immediately adjacent to the race-course;
  - (b) the farthest point of that zone is not more than 900 metres from the nearest point on the race track of the race-course; and
  - (c) all real property situated in that zone is owned or leased by the person or association who owns or leases the race-course.
- (10) Every person who contravenes or fails to comply with any of the provisions of this section or of any regulations made under this section is guilty of
- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.
- (11) For the purposes of this section, “association” means an association incorporated by or pursuant to an Act of Parliament or of the legislature of a province that owns or leases a race-course and conducts horse-races in the ordinary course of its business and, to the extent that the applicable legislation requires that the purposes of the association be expressly stated in its constituting instrument, having as one of its purposes the conduct of horse-races. R.S., c. C-34, s. 188; 1980-81-82-83, c. 99, s. 1; R.S.C. 1985, c. 47 (1st Supp.), s. 1; 1989, c. 2, s. 1; 1994, c. 38, ss. 18, 25.

#### CROSS-REFERENCES

Where the prosecution elects to proceed by indictment on the offence under subsec. (10) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

Section 204 creates *exemptions* from liability which would otherwise arise under s. 201 or 202, and it also creates a system of legalized *pari-mutuel betting*.

Section 204(1) creates *three types* of exemptions. Section 204(1)(a) exempts the *custodian* or the *stakeholder of moneys* when such person pays out the stakes or money to one of the class of persons described in subparas. (i) to (iii).

Section 204(1)(c) excludes bets made or records of bets made through the *pari-mutuel system* if the conditions in subparas. (i) and (ii) are satisfied.

Section 204(3) to (9.1) permit the setting of and functioning of a pari-mutuel betting operation for *horse races*. It provides for regulations to be made dealing with many aspects of system described in subsec. (8). Subsection (1.1) states that if the person does an act described in ss. 201 to 202 for the *purpose of legal pari-mutuel betting* it is exempt from liability if the acts are done in accordance with the regulations.

Section 204(11) provides an exhaustive *definition* of the word *association* for the purposes of the section.

Section 204(10) creates the *offence* of contravening the section or the regulations made



under it. In addition it provides for punishment by way of summary conviction procedure or by way of indictment. In the latter case the maximum sentence is two years.

205. [*Repealed. R.S.C. 1985, c. 52 (1st Supp.), s. 1.*]

OFFENCE IN RELATION TO LOTTERIES AND GAMES OF CHANCE / Definition of "three-card monte" / Exemption for fairs / Definition of "fair or exhibition" / Offence / Lottery sale void / *Bona fide* exception / Foreign lottery included / Saving.

206. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who

- (a) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property by lots, cards, tickets or any mode of chance whatever;
- (b) sells, barter, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever;
- (c) knowingly sends, transmits, mails, ships, delivers or allows to be sent, transmitted, mailed, shipped or delivered, or knowingly accepts for carriage or transport or conveys any article that is used or intended for use in carrying out any device, proposal, scheme or plan for advancing, lending, giving, selling or otherwise disposing of any property by any mode of chance whatever;
- (d) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who, or the holders of what lots, tickets, numbers or chances, are the winners of any property so proposed to be advanced, lent, given, sold or disposed of;
- (e) conducts, manages or is a party to any scheme, contrivance or operation of any kind by which any person, on payment of any sum of money, or the giving of any valuable security, or by obligating himself to pay any sum of money or give any valuable security, shall become entitled under the scheme, contrivance or operation to receive from the person conducting or managing the scheme, contrivance or operation, or any other person, a larger sum of money or amount of valuable security than the sum or amount paid or given, or to be paid or given, by reason of the fact that other persons have paid or given, or obligated themselves to pay or give any sum of money or valuable security under the scheme, contrivance or operation;
- (f) disposes of any goods, wares or merchandise by any game of chance or any game of mixed chance and skill in which the contestant or competitor pays money or other valuable consideration;
- (g) induces any person to stake or hazard any money or other valuable property or thing on the result of any dice game, three-card monte, punch board, coin table or on the operation of a wheel of fortune;
- (h) for valuable consideration carries on or plays or offers to carry on or to play, or employs any person to carry on or play in a public place or a place to which the public have access, the game of three-card monte;
- (i) receives bets of any kind on the outcome of a game of three-card monte; or
- (j) being the owner of a place, permits any person to play the game of three-card monte therein.

(2) In this section "three-card monte" means the game commonly known as three-card monte and includes any other game that is similar to it, whether or not the game

is played with cards and notwithstanding the number of cards or other things that are used for the purpose of playing.

(3) Paragraphs (1)(f) and (g), in so far as they do not relate to a dice game, three-card monte, punch board or coin table, do not apply to the board of an annual fair or exhibition, or to any operator of a concession leased by that board within its own grounds and operated during the fair or exhibition on those grounds.

(3.1) For the purposes of this section, “fair or exhibition” means an event where agricultural or fishing products are presented or where activities relating to agriculture or fishing take place.

(4) Every one who buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.

(5) Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending on or to be determined by chance or lot, is void, and all property so sold, lent, given, bartered or exchanged is forfeited to Her Majesty.

(6) Subsection (5) does not affect any right or title to property acquired by any *bona fide* purchaser for valuable consideration without notice.

(7) This section applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

(8) This section does not apply to

- (a) the division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests in any such property;
- (b) the distribution by lot of premiums given as rewards to promote thrift by punctuality in making periodical deposits of weekly savings in any chartered savings bank; or
- (c) bonds, debentures, debenture stock or other securities callable by drawing of lots and redeemable with interest and providing for payment of premiums on redemption or otherwise. R.S., c. C-34, s. 189; R.S.C. 1985, c. 52 (1st Supp.), s. 2.

#### CROSS-REFERENCES

The term “bet” is defined in s. 197 and “property” and “valuable security” in s. 2. The game of “three-card monte”, referred to in subsec. (2), was described in *Re Rosen* (1920), 37 C.C.C. 381 (Que. C.A.), as “a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card.”

The offences under subsec. (1) are pure indictable offences, but by virtue of s. 553 are offences over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may by virtue of s. 555(1) elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). The trial of the offence in subsec. (4) is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence in subsec. (4) is as set out in s. 787 and the limitation period is set out in s. 787(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496,

497 or by the officer in charge under s. 498. As regards special search and seizure powers in relation to offences under this section, see s. 199.

Section 207 provides for certain types of permitted lotteries. As regards pyramid selling and similar schemes, reference should be made to ss. 55 and 56 of the Competition Act, R.S.C. 1985, c. C-34 and respecting the conduct of promotional contests involving a lottery or other game, see s. 59 of the same Act.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 209, cheating at play.

## SYNOPSIS

Sections 206 and 207, when read together, create liability for acts in relation to *lotteries and games of chance* and create *exceptions* to such liability.

Section 206(1) creates the indictable offence of doing the acts specified on paras. (a) to (j). No purpose beyond the doing of the acts described need be proven. The maximum sentence upon imprisonment is two years.

Section 206(2) defines "three-card monte" for the purposes of this section.

Section 204(3) creates an exception from s. 206(1)(f) to (g) for the use of a board located at an *annual fair or exhibition* or the operator of such a board. However, the exemption does not include dice games, three-card monte, punch board or coin tables. Subsection (3.1) sets out an exhaustive definition of the phrase "fair or exhibition" – see where it is used in subsec. (3).

Section 206(4) creates a summary conviction offence applicable to any one who takes or receives a lot, ticket or other item mentioned in subsec. (1).

Section 206(5) provides that any right of property involved in the specified acts relating to lotteries and games of chance is void and is forfeited to the Crown. However, s. 206(6) is a saving provision which states that if a person acquires the property as a *bona fide purchaser for valuable consideration* without notice their rights are protected.

Section 206(7) sets out that application of this section to a foreign lottery.

Section 206(8) sets out additional general exemptions to the operation of this section.

## ANNOTATIONS

**Subsec. (1)(a)** – A conviction was upheld where the scheme was that 20 ticket holders would be chosen by chance and then those 20 would compete in a potato-peeling contest to see who would win the 10 cars which were offered as prizes. The Court held that the whole scheme was one of chance determining the result, as "the twenty drawn to enter the contest might well be without any real skill in paring a potato, and the cars would go to the ten least unskilful or inefficient . . . or what is also important, if any of the twenty should prove skilful, they were chosen as contestants by chance": *R. v. Wallace* (1954), 109 C.C.C. 351, 20 C.R. 39 (Alta. S.C. App. Div.). This case was distinguished in *R. v. Young* (1957), 119 C.C.C. 389, 27 C.R. 226 (B.C.C.A.) where it was held that the selection by chance of the persons entitled to participate in the contest of skill did not render the whole scheme a lottery.

The burden is on the Crown to prove that the proposed disposition of property was by mode of chance alone, involving the absence of any genuine skill and if the "skill testing question" constitutes an exercise of skill then the scheme is not a prohibited lottery. Where the police halt the lottery before the draw is held there is no burden on the accused to prove that the intended question would be a genuine test of skill: *R. v. Young* (1978), 45 C.C.C. (2d) 565, [1979] 2 W.W.R. 231 (Alta. S.C. App. Div.).

**Subsec. (1)(d)** – Where the lucky draw and skill-testing scheme was found to simply be a device to attempt to avoid prosecution, a conviction for operating a lottery was affirmed: *R. v. Robert Simpson (Regina) Limited* (1958), 121 C.C.C. 39 (Sask. C.A.).

A scheme which is one of skill or mixed skill and chance does not contravene this subsection: *Roe v. The King* (1949), 94 C.C.C. 273, 8 C.R. 135, [1949] S.C.R. 652.

The Montreal voluntary tax plan was reviewed under appeal in *City of Montreal v. A.-*



*G. Que.*, [1970] 2 C.C.C. 1, 10 D.L.R. (3d) 315 (S.C.C.). The Court, agreeing that the prize offering of silver ingots was a cash prize and that the scheme was based essentially on chance, held (7:0) that the plan was a lottery.

The accused's belief that the Criminal Code lottery provisions did not apply to bingo games held on an Indian Reserve was a mistake of law and, thus, no defence to the charge under this paragraph: *R. v. Jones* (1991), 66 C.C.C. (3d) 512 (S.C.C.) (7:0).

Any aboriginal rights which the First Nations may have in relation to economic activity on the reserves did not include the right to regulate high-stakes gambling on the reserve. By the valid exercise of the criminal law power, Parliament has made such activities a criminal offence: *R. v. Gardner*; *R. v. Jones* (1994), 95 C.C.C. (3d) 97, 120 D.L.R. (4th) 475, 21 O.R. (3d) 385 (C.A.).

**Subsec. (1)(e)** – Chance and skill are not factors in the offence of conducting a lottery as the offence is committed if a purchaser stands to receive back a larger amount than he contributed because other persons have contributed. Further, the offence was committed even where the accused deposited with the trust company running the contest sufficient funds to pay for the prize even if only one ticket was sold. The deposit of the funds with the trust company was only made by the accused by reason of the fact that it was part of a scheme by which contestants would pay money to enter the contest and such contest clearly contemplated, at its inception and throughout, that the prize would be awarded at the conclusion of the contest by reason of the payments for tickets of all the non-successful contestants: *Dream Home Contests (Edmonton) Ltd. v. The Queen, Hodges v. The Queen* (1960), 126 C.C.C. 241, [1960] S.C.R. 414 (5:0). *Foldt: R. v. Canus Of North America Ltd.*, [1965] 1 C.C.C. 91, 43 C.R. 321 (Sask. C.A.).

The legitimacy of a business is not a factor to be considered if a part of its operation is a lottery scheme. Furthermore, the key to this offence is that a participant shall become entitled to receive from others under the scheme an amount larger than his investment, and accordingly it does not matter whether that larger amount was in existence in the scheme before or after he joined it: *R. v. Golden Canada Products* (1973), 15 C.C.C. (2d) 1, 43 D.L.R. (3d) 251 (Alta. C.A.).

The essential element of this offence is the scheme and it is not necessary that money has been paid by the new recruits so long as it is contemplated that it will be payable and that a participant will receive a larger sum than he paid in as a result of the participation of others. It is not a requisite of the scheme that there be a banker: *R. v. Mackenzie, Ennis and Meilleur* (1982), 66 C.C.C. (2d) 528, 135 D.L.R. (3d) 374, 36 O.R. (2d) 562 (C.A.); *R. v. Fehr et al.* (1983), 4 C.C.C. (3d) 382 (B.C.C.A.).

The Crown is not required to prove that at the time of the alleged offence other people had already paid money so that one of the persons in the scheme had already been paid a sum greater than what he had earlier paid. It is sufficient that the Crown establishes that the scheme whereby that result could obtain was in existence: *R. v. Stead et al.* (1981), 60 C.C.C. (2d) 397 (Sask. Prov. Ct.).

Where a significant part of the scheme operated in the province it is no defence that part of the scheme, such as the actual payment of the money, also operated in the United States: *R. v. Stead et al.*, *supra*.

**Subsec. (1)(g)** – A wheel of fortune is a gambling device bearing some resemblance to a revolving wheel with sections indicating chances taken or bets placed: *R. v. Andrews and five others* (1975), 28 C.C.C. (2d) 450, 32 C.R.N.S. 358 (Sask. C.A.).

**Subsec. (3)** – An accused who can bring himself within this subsection is entitled to its protection even on a charge of keeping a common gaming house under s. 201: *R. v. Andrews and Five Others*, *supra*.

However, this principle does not apply where the games involved are slot machines: *R. v. Cross* (1978), 40 C.C.C. (2d) 505, [1978] 4 W.W.R 644 (Alta. S.C. App. Div.).

**Subsec. (8)** – The exemption in para. (a) does not apply to a bingo game where,

although all participants must be members of the sponsoring association, the prize money is derived from the sale of the bingo cards: *R. v. Gladue and Kirby* (1986), 30 C.C.C. (3d) 308 (Alta. Prov. Ct.).

**PERMITTED LOTTERIES / Terms and conditions of licence / Offence / Definition of "lottery scheme" / Exception re: pari-mutuel betting.**

**207. (1)** Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

- (a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;
- (b) for a charitable or religious organization, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme in that province if the proceeds from the lottery scheme are used for a charitable or religious object or purpose;
- (c) for the board of a fair or of an exhibition or an operator of a concession leased by that board, to conduct and manage a lottery scheme in a province where the Lieutenant Governor in Council of the province or such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof has
  - (i) designated that fair or exhibition as a fair or exhibition where a lottery scheme may be conducted and managed, and
  - (ii) issued a licence for the conduct and management of a lottery scheme to that board or operator;
- (d) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or by such other person or authority in the province as may be specified by the Lieutenant Governor in Council thereof, to conduct and manage a lottery scheme at a public place of amusement in that province if
  - (i) the amount or value of each prize awarded does not exceed five hundred dollars, and
  - (ii) the money or other valuable consideration paid to secure a chance to win a prize does not exceed two dollars;
- (e) for the government of a province to agree with the government of another province that lots, cards or tickets in relation to a lottery scheme that is by any of paragraphs (a) to (d) authorized to be conducted and managed in that other province may be sold in the province;
- (f) for any person, pursuant to a licence issued by the Lieutenant Governor in Council of a province or such other person or authority in the province as may be designated by the Lieutenant Governor in Council thereof, to conduct and manage in the province a lottery scheme that is authorized to be conducted and managed in one or more other provinces where the authority by which the lottery scheme was first authorized to be conducted and managed consents thereto;
- (g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and
- (h) for any person to make or print anywhere in Canada or to cause to be made or printed anywhere in Canada anything relating to gaming and betting that is to be used in a place where it is or would, if certain conditions provided by law are

met, be lawful to use such a thing, or to send, transmit, mail, ship, deliver or allow to be sent, transmitted, mailed, shipped or delivered or to accept for carriage or transport or convey any such thing where the destination thereof is such a place.

(2) Subject to this Act, a licence issued by or under the authority of the Lieutenant Governor in Council of a province as described in paragraph (1)(b), (c), (d) or (f) may contain such terms and conditions relating to the conduct, management and operation of or participation in the lottery scheme to which the licence relates as the Lieutenant Governor in Council of that province, the person or authority in the province designated by the Lieutenant Governor in Council thereof or any law enacted by the legislature of that province may prescribe.

(3) Every one who, for the purposes of a lottery scheme, does anything that is not authorized by or pursuant to a provision of this section

- (a) in the case of the conduct, management or operation of that lottery scheme,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, or
  - (ii) is guilty of an offence punishable on summary conviction; or
- (b) in the case of participating in that lottery scheme, is guilty of an offence punishable on summary conviction.

(4) In this section, “lottery scheme” means a game or any proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g), whether or not it involves betting, pool selling or a pool system of betting other than

- (a) a dice game, three-card monte, punch board or coin table;
- (b) bookmaking, pool selling or the making or recording of bets, including bets made through the agency of a pool or pari-mutuel system, on any race or fight, or on a single sport event or athletic contest; or
- (c) for the purposes of paragraphs (1)(b) to (f), a game or proposal, scheme, plan, means, device, contrivance or operation described in any of paragraphs 206(1)(a) to (g) that is operated on or through a computer, video device or slot machine, within the meaning of subsection 198(3).

(5) For greater certainty, nothing in this section shall be construed as authorizing the making or recording of bets on horse-races through the agency of a pari-mutuel system other than in accordance with section 204. R.S., c. C-34, s. 190; 1974-75-76, c. 93, s. 12; R.S.C. 1985, c. 27 (1st Supp.), s. 31, c. 52 (1st Supp.), s. 3.

#### CROSS-REFERENCES

The terms “bet” and “game” are defined in s. 197. Pari-mutuel systems are dealt with in s. 204. The game of “three-card monte”, referred to in subsec. (4), was described in *Re Rosen* (1920), 37 C.C.C. 381 (Que. C.A.), as a “a game played with three cards, say, two black ones and a red one, shuffled or manipulated by the dealer and placed face down and the opponent backs his ability to spot the position of a particular card. By sleight of hand or quickness of movement, the dealer endeavours to induce the person backing his opinion to put his hand on the wrong card”.

Where the Crown elects to proceed by indictment on the offence described in subsec. (3)(a) then the accused has an election as to mode of trial under s. 536(2). Where the Crown elects to proceed by way of summary conviction for the offence under subsec. (3)(a) and for any case under subsec. (3)(b), the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for these summary conviction offences is as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. As regards special search and seizure powers in relation to offences under this section, see s. 199.



As regards pyramid selling and similar schemes, reference should be made to ss. 55 and 56 of the Competition Act, R.S.C. 1985, c. C-34 and respecting the conduct of promotional contests involving a lottery or other game, see s. 59 of the same Act.

Related offences are: s. 201, keeping common gaming or betting house; s. 203, placing bets on behalf of others; s. 209, cheating at play.

## SYNOPSIS

Section 207 legalizes the *creation* and *operation* of *lotteries* run by any of the bodies specified in s. 207(1)(a) to (d). In addition it provides for the *regulation* of such schemes and creates an offence of operating or participating in a lottery not created or run in accordance with s. 207.

Section 207(1) permits lotteries to be created by a *province*, or *under licence* by charitable or religious organizations, by a board of a fair or exhibition or by any other person to whom a licence has been issued. The last-mentioned category only applies to lotteries in which the ticket cost no more than two dollars and the prize does not exceed \$500.

Section 207(1)(e) to (h) permits persons to do specified activities required to carry out the operation of lawful lotteries under this section.

Section 207(4) *exhaustively defines* the term *lottery scheme* for the purposes of this section and also specifically excludes the activities noted in s. 207(4)(a) to (c) which are dealt with (either by way of prohibition or regulation) in ss. 202 to 206.

Section 207(5) clarifies the scope of the exclusion in s. 207(4)(b) in relation to pari-mutuel schemes.

Section 207(2) permits *terms and conditions* to be imposed in a *licence* under this section to regulate the conduct, management, and operation or participation in a lottery scheme.

Section 207(3) makes it an offence to do anything not authorized by this section if the act is done for the purpose of a lottery scheme. It is a summary conviction offence or an indictable offence punishable by up to two years imprisonment if the act is done in relation to the conduct, management or operation of such scheme. It is a summary conviction offence to participate in an unlawful scheme.

## ANNOTATIONS

Since a "pull-ticket" vending machine falls within the definition of a slot machine in s. 198(3) the provincial gaming commission acts properly in refusing to issue licenses to charities or religious organizations seeking to use such machines: *Charity Vending Ltd. v. Alberta (Gaming Commission)* (1988), 45 C.C.C. (3d) 455 (Alta. C.A.).

The statutory scheme established by this section and s. 206 which, in effect, decriminalizes certain forms of gambling and creates a regulated industry does not constitute an unconstitutional delegation to the province, although the power to impose terms and conditions on licenses is delegated to the Lieutenant-Governor: *R. v. Furtney*, [1991] 3 S.C.R. 89, 66 C.C.C. (3d) 498, 8 C.R. (4th) 121 (7:0).

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**208. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 32.]**

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## CHEATING AT PLAY.

**209.** Every one who, with intent to defraud any person, cheats while playing a game or in holding the stakes for a game or in betting is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 192.

## CROSS-REFERENCES

The terms "game" and "bet" are defined in s. 197.

This offence is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court

judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences are: s. 201, keeping common gaming or betting house; s. 202, offences in relation to betting, pool-selling and book-making, etc.; s. 203, placing bets on behalf of others; s. 380, fraud.

## SYNOPSIS

This section makes it an indictable offence to *cheat at play*. The *actus reus* of the offence is to cheat while doing any of the following: playing a game; holding the stakes; or betting. The requisite mental element is the *intention of defrauding* any person. The maximum sentence upon conviction is two years.

## ANNOTATIONS

In *McGarey v. The Queen* (1972), 6 C.C.C. (2d) 525, 26 D.L.R. (3d) 231 (S.C.C.) the booth operator was convicted in the operation of a midway milk bottle toss game where the unsuspecting patron was unaware that the bottom bottles of each pyramid were heavily weighted. It was held (5:0) that in this game of mixed chance and skill the booth operator was a player and the surreptitious weighting of the bottom bottles constituted his intent to defraud the patron player by creating a false visual impression of the game, which false impression in itself was the ill-practice of cheating.

However, simple measures taken to increase the degree of skill required for success are not improper: *R. v. Reilly* (1979), 48 C.C.C. (2d) 286 (Ont. C.A.).

## Bawdy-houses

**KEEPING COMMON BAWDY-HOUSE / Landlord, inmate, etc. / Notice of conviction to be served on owner / Duty of landlord on notice.**

**210. (1)** Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**(2)** Every one who

- (a)** is an inmate of a common bawdy-house,
- (b)** is found, without lawful excuse, in a common bawdy-house, or
- (c)** as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

**(3)** Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

**(4)** Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence. R.S., c. C-34, s. 193.

## CROSS-REFERENCES

The terms “keeper”, “common bawdy-house” and “place” are defined in s. 197. Section 198(1)(a) and (d) set out certain presumptions which aid in proof that premises are a common bawdy-house.

As regards special search and seizure powers in relation to bawdy-houses, see s. 199.

The offence in subsec. (1) is a pure indictable offence, but, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). The trial of the offences in subsec. (2) are conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offences in subsec. (2) are as set out in s. 787 and the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

This offence falls within the definition of “enterprise crime offence” in s. 462.3 for the purposes of Part XII.2.

Other offences related to prostitution may be found in ss. 211 to 213.

## SYNOPSIS

This section creates a number of offences in relation to a common bawdy-house.

Section 210(1) makes it an indictable offence to *keep a common bawdy-house*. The maximum sentence upon conviction is two years.

Section 210(2) creates three summary conviction offences. Section 210(2)(a) makes it an offence to be an *inmate* in a common bawdy-house. “Inmate” is not defined in the Criminal Code but would include a resident or regular occupant of the premises. Section 210(2)(b) makes it an offence to be *found in* a common bawdy-house. It must be shown that there was no lawful excuse for the accused’s presence. The term “found in” is not defined. Section 210(2)(c) makes it an offence for any of the named persons to *knowingly permit* any part of a premises to be used or let for the *purposes* of a common bawdy-house. The category of persons who are caught by this paragraph are those who have actual control or charge over the premises. To demonstrate that the conduct satisfies the necessary mental element of having *knowingly permitted* the use, it must be shown that the accused was aware of the use of the premises and either acquiesced or encouraged its continued use for the illicit purposes.

Subsections (3) and (4) must be read together and create a duty upon the owner, landlord or lessor of the premises which was the subject of a conviction under subsec. (1) (keeping a common bawdy-house). Subsection (3) provides for a notice to be served upon such person or his agent advising of the conviction, and upon receipt of the notice the landlord, owner or lessor must either *forthwith* attempt to terminate the tenancy or other arrangement permitting the keeper to be on the premises or face possible later prosecution. If there is a conviction under subsec. (1) in relation to the same premises after the notice has served upon the owner (or other person mentioned in the subsection) the person who had received the notice *shall be deemed* to also be a keeper pursuant to subsec. (1). To accord with fundamental fairness, at the least it must be shown that the later conviction involving the same premises related to activity which occurred after the notice has been served. The effect of the deeming provision may be ousted if the accused establishes that all reasonable steps were taken to prevent the reoccurrence of the offence under subsec. (1).

## ANNOTATIONS

**Common bawdy-house** / [Also see notes under s. 197] – Any defined space is capable of being a common bawdy-house, even a parking lot, if there is localization of a number of acts of prostitution within its specified boundaries. However, mere presence by prostitutes in the parking lot on a number of occasions, where they did not exercise any con-



trol or management over the lot and had no right or interest in the lot as owners, tenants or licensees, is not sufficient to establish them as keeping a common bawdy-house: *R. v. Pierce and Golloher* (1982), 66 C.C.C. (2d) 388, 37 O.R. (2d) 721 (C.A.).

That the premises are a common bawdy-house may be proved by evidence of the general reputation of the house in the community: *Theirlynck v. The King* (1931), 56 C.C.C. 156, [1931] S.C.R. 478, [1931] 4 D.L.R. 591.

As well, where there is evidence that the place has the reputation as a common bawdy-house, evidence was admissible as to the accused's reputation as a prostitute. Such evidence is not admitted to show that the accused was the keeper but that the place is occupied by a person whose reputation is consistent with the reputation which it is said the place bears: *R. v. West* (1950), 96 C.C.C. 349, 9 C.R. 355, [1950] O.W.N. 302 (C.A.).

**Keeps [subsec. (1)]** – As not every “keeper” as defined in s. 197 “keeps” a common bawdy-house, an information charging that the accused “were the keepers of a common bawdy-house” does not charge an offence known to law: *R. v. Catalano* (1977), 37 C.C.C. (2d) 255 (Ont. C.A.).

Thus the offence requires proof of provision of accommodation by the accused. A prostitute who on several occasions over a two-week period resorted to the same hotel must be acquitted of this offence where there is no evidence she was given any particular room, or had rented a particular room or even that she had paid the rent on the room: *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 (B.C.C.A.).

To establish the offence of keeping there must be proof that the accused had some degree of control over the care and management of the premises, and that the accused participated to some extent in the illicit activities of the common bawdy-house. This element of participation does not, however, require personal participation in the sexual acts which occur in the house. It is sufficient that the accused participated in the use of the house as a common bawdy-house. Thus, a person who satisfies the definition of “keeper” in s. 197(1) does not necessarily commit the offence under subsec. (1): *R. v. Corbeil* (1991), 64 C.C.C. (3d) 272, 5 C.R. (4th) 62, 124 N.R. 241 (S.C.C.) (4:1).

It is unnecessary to show that the accused participated in the day-to-day running of the premises where he is shown to be the directing mind of the corporation which owned the premises, participated in the management, received the proceeds and was aware of the activities being carried on: *R. v. Woszczyna*; *R. v. Soucy* (1983), 6 C.C.C. (3d) 221 (Ont. C.A.).

Even where the accused uses her own residence by herself for the purposes of prostitution she may be convicted under this section: *R. v. Worthington* (1972), 10 C.C.C. (2d) 311, 22 C.R.N.S. 34 (Ont. C.A.).

**Found in [subsec. (2)(b)]** – The offence of being found in a common bawdy-house is not a lesser offence included in the charge of keeping a common bawdy-house: *R. v. Labelle*, [1957] Que. Q.B. 81 (C.A.).

The offence under para. (2)(b) requires that the accused was found in the common bawdy house and it was not sufficient that the accused “was present”. Mere proof of presence on the premises in question at some earlier time is not sufficient, the accused must have been perceived there or seen by someone. On the other hand, evidence that the accused was seen entering and leaving was sufficient to prove the offence, his presence in the bawdy house not being the object of subsequent admission but being discovered by the contemporaneous observation or inspection by the police: *R. v. Lemieux* (1991), 70 C.C.C. (3d) 434, [1992] R.J.Q. 295, 44 Q.A.C. 1 (C.A.).

**Permitting [subsec. (2)(c)]** – Where the accused knowingly allowed the premises to be used as a place to which men and women resorted for the purpose of illicit sexual intercourse then a conviction will be sustained even though there was no evidence that the women were charging money for their services or that the couples resorting to the premises were unmarried: *R. v. Turkiewich* (1962), 133 C.C.C. 301, 38 C.R. 220 (Man. C.A.).

A charge of being an occupier unlawfully permitting premises to be used as a common bawdy-house was held to be a lesser offence included in the charge of keeping a common bawdy-house: *R. v. Lafreniere*, [1965] 1 C.C.C. 31, 44 C.R. 274 (Ont. H.C.J.).

The words "or otherwise having charge or control" qualify the earlier words in the subsection and make it clear that the section is not directed at an owner or landlord, *per se*, but rather at such persons as being the ones having charge or control of the premises. Even where the landlord has power to acquire the charge or control of the premises by immediate termination of the lease, still, once he leased the premises, it was the tenant who had charge or control. The section is directed at a landlord who has actual charge or control in the sense that he has the right to intervene forthwith and whose failure to do so can be considered the granting of permission: *R. v. Wong* (1977), 33 C.C.C. (2d) 6, 2 Alta. L.R. 90 (S.C. App. Div.).

**Constitutional considerations** – This section does not offend either s. 2 or s. 7 of the Charter of Rights and Freedoms: *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1235, [1990] 4 W.W.R. 481, 77 C.R. (3d) 1 (4:2).

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## TRANSPORTING PERSON TO BAWDY-HOUSE.

**211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 194.**

### CROSS-REFERENCES

The term "common bawdy-house" is defined in s. 197.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Other offences in relation to bawdy-houses are found in s. 210. Offences in relation to prostitution are found in ss. 212 and 213.

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## *Procuring*

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### PROCURING / *Idem* / Presumptions / Offence in relation to juvenile prostitution.

#### **212. (1) Every one who**

- (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
- (b) inveigles or entices a person who is not a prostitute or a person of known immoral character to a common bawdy-house or house of assignation for the purpose of illicit sexual intercourse or prostitution,
- (c) knowingly conceals a person in a common bawdy-house or house of assignation,
- (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
- (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
- (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house or house of assignation,

- (g) procures a person to enter or leave Canada, for the purpose of prostitution,
  - (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
  - (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or
  - (j) lives wholly or in part on the avails of prostitution of another person,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) Notwithstanding paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house or in a house of assignation is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsection (2).

(4) Every person who, in any place, obtains or attempts to obtain, for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 195; 1972, c. 13, s. 14; 1980-81-82-83, c. 125, s. 13; R.S.C. 1985, c. 19 (3rd Supp.), s. 9.

#### CROSS-REFERENCES

The terms “prostitute”, “common bawdy-house” and “place” are defined in s. 197. Sexual intercourse is defined in s. 4(5).

Under s. 150.1, it is no defence to the offences in subsec. (2) and (4) that the accused believed that the complainant was 18 years of age, unless the accused took all reasonable steps to ascertain the complainant’s age. Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides means of proving the age of a child. The accused may elect his mode of trial on any of the offences in this section pursuant to s. 536(2). Release pending trial is determined by s. 515, although an accused charged with the offence under subsec. (4) is eligible for release by the officer in charge under s. 498.

A person found guilty of an offence under subsec. (1) or (2) may, depending on the circumstances, be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. The offence in subsec. (1) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance by reason of s. 487.01(5). The offences in this section fall within the definition of “enterprise crime offence” in s. 462.3 for the purposes of Part XII.2.

**Special evidentiary and procedural provisions** – Section 274 specifically provides that no corroboration is required for a conviction for these offences and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Also see s. 659 abrogating any rule requiring a warning about convicting on the evidence of a child. Under s. 4(2) of the Canada Evidence Act, the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

Related offences are: ss. 210 and 211, offences in relation to bawdy-houses; s. 213, offences in relation to prostitution; ss. 271 to 273, sexual assault; s. 245, administering noxious substance. Sexual offences in relation to children may be found in Part V, ss. 151 to 153 and ss. 170 to 172.



## SYNOPSIS

This section makes it an indictable offence to engage in any of the listed actions in relation to *procuring a person for the purposes of prostitution* and related illicit activities. It also creates indictable offences relating to youthful prostitutes.

Section 212(1)(a) prohibits *procuring*, attempting to procure or soliciting a person to have *illicit sexual intercourse with another person*. The act of intercourse may occur (or be intended to occur) in or out of Canada. The term "illicit" is broader than prohibited by the criminal law and includes such acts as requiring an employee to have sex with prospective clients in order for the employer to obtain business.

Section 212(1)(b) makes it an offence to *inveigle or entice* another person to a common bawdy-house or a house of assignation. It must be shown that the accused did the acts *for the purpose of getting that person to engage in illicit sexual intercourse or prostitution*. The paragraph specifically excludes liability if the person enticed or inveigled is a prostitute or a person of known immoral character.

Section 212(1)(c) makes it an offence to *conceal another* in a common bawdy-house or a house of assignation. It must be proven that the accused did so knowingly, namely, that the accused did the act while aware of the nature of the premises involved.

Section 212(1)(d) prohibits *procuring* or attempting to procure any one to *become a prostitute*. It applies whether the person is being procured to be a prostitute in or out of Canada. It is a defence if the accused reasonably believed that the person is already a prostitute.

Section 212(1)(e) makes it an offence to procure or attempt to procure any one to *move from their home for the purpose of becoming an inmate or a frequenter of a common bawdy-house*. The common bawdy-house may be located in or out of Canada. It must be shown that the person does not already live in a common bawdy-house.

Section 212(1)(f) makes it an offence to direct, take (or to cause either) a *person arriving in Canada to a common bawdy-house* or a house of assignation. No intention beyond the doing of the physical acts need be shown.

It is an offence under s. 212(1)(g) to *procure another to enter or leave Canada for the purpose of prostitution*.

Section 212(1)(h) makes it an offence to *exercise control, direction or influence* over another person if the accused's acts aid abet or compel another to *carry on prostitution*. It must be proven, in addition to the foregoing, that the acts were done *for the purpose of gain*.

Pursuant to s. 212(1)(i) it is an offence to *administer* or cause another to take *anything* (including drugs or alcohol) if the acts are accompanied by the mental elements of intent to either *stupefy or overpower* another person for the *purpose of enabling any one to have sexual intercourse with that person*.

The final offence created by this subsection is to *live entirely, or in part, on the avails of the prostitution of another person*. A prostitute cannot be prosecuted for supporting him or herself on the proceeds of the trade nor can such a person be convicted as a party or co-conspirator to living off the avails of their own earnings.

The maximum sentence upon conviction for any of the offences in s. 212(1) is 10 years' imprisonment.

Subsection (3) creates a presumption that one who lives with a prostitute or is in the habitual company of a prostitute or lives in a common bawdy-house, or a house of assignation, lives on the avails of prostitution. The accused may rebut the inference which would otherwise be relevant to a prosecution under subssecs. (1)(j) or (2).

Subsections (2) and (4) create offences relating to youthful prostitutes. Section 212(2) raises the maximum sentence upon conviction for living off the avails of a prostitutes to 14 years if the prostitute is under 18. (The maximum sentence would otherwise be 10 years – see s. 212(1)(j)). Section 212(4) makes it an offence to obtain, or attempt to obtain, the *sexual services of a person under 18 years of age*. It must be shown that

consideration was offered for the services. The accused is liable to a sentence of five years upon conviction.

#### ANNOTATIONS

**Subsec. (1)(a)** – Evidence of an attempt to obtain a female person for a man who desires sexual intercourse for money will support a conviction: *R. v. Babcock* (1974), 18 C.C.C. (2d) 175 (B.C.C.A.).

The word “illicit” in this paragraph refers to sexual intercourse not authorized or sanctioned by lawful marriage and is not limited to sexual intercourse prohibited by the criminal law or other enactment of positive law and would include requiring an employee to have intercourse with the company’s clients in order to conclude contracts: *Deutsch v. The Queen* (1986), 27 C.C.C. (3d) 385, 52 C.R. (3d) 305, [1986] 2 S.C.R. 2. (5:0).

Assuming that the offence of procuring a woman to have illicit sexual intercourse is not committed unless sexual intercourse takes place nevertheless the accused could be convicted of attempting to procure under this paragraph where the accused in the course of a job interview advised the prospective employee that she would have to have sexual intercourse with the company’s clients where necessary to conclude a contract and that a successful employee could make a great deal of money, even if in the end no job offer was actually made. Provided the accused had the necessary intent to induce or persuade the woman to seek employment that would require her to have sexual intercourse with prospective clients, then the holding out of the large financial rewards in the course of the interviews, in which the necessity of having sexual intercourse with prospective clients was disclosed, could constitute the *actus reus* of an attempt to procure. This would clearly be a step, and an important step, in the commission of the offence: *Deutsch v. The Queen*, *supra*.

**Subsec. (1)(d)** – It is no offence to recruit a woman who is already a prostitute and the accused’s belief that the woman is already a prostitute is a defence to this charge: *R. v. Cline* (1982), 65 C.C.C. (2d) 214, [1982] 2 W.W.R. 286 (Alta. C.A.).

**Subsec. (1)(j)** – This offence requires proof that the accused received in kind all or part of the female’s proceeds from prostituting herself or had those proceeds applied in some way to support his living. It is her avails as such that he must live on and indirect benefits resulting to him from her practice are not avails of her prostitution. As well, the words “living on” connote living parasitically and those persons who offer the same services to prostitutes as to other persons do not commit this offence: *R. v. Celebrity Enterprises Ltd. et al.* (1977), 41 C.C.C. (2d) 540, [1978] 2 W.W.R. 562 (B.C.C.A.).

Where the accused is living with a prostitute, the question to be determined is whether the accused and the prostitute had entered into a normal and legitimate living arrangement which included a sharing of expenses for their mutual benefit or whether, instead, the accused was living parasitically on the earnings of the prostitute for his own advantage. This is not to say that, to avoid liability under this paragraph, each of the parties must make an equal contribution to the living expenses. The parasitic aspect of the relationship involves an element of exploitation which is essential to the concept of living on the avails of prostitution: *R. v. Grilo* (1991), 64 C.C.C. (3d) 53, 5 C.R. (4th) 113, 2 O.R. (3d) 514 (C.A.). Similarly: *R. v. Bramwell* (1993), 86 C.C.C. (3d) 418, 60 W.A.C. 293 (B.C.C.A.).

The prostitute on whose avails another person lives may not be convicted of the offence of conspiring with that person to commit the offence contrary to this paragraph. The prostitute’s immunity from prosecution does not, however, bar the conviction for conspiracy of the person who lived on the avails of her prostitution where there is proof of an agreement between him and the prostitute that he do so: *R. v. Murphy and Bieneck* (1981), 60 C.C.C. (2d) 1, 21 C.R. (2d) 39 (Alta. C.A.).

**Subsec. (3)** – This subsection creates a mandatory presumption whereby the accused

will need to call evidence, unless there is already evidence to the contrary in the Crown's case. This presumption infringes the presumption of innocence as guaranteed by s. 11(d) of the Charter but constitutes a reasonable limit and is therefore valid. *R. v. Downey* (1992), 72 C.C.C. (3d) 1, 13 C.R. (4th) 129, [1992] 2 S.C.R. 10.

**Repeal of limitation period** – Where, prior to the repeal of the one year limitation period in former s. 212(4), the charges would have been statute-barred then proceedings cannot thereafter be commenced against the accused: *R. v. Ford* (1993), 84 C.C.C. (3d) 544, 106 D.L.R. (4th) 325, 15 O.R. (3d) 171 (C.A.). *Contra: R. v. Sheppard* (1990), 57 C.C.C. (3d) 213, 84 Nfld. & P.E.I.R. 242 (Nfld. S.C.).

## Offence in Relation to Prostitution

### OFFENCE IN RELATION TO PROSTITUTION / Definition of “public place”.

213. (1) Every person who in a public place or in any place open to public view  
 (a) stops or attempts to stop any motor vehicle,  
 (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or  
 (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person  
 for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view. 1972, c. 13, s. 15; R.S.C. 1985, c. 51, (1st Supp.), s. 1.

**Editor's Note:** By virtue of s. 2 of R.S.C. 1985, c. 51 (1st Supp.), an Act to amend the Criminal Code (prostitution), three years after the coming into force of this section (December 20, 1985) a comprehensive review is to be undertaken of its provisions by a committee designated or established by the House of Commons for that purpose. Within one year of that review the committee is to submit a report to the House including a statement of any changes the committee recommends.

### CROSS-REFERENCES

The terms “place” and “prostitute” are defined in s. 197. “Motor vehicle” is defined in s. 2.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Other offences in relation to prostitution are found in ss. 211 and 212. Offences in relation to bawdy-houses are found in ss. 210 and 211.

### SYNOPSIS

This section makes it an offence to do any of the prohibited acts (described in para. (1)(a) to (c)) if accompanied by the intention of *engaging in prostitution* or obtaining the *sexual services of a prostitute*. This summary conviction offence applies to the acts described below only if they are done in a *public place* (as defined by s. 213(2)) or a place open to public view.

Section 213(1)(a) applies to the act of either stopping a motor vehicle or attempting to do so for the prohibited purpose.

Section 213(1)(b) prohibits impeding either pedestrian or motor vehicle traffic, or



impeding others from going in or out of any premises adjacent to a public place, or one open to the public for the purposes described above.

Section 213(1)(c) makes it an offence to stop any one or to *communicate in any manner* (or attempt to do either) for the prohibited purpose.

### ANNOTATIONS

Subsection (1)(c) of this section, while infringing freedom of expression as guaranteed by s. 2(b) of the Charter, is a reasonable limit on that freedom and is therefore valid. Nor is the provision on its own or in combination with the bawdy-house prohibition in s. 210(1) a violation of s. 7 of the Charter: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1123, [1990] 4, W.W.R. 481, 77 C.R. (3d) 1 (4:2). Nor does subsec. (1)(c) violate the guarantee to freedom of association: *R. v. Skinner* (1990), 56 C.C.C. (3d) 1, [1990] 1 S.C.R. 1235, 77 C.R. (3d) 84 (4:2).

Paragraph (1)(c) in effect creates two ways in which the offence may be carried out in that it makes it an offence either to stop or attempt to stop the person or to in any manner communicate or attempt to communicate for the prohibited purpose. There is no requirement that the accused be shown to have stopped and communicated with another person: *R. v. Head* (1987), 36 C.C.C. (3d) 56, 59 C.R. (3d) 80 (B.C.C.A.).

The offence of communicating for the purpose of obtaining sexual service requires proof of an intention to engage sexual services. More than mere communication is required. The intention of the accused, however, may be inferred from the circumstances. In this case, evidence that the accused spoke to the undercover officer merely out of curiosity negated intent: *R. v. Pake* (1995), 103 C.C.C. (3d) 524 (Alta. C.A.).

The mere response by the accused, to an overture by a plainclothes police woman, that he wished to obtain the sexual services of a prostitute is sufficient to make out the offence under this section: *R. v. Edwards and Pine* (1986), 32 C.C.C. (3d) 412 (B.C. Co. Ct.).

The offence in para. (c) was intended to protect everyone from the nuisance of being propositioned on the street and at least prohibits communication for the purpose of engaging the sexual services of a person whom the accused thinks to be a prostitute: *R. v. Ruest* (1991), 67 C.C.C. (3d) 476, 7 C.R. (4th) 48, 40 Q.A.C. 147 (C.A.).

A conversation in a motor vehicle on a public street is within this section, although the vehicle is at all times in motion: *R. v. Smith* (1989), 49 C.C.C. (3d) 127 (B.C.C.A.).

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## Part VIII / OFFENCES AGAINST THE PERSON AND REPUTATION

### Interpretation

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**DEFINITIONS** / “abandon” or “expose” / “aircraft” / “child” / “form of marriage” / “guardian” / “operate” / “vessel”.

#### 214. In this Part

“abandon” or “expose” includes

- (a) a wilful omission to take charge of a child by a person who is under a legal duty to do so, and
- (b) dealing with a child in a manner that is likely to leave that child exposed to risk without protection;

“aircraft” does not include a machine designed to derive support in the atmosphere primarily from reactions against the earth’s surface of air expelled from the machine;

“child” includes an adopted child and an illegitimate child;

**“form of marriage”** includes a ceremony of marriage that is recognized as valid

(a) by the law of the place where it was celebrated, or

(b) by the law of the place where an accused is tried, notwithstanding that it is not recognized as valid by the law of the place where it was celebrated;

**“guardian”** includes a person who has in law or in fact the custody or control of a child.

**“operate”**

(a) means, in respect of a motor vehicle, to drive the vehicle,

(b) means, in respect of railway equipment, to participate in the direct control of its motion, whether

(i) as a member of the crew of the equipment,

(ii) as a person who, by remote control, acts in lieu of such crew, or

(iii) as other than a member or person described in subparagraphs (i) and (ii), and

(c) includes, in respect of a vessel or an aircraft, to navigate the vessel or aircraft;

**“vessel”** includes a machine designed to derive support in the atmosphere primarily from reactions against the earth's surface of air expelled from the machine. R.S., c. C-34, s. 196; R.S.C. 1985, c. 27 (1st Supp.), s. 33; c. 32 (4th Supp.), s. 56.

#### CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. The terms “motor vehicle” and “railway equipment” are defined in s. 2. The term “wilfully” does not have a fixed meaning and must take its meaning from the context. Generally speaking, however, it connotes an intention to bring about a proscribed consequence. See: *Regina v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.). Most of the legal duties referred to in the definition of “abandon” or “expose” may be found in ss. 215 to 217. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

#### ANNOTATIONS

**“abandon or expose”** – A relative who undertakes to babysit young children is under a legal duty to take the same care of the children as their parents are at law required to do: *R. v. Reedy* (No. 2) (1981), 60 C.C.C. (2d) 104 (Ont. Dist. Ct.).

## Duties Tending to Preservation of Life

### DUTY OF PERSONS TO PROVIDE NECESSARIES / Offence / Punishment / Presumptions.

#### 215. (1) Every one is under a legal duty

(a) as a parent, foster parent, guardian or head of a family, to provide necessities of life for a child under the age of sixteen years;

(b) as a married person, to provide necessities of life to his spouse; and

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

(a) with respect to a duty imposed by paragraph (1)(a) or (b),

(i) the person to whom the duty is owed is in destitute or necessitous circumstances, or

- (ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or
  - (b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.
- (3) Every one who commits an offence under subsection (2) is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
  - (b) an offence punishable on summary conviction.
- (4) For the purpose of proceedings under this section,
- (a) evidence that a person has cohabited with a person of the opposite sex or has in any way recognized that person as being his spouse is, in the absence of any evidence to the contrary, proof that they are lawfully married;
  - (b) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;
  - (c) evidence that a person has left his spouse and has failed, for a period of any one month subsequent to the time of his so leaving, to make provision for the maintenance of his spouse or for the maintenance of any child of his under the age of sixteen years is, in the absence of any evidence to the contrary, proof that he has failed without lawful excuse to provide necessities of life for them; and
  - (d) the fact that a spouse or child is receiving or has received necessities of life from another person who is not under a legal duty to provide them is not a defence. R.S., c. C-34, s. 197; 1974-75-76, c. 66, s. 8; 1991, c. 43, s. 9.

#### CROSS-REFERENCES

The terms “child” and “guardian” are defined in s. 214. The term “mental disorder” is defined in s. 2. Omission to perform the duty imposed by subsec. (1) may, in some circumstances, amount to criminal negligence as defined in s. 219 and, if conduct results in death or bodily harm, will amount to an offence under ss. 220 and 221 respectively. Criminal negligence causing death is also a form of culpable homicide for the purposes of ss. 222 to 237. The related offence of abandoning a child is in s. 218. Neglecting to obtain assistance in child birth is an offence under s. 242. The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section creates an offence for *failing to provide the necessities of life* and contains a number of *rebuttable presumptions which facilitate proof of certain elements of the offence*.

Section 215(1) establishes three classes of relationships in which one party has a legal duty to provide the necessities of life to the other party. (a) a parent, foster parent, guardian or head of a family must provide the necessities of life to a child under the age of 16; (b) a married person must provide for his spouse; and (c) a person who has charge of another must provide the necessities of life to that person if for one of the specified reasons that person is unable to withdraw from the charge and is unable to provide himself with the necessities of life.

Section 215(2) states that failure to carry out the legal duty specified in subsec. (1)



constitutes an offence. The first element of this offence is that the accused failed, without lawful excuse, to fulfil a duty imposed by subsec. (1) if the additional conditions in either s. 215(2)(a) or (b) are established. The onus of establishing a lawful excuse is on the accused and, as with all such burdens placed on the accused, it has been attacked as an alleged violation of ss. 7 and 11(d) of the Charter.

Section 215(2)(a) applies to cases in which the legal duty owed by the accused arises as a result of s. 215(1)(a) or (b) (basically parents and spouses). Under s. 215(2)(a), the offence will be made out if the person to whom the duty is owed is either *destitute or in necessitous circumstances* or if the result of the failure to fulfil the duty *endangers the life* of the person to whom the duty is owed or *causes or is likely to cause* permanent endangerment to the health of that person. Section 215(2)(b) applies if the duty upon the accused arose from s. 215(1)(c) (a person under the charge of the accused if certain circumstances pertain). The failure to fulfil that duty makes out the offence, if the result is that the *life* of the person to whom the duty is owed is *endangered* or it is *likely to cause the health* of that person to be *injured permanently*.

Subsection (3) provides that the offence created may be prosecuted by way of summary conviction procedure or by indictment. In the latter event, the maximum sentence is two years.

Section 215(4)(a) to (c) set out *rebuttable evidentiary presumptions* that evidence of the things specified is *proof* of certain elements of the offence *unless* there is *any evidence to the contrary*. Section 215(4)(d) limits what constitutes a defence to the charge of failing to provide the necessities of life. It provides that it is not a defence that some one else, who is not under a legal duty to do so, provided a spouse or child the necessities of life.

## ANNOTATIONS

**"necessaries of life"** – The words "necessaries of life" mean such necessities as tend to preserve life, and not necessities in their ordinary legal sense and may include medical aid: *R. v. Brooks* (1902), 5 C.C.C. 372 (B.C.S.C.).

Medical treatment tending to preserve life is a necessary of life and if it were established that the parent of a minor child, by denying treatment to the child, accelerated the child's death then he could be convicted of the offence of criminal negligence causing death contrary to s. 220 if the requisite reckless disregard for the child's life and safety was demonstrated: *R. v. Cyrenne, Cyrenne and Cramb* (1981), 62 C.C.C. (2d) 238 (Ont. Dist. Ct.).

**Lawful excuse** – The accused's inability to support his wife may constitute a lawful excuse: *R. v. Yuman* (1910), 17 C.C.C. 474, 22 O.L.R. 500 (C.A.).

It is not a lawful excuse for a parent who, knowing that a child is in need of medical assistance, refused to obtain such assistance because to do so would be contrary to a tenet of his own particular faith. The guarantee to freedom of conscience and religion in s. 2(a) of the Charter of Rights and Freedoms does not affect that issue: *R. v. Tutton and Tutton* (1985), 18 C.C.C. (3d) 328, 44 C.R. (3d) 193, 14 C.R.R. 314 (Ont. C.A.), affd 48 C.C.C. (3d) 1 (S.C.C.) (6:0).

Where an accused is charged with manslaughter in an indictment so worded as to make the offence under this subsection an included offence, it must be made clear to the jury that the issue of lawful excuse and the onus on the accused on that issue is not applicable on the manslaughter charge: *R. v. Tutton and Tutton, supra*.

Placing the burden of proof of lawful excuse upon the accused infringes the presumption of innocence guarantee in s. 11(d) of the Charter and, accordingly, the words "the proof of which lies upon him" are of no force and effect: *R. v. Atikian* (1990), 57 C.C.C. (3d) 293 (Ont. H.C.J.).

**Mens rea** – This offence imposes liability on an objective basis. On a charge contrary to subsec. (2) (a)(ii), the Crown must prove a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the

failure to provide the necessities of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child: *R. v. Naglik*, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335.

In a series of cases, the Supreme Court of Canada had occasion to explore the fault element in cases of so-called “penal negligence” apparently as distinguished from criminal negligence. Failure to provide necessities would be one of these offences. In *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632 (S.C.C.) McLachlin J., writing for a majority of the court, suggested the following approach to proof of such offences. The first question is whether the *actus reus* is established. This requires that the negligence constitute a marked departure from the standards of a reasonable person in all the circumstances of the case. The next question is whether the *mens rea* is established. Normally the *mens rea* for objective foresight of risk of harm is inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. The normal inference that a person who committed a manifestly dangerous act failed to direct their mind to the risk and the need to take care may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. Short of incapacity, personal factors are not relevant whether those factors might indicate, for example, either a lack of experience or a special experience. Also see: *R. v. Naglik*, *supra*.

#### DUTY OF PERSONS UNDERTAKING ACTS DANGEROUS TO LIFE.

**216. Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful act that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing. R.S., c. C-34, s. 198.**

#### CROSS-REFERENCES

Omission to perform the duty imposed by this section may, in some circumstances, amount to criminal negligence as defined in s. 219 and, if conduct results in death or bodily harm, will amount to an offence under ss. 220 and 221 respectively. Criminal negligence causing death is also a form of culpable homicide for the purposes of ss. 222 to 237. Also note s. 217 respecting the duty of persons undertaking acts. Section 45 protects a person from criminal responsibility for performing surgical operations in certain circumstances.

#### SYNOPSIS

This section creates a *legal duty* upon those who undertake *lawful* acts that may endanger the life of another to have and to *use reasonable knowledge, skill and care* in so doing. Section 216 specifically addresses those administering surgical or medical treatment, but also extends to anyone who does any other *lawful act that may endanger the life of another person*. This section explicitly *excludes* those cases in which the act was performed out of *necessity*.

#### ANNOTATIONS

Whether or not the accused, who were acting as midwives at a home birth, were administering medical treatment within the meaning of this section their conduct did constitute “any other lawful act that may endanger the life of another person” and they were therefore under a legal duty to have and use reasonable knowledge, skill and care and were to be held to the standard of a competent childbirth attendant notwithstanding their lack of formal training as midwives: *R. v. Sullivan and Lemay* (1986), 31 C.C.C. (3d) 62, 55 C.R. (3d) 48 (B.C. Co. Ct.). [Appeal to Court of Appeal dismissed on other grounds (1988), 43 C.C.C. (3d) 65, 65 C.R. (3d) 256, 31 B.C.L.R. (2d) 145, further appeal to S.C.C. allowed on other grounds 63 C.C.C. (3d) 97, 3 C.R. (4th) 277, [1991] 1 S.C.R. 489.

This section imposed a legal duty on the accused, who knew he was infected with the AIDS virus, to not donate blood to the Red Cross and breach of this duty may found a

conviction for common nuisance under s. 180: *R. v. Thornton*, [1993] 2 S.C.R. 445, 82 C.C.C. (3d) 530, 21 C.R. (4th) 215 (9:0).

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## **DUTY OF PERSONS UNDERTAKING ACTS.**

**217. Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life. R.S., c. C-34, s. 199.**

### **CROSS-REFERENCES**

Omission to perform the duty imposed by this section may, in some circumstances, amount to criminal negligence as defined in s. 219 and if conduct results in death or bodily harm will amount to an offence under ss. 220 and 221 respectively. Criminal negligence causing death is also a form of culpable homicide for the purposes of ss. 222 to 237.

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## **ABANDONING CHILD.**

**218. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 200.**

### **CROSS-REFERENCES**

The terms "child", "abandon" and "expose" are defined in s. 214. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. The related offence of failing to provide necessities is found in s. 215. Neglecting to obtain assistance in child birth is an offence under s. 242.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

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### **ANNOTATIONS**

While the Crown, to prove this offence, must prove not only that the child was abandoned but that, *inter alia*, its life was likely to be endangered, the offence was made out where the accused abandoned her child in a motor vehicle for an indefinite period of time in an environment which posed a threat to its life due to the cold temperatures and risk of abduction. It was no excuse that the accused intended to return several hours later at a time, when according to expert evidence, the child would still be alive. It is the act of endangering that constitutes the offence: *R. v. Holzer* (1988), 63 C.R. (3d) 301 (Alta. Q.B.).

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## ***Criminal Negligence***

### **CRIMINAL NEGLIGENCE / Definition of "duty".**

**219. (1) Every one is criminally negligent who**

**(a) in doing anything, or**

**(b) in omitting to do anything that it is his duty to do,**

**shows wanton or reckless disregard for the lives or safety of other persons.**

**(2) For the purposes of this section, "duty" means a duty imposed by law. R.S., c. C-34, s. 202.**



## CROSS-REFERENCES

The offences of criminal negligence causing death and causing bodily harm are set out in ss. 220 and 221 respectively. Criminal negligence is also a form of culpable homicide for the purposes of s. 222. Duties imposed under sections of the Criminal Code include the following: s. 33, duty to disperse rioters; s. 79, duty of care re explosives; s. 86, duty of care re firearms; s. 215, duty to provide necessities; s. 216, duty of person undertaking acts dangerous to life; s. 217, duty of persons undertaking acts; s. 263(1) and (2), duty to safeguard opening in ice and excavations.

Related offences where the conduct results only in damage to property or animals are found in Part XI.

## SYNOPSIS

Section 219 defines the term *criminal negligence*.

Criminal negligence can arise from either acts or omissions, if the accused was under a *legal duty* to do the omitted act. If the act or omission shows a *wanton or reckless disregard for the lives or safety of other persons*, this makes out criminal negligence. Despite the reference to “other persons” the offence *need only* result in potential harm to *one* other person.

## ANNOTATIONS

**Meaning of criminal negligence** – The mere breach of a duty imposed by a provincial statute does not *per se* constitute criminal negligence: *R. v. Tüchner* (1961), 131 C.C.C. 64, 29 D.L.R. (2d) 1 (Ont. C.A.) but it is proper for the Judge to refer the jury to the legislation which governs the particular activity in which the accused is engaged: *Leblanc v. The Queen* (1975), 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243 (S.C.C.) (6:3).

Criminal negligence does not require proof of intention or deliberation, indifference being sufficient. Thus, the accused may be convicted on proof of driving amounting to a marked and substantial departure from the standard of a reasonable driver in circumstances where the accused either recognized and ran an obvious and serious risk to the lives and safety of others or, alternatively, gave no thought to that risk: *R. v. Sharp* (1984), 12 C.C.C. (3d) 428, 39 C.R. (3d) 367, 26 M.V.R. 279 (Ont. C.A.).

In two cases *R. v. Waite* (1989), 48 C.C.C. (3d) 1, [1989] 1 S.C.R. 1436, 69 C.R. (3d) 323, and *R. v. Tutton* (1989), 48 C.C.C. (3d) 129, [1989] 1 S.C.R. 1392, 69 C.R. (3d) 289, the Supreme Court considered the *mens rea* of the criminal negligence offence as it applied to acts of commission [*Waite*, operation of a motor vehicle] and omission [*Tutton*, failure of parents to provide medical treatment to a child]. In each case there were three judgments and no clear consensus emerged as to the requisite *mens rea*. On two points, there was agreement as follows: (1) There is no distinction between acts of commission or omission in determining the requisite *mens rea*; (2) It is an error to direct the jury that the Crown must prove elements of deliberateness and wilfulness. The court divided equally however on whether the *mens rea* required was subjective or objective. Three members of the court (McIntyre, Lamer and L’Heureux-Dubé JJ.) were of the view that an objective standard was to be applied. Thus, proof of conduct which reveals a marked and significant departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction. The decision must be made, however, on a consideration of the facts existing at the time and in relation to the accused’s perception of those facts. Thus, an honest and reasonably held belief in the existence of certain facts may be a relevant consideration in assessing the reasonableness of the accused’s conduct. Further, McIntyre J., writing for himself and L’Heureux-Dubé J., adopted the reasons for judgment of Cory J.A. in the Ontario Court of Appeal in *R. v. Waite* (1986), 28 C.C.C. (3d) 326, 52 C.R. (3d) 355, 41 M.V.R. 119. This would appear to represent approval of that court’s principle of fault as it applies to this offence, especially in the driving context. The clearest explanation of this principle may be found in *R. v. Sharp, supra*, where the Court of Appeal held that, while the jury may find the required fault in the nature of the accused’s driving which amounts to a marked and sub-

stantial departure from the standard of a reasonable driver in the circumstances, the accused may be acquitted if there is an explanation which arises from the evidence that would account for the deviant conduct in a manner which would negative the element of fault, such as a cause resulting from circumstances beyond the accused's control, for example, a sudden mechanical malfunction. Lamer J. in his concurring reasons in both cases, while accepting the objective standard, was of the view that, in applying this, a generous allowance must be made for factors which are particular to the accused, such as youth, mental development, education. [*Quaere* whether such a generous allowance applies in the case of licensed activity such as driving.]

Wilson J. writing for herself, Dickson C.J.C. and Le Dain J., while explicitly adopting the fault notion as explained in *R. v. Sharp, supra*, in the motor vehicle context, would also require proof of some minimal blameworthy state of mind described as advertence to the risk or wilful blindness to the risk. In the driving context, however, where risks to lives and safety of others is constant and obvious, the accused's claim that he or she gave no thought to the risk or has simply a negative state of mind would, in most cases, amount to the culpable positive mental state of wilful blindness to the prohibited risk. More generally it was explained [*Tutton, supra*, at p. 154 C.C.C.]:

"Conduct which shows a wanton or reckless disregard for the lives and safety of others will by its nature constitute *prima facie* evidence of the mental element, and in the absence of some evidence that casts doubt on the normal degree of mental awareness, proof of the act and reference to what a reasonable person in the circumstances must have realized will lead to a conclusion that the accused was aware of the risk or wilfully blind to the risk."

In the subsequent cases of *R. v. Nelson* (1990), 54 C.C.C. (3d) 285, 75 C.R. (3d) 70, 21 M.V.R. (2d) 245 (Ont. C.A.), and *R. v. Cabral* (1990), 54 C.C.C. (3d) 317, 21 M.V.R. (2d) 252 (Ont. C.A.), held that, until the Supreme Court of Canada holds otherwise, it is still open to that court to follow its decisions in *R. v. Sharp, supra*, and in *R. v. Waite* (1986), 28 C.C.C. (3d) 326, and apply the objective test as enunciated in those decisions. Further, the court noted that in the context of a charge of criminal negligence involving the operation of a motor vehicle, in most cases, as a practical matter, there will be very little difference between the limited subjective approach of Wilson J. and the objective approach in *R. v. Sharp, supra*, and in *R. v. Waite* (1986), 28 C.C.C. (3d) 326.

In *R. v. Anderson* (1990), 53 C.C.C. (3d) 481, [1990] 1 S.C.R. 265, 75 C.R. (3d) 50 (7:0), the court returned to the question of criminal negligence in the context of a driving case. Sopinka J. for the court, while not attempting to resolve the objective/subjective issue, pointed out that fundamental to either approach is a finding that the conduct of the accused constituted a marked departure from the norm. He also pointed out that, as the risk created increases, the objective and subjective approaches begin to converge, since the easier it is to conclude that both a reasonably prudent person would have foreseen the consequences [the objective approach] and that the particular accused must have foreseen the consequences [the subjective approach]. In this case, it was unnecessary to resolve the issue because the trial judge had a reasonable doubt whether the conduct of the accused in driving in an impaired condition and failing to stop at a red light was a marked departure from the norm. That being the case, a conclusion that the accused had a wanton or reckless disregard for the lives and safety of others could not be drawn on either a subjective or objective basis.

In determining whether the conduct of the accused, a 16-year-old boy, constituted criminal negligence the standard to be used is that of a sane and sober 16-year-old. The question then was whether or not the conduct amounted to a marked and substantial departure from that standard. In this case the accused lightly pushed his friend at the top of a staircase who then fell to his death. While such conduct constituted negligence it involved only minimal force and momentary inadvertence and was not sufficient to amount to a marked and substantial departure from the standard of a reasonable person: *R. v. Barron* (1985), 23 C.C.C. (3d) 544, 48 C.R. (2d) 334 (Ont. C.A.).

Evidence that the accused suffered from mental retardation was relevant to determining whether he possessed the capacity to understand and appreciate the risks entailed by his conduct and could therefore be held to be criminally negligent: *R. v. Ubhi* (1994), 27 C.R. (4th) 332, 1 M.J.R. (3d) 161, 65 W.A.C. 248 (B.C.C.A.), leave to appeal to S.C.C. refused 31 C.R. (4th) 405, 5 M.V.R. (3d) 249n, 177 N.R. 79n.

A “duty imposed by law” may be a duty arising by virtue of either statute or common law: *R. v. Coyne* (1958), 124 C.C.C. 176, 31 C.R. 335 (N.B. S.C. App. Div.).

A parent is under a legal duty at common law to take reasonable steps to protect his child from illegal violence used by the other parent towards the child which the parent foresees or ought to foresee. Such a parent is criminally liable for failing to discharge that duty in circumstances which show a wanton or reckless disregard for the child’s safety, where the failure to discharge the legal duty has contributed to the death of the child or resulted in bodily harm to the child: *R. v. Popen* (1981), 60 C.C.C. (2d) 232 (Ont. C.A.).

**Constitutional considerations** – Section 7 of the Charter of Rights and Freedoms does not require proof of subjective foresight for a conviction for criminal negligence: *R. v. Nelson*, *supra*.

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### CAUSING DEATH BY CRIMINAL NEGLIGENCE.

**220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable**

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life. R.S., c. C-34, s. 203; 1995, c. 39, s. 141.

### ANNOTATIONS

The word “person” should be interpreted in the same manner as “human being” as defined for the homicide provisions by s. 223. Thus for this section to apply the child must have been completely extruded from its mother’s body and be born alive. Where the child dies while it is in the birth canal it is not at that time a “person” and the offence under this section could not be committed: *R. v. Sullivan* (1991), 63 C.C.C. (3d) 97, 3 C.R. (4th) 277, 122 N.R. 166 (S.C.C.).

Evidence of the type of driving by the accused immediately after the accident is admissible as part of the *res gestae* and also for consideration on the issue of his wanton and reckless disregard prior to and at the time of the accident: *Balcerczyk v. The Queen* (1956), 117 C.C.C. 71, [1957] 3 S.C.R. 20 (S.C.C.) (4:1).

For conviction the Crown must prove the breaching of an obligation imposed by law with a wanton or reckless disregard for the lives or safety of others and, to assist in the proof of *mens rea*, may lead evidence of previous similar conduct: *Leblanc v. The Queen* (1975), 29 C.C.C. (2d) 97, 68 D.L.R. (3d) 243 (S.C.C.) (6:3).

The element of causation is satisfied if the evidence shows that the criminally negligent conduct of the accused was at least a contributing cause of death outside the *de minimis* range. It is misdirection to instruct the jury that the conduct must be shown to be a substantial cause. Further, foreseeability of the risk of death is not a factor which the jury should consider on the question of whether the accused’s conduct amounts to criminal negligence: *R. v. Pinske* (1988), 6 M.V.R. (2d) 19, 30 B.C.L.R. (2d) 114 (C.A.), *affd* 100 N.R. 399 (S.C.C.) (7:0).

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### CAUSING BODILY HARM BY CRIMINAL NEGLIGENCE.

**221. Every one who by criminal negligence causes bodily harm to another person is**



**guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 204.**

#### CROSS-REFERENCES

Criminal negligence is defined in s. 219. Bodily harm is defined in s. 2.

As to included offences, see s. 662(5).

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. An accused convicted of this offence may, pursuant to s. 259, be ordered prohibited from operating a motor vehicle, vessel, aircraft or railway equipment for any period not exceeding ten years where the offence under this section was committed by means of a motor vehicle, vessel, aircraft or railway equipment. The procedure respecting the making of that order of prohibition is found in s. 260. It may be that, in some circumstances, the accused will also be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1). With respect to causation see notes under ss. 220, 249 and 255.

## *Homicide*

**HOMICIDE / Kinds of homicide / Non culpable homicide / Culpable homicide / Idem / Exception.**

**222. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.**

**(2) Homicide is culpable or not culpable.**

**(3) Homicide that is not culpable is not an offence.**

**(4) Culpable homicide is murder or manslaughter or infanticide.**

**(5) A person commits culpable homicide when he causes the death of a human being,**  
**(a) by means of an unlawful act,**  
**(b) by criminal negligence,**  
**(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death, or**  
**(d) by wilfully frightening that human being, in the case of a child or sick person.**

**(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law. R.S., c. C-34, s. 205.**

#### CROSS-REFERENCES

The scheme of the homicide provisions is that this section defines culpable homicide and then other provisions determine whether culpable homicide is murder, manslaughter or infanticide. The distinction is largely, although not exclusively, dependent on the intent accompanying the conduct which resulted in death. Murder is defined in ss. 229 and 230. The punishment for murder is set out in s. 235. Infanticide is defined in s. 233. The punishment for infanticide is set out in s. 237. Manslaughter is defined in ss. 232, 234 and 263. The punishment for manslaughter is set out in s. 236.

As to causation, see ss. 223(2) and 224 to 227. As to definition of "human being" see s. 233.

Criminal negligence is defined in s. 219 and criminal negligence causing death is also a separate offence under s. 220.

## SYNOPSIS

This section spells out *what constitutes homicide* and sets out the *distinction between culpable and non-culpable homicide*.

Section 222(1) states that *homicide* is committed when a person *causes the death*, directly or indirectly, of another person. Homicide may be either culpable or not, and non-culpable homicide is not an offence. Subsection (6) provides a clarification by excluding from the ambit of homicide procuring the death of another by false evidence which leads to that person's conviction and the imposition of the death penalty. The only Canadian statute which retains the death penalty is the National Defence Act.

Subsection (4) exhaustively *defines culpable homicide as being murder, manslaughter or infanticide*. Subsection (5) deals with the ways in which culpable homicide may be committed such as by an unlawful act (s. 222(5)(a)) or by criminal negligence (s. 222(5)(b)).

## ANNOTATIONS

**Causation** – Where an issue of causation arises the jury in deciding the question is not limited to considering the testimony of expert witnesses but may also consider the evidence of lay witnesses who witnessed the assault alleged by the Crown to have been the cause of death. Causation as a question of fact is for the jury not the experts. Further, where it is established that the assault by the accused was at least a contributing cause of death, outside the *de minimis* range, then causation as a matter of law has been established. The accused must take his victim as he finds him and it is no defence to a charge of manslaughter that death was unexpected and the physical reactions of the victim to the assault unforeseen or that death ordinarily would not result from the unlawful act: *Smithers v. The Queen* (1977), 34 C.C.C. (2d) 427, 75 D.L.R. (3d) 321, [1978] 1 S.C.R. 506 (9:0).

The test for the time of death is whether any of the victim's vital organs including the heart continue to operate. The criminal law does not recognize brain death or cessation of brain function as the legal standard of determining when death occurs: *R. v. Green* (1988), 43 C.C.C. (3d) 413 (B.C.S.C.).

Where the entire episode involving a series of unlawful acts is one continuing transaction then it is not open to the accused to rely upon the defence of honest but mistaken belief on the basis that at the time of the final act which actually resulted in the death of the victim the accused believed the victim to be already dead: *R. v. Frizzell* (1993), 81 C.C.C. (3d) 463, 22 C.R. (4th) 400, 47 W.A.C. 122 (B.C.C.A.).

The common law definition of causation requiring proof that the unlawful act was at least a contributing cause of death outside the *de minimus* range complies with the principles of fundamental justice as guaranteed by s. 7 of the Charter. When combined with the requisite fault element for manslaughter by an unlawful act, being commission of an unlawful dangerous act, in circumstances where a reasonable person would have foreseen the risk of bodily harm which is neither trivial nor transitory, there is no risk that a person who is morally innocent will be convicted for consequences that should not be attributed to him: *R. v. Cribbin* (1994), 89 C.C.C. (3d) 67, 28 C.R. (4th) 137, 17 O.R. (3d) 548 (C.A.).

**Homicide by "unlawful act"** – The *mens rea* of unlawful act manslaughter under subsec. (5)(a) is, in addition to the *mens rea* of the underlying offence, objective foreseeability of the risk of bodily harm which is neither trivial nor transitory: *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632 (S.C.C.).

The unlawful act must also be objectively dangerous, that is, likely to injure another person: *R. v. DeSousa* (1992), [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66; *R. v. Creighton, supra*.

Where the defence of self-defence is made out then the act done in self-defence is not unlawful, the homicide is not culpable and the accused must be acquitted: *R. v. Baker* (1988), 45 C.C.C. (3d) 368 (B.C.C.A.).

**Homicide by criminal negligence** – See notes under ss. 219 and 220.

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**WHEN CHILD BECOMES HUMAN BEING / Killing child.**

**223. (1)** A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother whether or not

- (a) it has breathed,
- (b) it has an independent circulation, or
- (c) the navel string is severed.

**(2)** A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being. R.S., c. C-34, s. 206.

**CROSS-REFERENCES**

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. The effect of this section is that killing of a child who has become a human being can amount to homicide or also found the offence of criminal negligence causing death under s. 220. Where the child's death is caused in the act of birth before it becomes a human being then the accused commits the offence under s. 238. Neglecting to obtain assistance in child-birth is an offence under s. 242 and concealing the body of a child an offence under s. 243. Other causation provisions are found in ss. 224 to 228.

**SYNOPSIS**

This section establishes the point at which a *child becomes a human being* for the purpose of determining if a homicide has been committed.

Section 223(1) defines that a child is a human being if it has completely proceeded from its mother in a *living state*, even if it has not done one of the things listed in s. 223(1)(a) to (c). Subsection (2) provides that homicide is committed if a child dies after meeting the definition of human being, in subsec. (1) even if the cause of death was injuries sustained by the child before or during its birth.

**ANNOTATIONS**

A person who attacks an obviously pregnant woman with intent to harm her is guilty of at least manslaughter if the foetus being subsequently born alive dies from injury or disease caused by the attack: *R. v. Prince* (1988), 44 C.C.C. (3d) 510, [1989] 1 W.W.R. 80 (Man. C.A.).

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**DEATH THAT MIGHT HAVE BEEN PREVENTED.**

**224.** Where a person, by an act or omission, does any thing that results in the death of a human being, he causes the death of that human being notwithstanding that death from that cause might have been prevented by resorting to proper means. R.S., c. C-34, s. 207.

**CROSS-REFERENCES**

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. Other causation provisions are found in ss. 223(2) and 225 to 228. "Human being" is defined in s. 223(1). This provision would also apply to the offences of criminal negligence causing death under s. 220, dangerous driving causing death under s. 249(4) and impaired operation causing death under s. 255(3).

**SYNOPSIS**

Section 224 deals with the issue of a *death which might have been prevented*, which arises as a question of causation in relation to homicide cases.

This section provides that a person commits homicide if that person does anything



which results in the death of another person, even if proper treatment could have prevented death from that cause. The person may have caused the death by act or omission. This satisfies the first requirement of all homicides: proof that the person caused the death of another person (see s. 222(1)).

## DEATH FROM TREATMENT OF INJURY.

**225. Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith. R.S., c. C-34, s. 208.**

## CROSS-REFERENCES

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. Other causation provisions are found in ss. 223(2), 224 and 226 to 228. “Human being” is defined in s. 223(1). This provision would also apply to the offences of criminal negligence causing death under s. 220, dangerous driving causing death under s. 249(4) and impaired operation causing death under s. 255(3). The term “bodily injury” is not defined in this section. Some assistance may, however, be obtained from the definition of “bodily harm” in s. 267(2).

## SYNOPSIS

Section 225 deals with one aspect of the issue of causation in homicide cases, namely, the effect of the *immediate cause of death being treatment* applied after the accused caused a *dangerous injury* to the deceased. The section provides that, if the *treatment was given in good faith*, it is irrelevant whether it was proper or not. The key is whether the *injury, caused by the accused* to the deceased, was of a *dangerous nature and that death resulted from it*. Thus, causation will be supplied by this section so long as the act of the accused causing injury was an operative factor, even if it was only one of the causes of the death.

## ANNOTATIONS

In *R. v. Kitching And Adams* (1976), 32 C.C.C. (2d) 159, [1976] 6 W.W.R. 697 (Man. C.A.) the defence raised was that the cause of death was the act of doctors who, having detected no sign of brain activity, removed the deceased’s kidneys and then disconnected the deceased from the mechanical devices which were used to keep his heart and other organs functioning. Matas, J.A., for four of the Judges, held that the jury had been adequately instructed on the effects of ss. 207 to 209 [now ss. 224 to 226]. O’Sullivan, J.A., in a concurring opinion pointed out that those sections extend liability in certain cases and do not affect the principle that it is not necessary to prove that a criminal is the sole cause of his crime and that even if it could be shown that the actions of the doctors constituted an operative cause of death, still, that would not exonerate the accused unless the evidence left a reasonable doubt that the accused’s actions also constituted an operative cause of the deceased’s death.

A similar result was reached in *R. v. Malcherek*; *R. v. Steel* (1981), 73 Cr. App. R. 173 (C.A.).

In *R. v. Torbiak and Gillis* (1978), 40 C.C.C. (2d) 193 (Ont. C.A.) the Court held that there could be no doubt that the cause of death in law was a gunshot wound to the groin inflicted by one of the accused although the doctors, because of the elderly victim’s age decided to follow a conservative course of non-interventional treatment following the shooting until three weeks later the victim’s condition deteriorated and he died on the operating table.

## ACCELERATION OF DEATH.

**226. Where a person causes to a human being a bodily injury that results in death, he**

causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause. R.S., c. C-34, s. 209.

#### CROSS-REFERENCES

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. Other causation provisions are found in ss. 223(2), 224, 225, 227 and 228. "Human being" is defined in s. 223(1). This provision would also apply to the offences of criminal negligence causing death under s. 220, dangerous driving causing death under s. 249(4) and impaired operation causing death under s. 255(3). The term "bodily injury" is not defined in this section. Some assistance may, however, be obtained from the definition of "bodily harm" in s. 267(2).

#### SYNOPSIS

Section 226 deals with the legal effect of actions which *accelerate the death* of another person.

This section states that when a person causes bodily injury to another person which results in death, that person causes the death of the deceased, even if the only effect of the injury was to hasten the unavoidable death of that person.

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#### DEATH WITHIN YEAR AND A DAY.

**227. No person commits culpable homicide or the offence of causing the death of a person by criminal negligence or by means of the commission of an offence under subsection 249(4) or subsection 257(3) unless the death occurs within one year and one day from the time of the occurrence of the last event by means of which the person caused or contributed to the cause of death. R.S., c. C-34, s. 210; R.S.C. 1985, c. 27 (1st Supp.), s. 34.**

#### CROSS-REFERENCES

As to determination of the period of "within one year and one day" see s. 27(5) of the Interpretation Act, R.S.C. 1985, c.s. I-21. The term "year" is defined in s. 37 of the same Act.

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. Other causation provisions are found in ss. 223(2) and 224 to 226. "Human being" is defined in s. 223(1). The offence of criminal negligence causing death is found in s. 220. The reference to s. 249(4) is to dangerous driving causing death. The reference to "subsection 257(3)" is an obvious error and was intended to refer to the offence of impaired operation causing death under s. 255(3).

#### SYNOPSIS

Section 227 codifies the common law which sets the *outer time limit* between the acts of the accused and the death of the victim for the purpose of establishing criminal liability.

The rule is that the death must occur *within a year and one day* of the accused's acts. The section lists a number of provisions to which this rule applies, including criminal negligence, culpable homicide and dangerous driving.

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#### KILLING BY INFLUENCE ON THE MIND.

**228. No person commits culpable homicide where he causes the death of a human being**

(a) by any influence on the mind alone, or

(b) by any disorder or disease resulting from influence on the mind alone, but this section does not apply where a person causes the death of a child or sick person by wilfully frightening him. R.S., c. C-34, s. 211.

## CROSS-REFERENCES

Culpable homicide is defined in s. 222 and see cross-references under that section respecting murder, manslaughter and infanticide. Other causation provisions are found in ss. 223(2), 224, 225, 227 and 228. “Human being” is defined in s. 223(1). The proviso in this section respecting death caused to a child or sick person relates back to s. 222(5)(d). Similarly, it would seem that, if the conduct fell within s. 222(5)(c) it would not likely come within the term “by any influence on the *mind alone*” in para. (a).

## SYNOPSIS

This section excludes certain acts, which can be referred to as *killing by influence of the mind*, from what would otherwise constitute culpable homicide.

The acts excluded are causing the death of a human being as means of influence of the mind or as a consequence of any disorder or disease resulting from such influence. However, it does not exclude such acts if the person *wilfully frightens* a sick person or child and thereby causes the death. This exception is a corollary of s. 222(5)(d) which makes such conduct culpable homicide.

## ANNOTATIONS

This section was applied and the accused’s conviction for manslaughter quashed where the evidence indicated that the deceased died from acute heart failure precipitated by the fear and emotional stress of a break-in by the accused and an ensuing struggle. There was no evidence that either the physical exertion of the struggle or an assault during the struggle was a contributing factor to the victim’s death. The victim did have a pre-existing heart condition: *R. v. Powder* (1981), 29 C.R. (3d) 183 (Alta. C.A.), leave to appeal to S.C.C. refused *loc. cit.*

## Murder, Manslaughter and Infanticide

## MURDER.

## 229. Culpable homicide is murder

- (a) where the person who causes the death of a human being
  - (i) means to cause his death, or
  - (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not;
- (b) where a person, meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
- (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. R.S., c. C-34, s. 212.

## CROSS-REFERENCES

Culpable homicide is defined in s. 222. Culpable homicide is also defined as murder in the circumstances set out in s. 230. Murder is classified as first or second degree murder under s. 231. The punishment for murder is, pursuant to s. 235, a minimum of life imprisonment. Eligibility for parole for a person convicted of murder is determined by ss. 742 to 747. [Respecting parole eligibility, see further cross-references under s. 235.] A person convicted of murder will also be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of



s. 100(1). As to included offences, see s. 662. For special provision respecting the plea of *autrefois*, see s. 610(2) to (4).

Pursuant to s. 582, no person may be convicted of first degree murder unless he is specifically charged with that offence in the indictment. Under s. 589, no count that charges an offence other than murder shall be joined in an indictment to a count that charges murder.

The offence of attempted murder is set out in s. 239, accessory after the fact to murder in s. 240 and conspiracy to commit murder in s. 465(1)(a).

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5), and falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 [official premises, etc.].

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

Section 17 limits the availability of the statutory defence of compulsion by threats. As to other defences see: s. 16, insanity; s. 25, use of force in enforcement of law; s. 27, use of force to prevent commission of certain offences; ss. 34 to 37, self defence and defence of person under accused's protection; ss. 38 to 41, defence of property; s. 44, use of force by master of vessel; s. 232, provocation. As to notes respecting the intoxication and necessity defences, see s. 8.

Trial of murder is by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence.

## SYNOPSIS

This section defines *culpable homicide* as murder in three circumstances.

Section 229(a)(i) provides the simplest definition, namely intentionally causing the death of a human being by s. 229(a)(ii), death caused by a person, who *means to cause bodily harm* that he *knows is likely to cause death* and is reckless whether death ensues or not, is also culpable homicide. The key elements of the mental element in this offence is the intention to cause the requisite degree of bodily harm, coupled with the necessary recklessness as to its effect.

Section 229(b) deals with the situation in which an *unintended victim is killed* as a result of accused's acts. The requisite *mental element described in s. 229(a)* must be proven in this paragraph, except that it is satisfied by proof *in relation to the intended victim*. If the mental element as well as the fact that the accused caused the death of the unintended victim are proven, then the fact that the death of that person is caused by accident or mistake is irrelevant and the acts will still render the accused guilty of culpable homicide. The paragraph specifically states that it is culpable homicide, even if the accused did not intend to cause death or inflict any bodily harm upon the person who was killed.

Section 229(c) deals with homicides which occur while a person commits another unlawful object. If a person does anything for an *unlawful object* that he *knows or ought to know is likely to cause death* and death results from this act, it is culpable homicide. The fact that the accused wanted to carry out the purpose without any death or bodily injury to anyone is legally irrelevant for the purposes of this paragraph. The unlawful object desired by the accused must be some additional object beyond the very act which resulted in the death.

## ANNOTATIONS

**Proof of intent** – There is no such thing as a presumption of law that a person intends the natural consequences of his acts. At most it is an inference of fact that *may* be drawn: *R. v. Giannotti* (1956), 115 C.C.C. 203, 23 C.R. 259 (Ont. C.A.).

Notwithstanding that the accused's primary defence is self-defence where there is also

evidence of alcohol consumption and provocation the jury should be directed to consider the cumulative effect of that evidence in determining whether the requisite intent is made out: *R. v. Desveaux* (1986), 26 C.C.C. (3d) 88, 51 C.R. (3d) 173 (Ont. C.A.); *R. v. Clow* (1985), 44 C.R. (3d) 228 (Ont. C.A.). Similarly, *R. v. Nealy* (1986), 30 C.C.C. (3d) 460, 54 C.R. (3d) 158 (Ont. C.A.), where there was evidence of alcohol consumption, provocation, anger and fear.

Where the trial judge has clearly directed the jury as to the requirement of proof of intent there is no requirement for a “residual direction” as to the effect of self-defence and provocation. The judge could, however, give such a direction having regard to the equities and needs of a particular case: *R. v. Ferber* (1987), 36 C.C.C. (3d) 157 (Alta. C.A.), leave to appeal to S.C.C. refused *loc. cit.* To a similar effect, see *R. v. Smith* (1990), 53 C.C.C. (3d) 97, 94 N.S.R. (2d) 361 (C.A.).

Paragraph (a)(ii) represents only a slight relaxation of the *mens rea* for murder and requires proof of a subjective intent to cause bodily harm and subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. Further, this *mens rea* must be concurrent with the impugned act. However, it is not always necessary for the guilty act and the intent to be completely concurrent or that the requisite *mens rea* persist throughout the entire commission of the wrongful act. If death results from a series of wrongful acts that are part of a single transaction, then it must be established that the requisite intent coincided at some point with the wrongful acts: *R. v. Cooper* (1993), 78 C.C.C. (3d) 289, [1993] 1 S.C.R. 146, 18 C.R. (4th) 1.

In the case of a genuine suicide pact, the surviving party should have a defence to murder. This defence will only be available when the parties are in such a mental state that they have formed a common and irrevocable intent to commit suicide together simultaneously and by the same act where the risk of death is identical and equal for both: *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143, 24 C.R. (4th) 369, [1993] R.J.Q. 1716 (C.A.).

**Intoxication defence** [*Also see notes under s. 8*] – The rules in *D.P.P. v. Beard* (1920), 14 Cr. App. R. 159 (H.L.) violate ss. 7 and 11(d) of the Charter because they limit the defence of intoxication to the capacity of an accused to form the specific intent. Before a trial judge charges a jury on the issue of intoxication, the judge must be satisfied that the effect of the intoxication was such that its effect might have impaired the accused’s foresight of consequences sufficient to raise a reasonable doubt. Once this threshold test is met, the judge must make clear to the jury that the issue is whether the Crown has satisfied them beyond a reasonable doubt that the accused had the requisite intent. In most circumstances, a one-step charge which omits any reference to “capacity” or “capability” and focuses the jury on the question of “intent in fact” is appropriate. Consequently, the jury must consider whether the accused possessed the requisite specific intent having regard to the evidence of intoxication, along with all of the other evidence in the case. In certain cases, however, in light of the facts of the case and/or the admission of expert evidence, a two-step charge may be appropriate. In this case, the jury is charged both with regard to the capacity to form the requisite intent and with regard to the need to determine in all of the circumstances whether the requisite intent was in fact formed by the accused. In these circumstances, the jury might be instructed that their overall duty is to determine whether or not the accused possessed the requisite intent for the crime. If, on the basis of the expert evidence, the jury is left with a reasonable doubt as to whether, as a result of the consumption of the alcohol, the accused had the capacity to form the requisite intent then that ends the inquiry and the accused must be acquitted of the offence and consideration must then be given to any included lesser offences. If the jury is not left with a reasonable doubt as a result of the expert evidence as to the capacity to form the intent then they must consider and take into account all the surrounding circumstances and the evidence pertaining to those circumstances in determining whether or not the accused possessed the requisite intent for the offence. Furthermore, the presumption that a person intends the natural consequences of their act refers only to a common-sense and logical inference that the jury can but is not compelled to

make. Where there is some evidence of intoxication, the trial judge must link the instructions on intoxication with the instruction on the common-sense inference so that the jury is specifically instructed that evidence of intoxication can rebut the inference: *R. v. Robinson* (unreported, March 21, 1996, S.C.C.) [096/085/063-70 pp.]. See also *R. v. McMaster* (unreported, March 21, 1996, S.C.C.) [096/085/062-26 pp.].

It is essential in a case where the Crown relies upon the intent described in para. (a)(ii) that the jury receive an explanation of the essential difference between that intent and the intent in para. (a)(i), namely, that the former requires foresight of the likely consequences of the acts which cause bodily harm combined with recklessness as to that consequence: *R. v. Korzepa* (1991), 64 C.C.C. (3d) 489 (B.C.C.A.).

It was held in *R. v. Young* (1981), 59 C.C.C. (2d) 305, 20 C.R. (3d) 325, [1981] 2 S.C.R. 39 (5:4), that the fact that the trial Judge related the defence of drunkenness to the accused's "capacity" to form the requisite intent did not constitute grounds for interfering with the accused's conviction for murder. Further, where the only defence relied upon was drunkenness and the accused's acts were such as, in the normal course of events, to give rise to a probability of serious injury that would likely cause death, then in the absence of any indication that the accused lacked the normal intent which accompanies such acts the inference to be drawn from the facts, absent drunkenness, was that the accused intended to cause bodily harm which he knew was likely to cause death and was reckless as to whether death ensued or not. It did not constitute fatal non-direction for the trial Judge not to direct the jury that manslaughter was an available verdict if apart from drunkenness the jury had a reasonable doubt as to the accused's intent.

A psychiatrist may give opinion evidence that an accused lacked capacity to form the intent required for murder, provided that there is a proper basis for such opinion. Thus, the psychiatrist may not express an opinion that the accused as a normal person did not have the capacity to form the required intent, based on his conclusion that the personality of the accused is such that he could not have had the intent requisite for murder in committing a crime of such brutality as was involved in the particular case. Such an opinion does not involve the application of knowledge within the expertise of the psychiatrist. On the other hand, an opinion that, for example, the accused had an organic amnesia as the result of the consumption of alcohol is within the expertise of a psychiatrist: *R. v. Gowland* (1978), 45 C.C.C. (2d) 303 (Ont. C.A.).

**Liability of party** – The accused's liability as a party to a killing cannot be determined simply by application of a principle that the accused was party to some single ongoing transaction. In the case of an accused who aids or abets in the killing of another, the requisite intent that the aider or abettor must have to warrant conviction for murder must be the same as that of the principal offender. The aider or abettor must intend that he or the perpetrator cause bodily harm of a kind likely to result in death and be reckless whether death ensues or not. If the intent of the aiding party is insufficient to support a conviction for murder, then the party may still be convicted of manslaughter if the unlawful act which was aided or abetted is one he knows is likely to cause some harm short of death: *R. v. Kirkness* (1990), 60 C.C.C. (3d) 97, 1 C.R. (4th) 91, 116 N.R. 81 (S.C.C.) (5:2).

**Transferred intent [para. (b)]** – Even where the provisions of this paragraph apply the Crown must prove a concurrence of *mens rea* and *actus reus*; that at the time of the act, which killed the deceased, the accused had the specified intent with respect to the proposed victim: *R. v. Droste* (1979), 49 C.C.C. (2d) 52, 18 C.R. (3d) 64 (Ont. C.A.).

An accused's intention to kill himself is sufficient to trigger the operation of this paragraph. Thus, an accused, who while attempting to kill himself accidentally kills another, may be convicted of murder: *R. v. Brown* (1983), 4 C.C.C. (3d) 571 (Ont. H.C.J.).

**Homicide in course of effecting unlawful purpose [para. (c)]** – Liability for murder cannot be based on any *mens rea* less than subjective foresight of death and, accordingly, that part of para. (c) allowing for a conviction upon proof that the accused ought to have



known that death was likely to result is unconstitutional: *R. v. Martineau* (1990), 58 C.C.C. (3d) 353, 79 C.R. (3d) 129, [1990] 2 S.C.R. 633 (5:2).

## MURDER IN COMMISSION OF OFFENCES.

230. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 75 (piratical acts), 76 (hijacking an aircraft), 144 or subsection 145(1) or sections 146 to 148 (escape or rescue from prison or lawful custody), section 270 (assaulting a peace officer), section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), 273 (aggravated sexual assault), 279 (kidnapping and forcible confinement), 279.1 (hostage taking), 343 (robbery), 348 (breaking and entering) or 433 or 434 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if

- (a) he means to cause bodily harm for the purpose of
  - (i) facilitating the commission of the offence, or
  - (ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm;
- (b) he administers a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensues therefrom; or
- (c) he wilfully stops, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensues therefrom; R.S., c. C-34, s. 213; 1974-75-76, c. 93, s. 13, c. 105, s. 29; 1980-81-82-83, c. 125, s. 15; R.S.C. 1985, c. 27 (1st Supp.), s. 40(2); 1991, c. 4, s. 1.
- (d) [*Repealed*. 1991, c. 4, s. 1.]

## ANNOTATIONS

**Constitutional considerations** – In two cases, *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 68 Nfld. & P.E.I.R., 81 N.R. 115, 32 C.R.R. 18, and *R. v. Martineau* (1990), 58 C.C.C. (3d) 353, [1990] 2 S.C.R. 633, 79 C.R. (3d) 129, the Supreme Court has considered the constitutionality of the provisions of this section. In the latter case, a majority of the court held that liability for murder cannot be based on any *mens rea* less than subjective foresight of death and that, accordingly, all of this section is unconstitutional.

In the subsequent case of *R. v. Siu* (1991), 66 C.C.C. (3d) 449 (S.C.C.) the court confirmed the scope of its earlier decisions and, in particular, held that para. (c) is of no force and effect.

**CLASSIFICATION OF MURDER** / Planned and deliberate murder / Contracted murder / Murder of peace officer, etc. / Hijacking, sexual assault or kidnapping / Second degree murder.

231. (1) Murder is first degree murder or second degree murder.

(2) Murder is first degree murder when it is planned and deliberate.

(3) Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.

(4) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the victim is

- (a) a police officer, police constable, constable, sheriff, deputy sheriff, sheriff's

officer or other person employed for the preservation and maintenance of the public peace, acting in the course of his duties;

- (b) a warden, deputy warden, instructor, keeper, jailer, guard or other officer or a permanent employee of a prison, acting in the course of his duties; or
- (c) a person working in a prison with the permission of the prison authorities and acting in the course of his work therein.

(5) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder in respect of a person when the death is caused by that person while committing or attempting to commit an offence under one of the following sections:

- (a) section 76 (hijacking an aircraft);
- (b) section 271 (sexual assault);
- (c) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (d) section 273 (aggravated sexual assault);
- (e) section 279 (kidnapping and forcible confinement); or
- (f) section 279.1 (hostage taking).

(6) [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 35.]

(7) All murder that is not first degree murder is second degree murder. R.S., c. C-34, s. 214; R.S. c. C-35, s. 4; 1973-74, c. 38, s. 2; 1974-75-76, c. 105, s. 4; 1980-81-82-83, c. 125, s. 16; R.S.C. 1985, c. 27 (1st Supp.), ss. 7(2)(b), 35, 40(2).

#### CROSS-REFERENCES

Note that s. 3 provides that the descriptions in parenthesis after the section number are inserted for convenience of reference only and are no part of the provision.

Murder is defined in ss. 229 and 230. The term "prison" is defined in s. 2. The punishment for murder is, pursuant to s. 235, a minimum of life imprisonment. Eligibility for parole for a person convicted of murder is determined by ss. 742 to 747. [Respecting parole eligibility, see further cross-references under s. 235.] However, note that under s. 742(a.1), a person convicted of second degree murder must be sentenced to life imprisonment without eligibility for parole for 25 years where he has previously been convicted of murder, however described. A person convicted of murder will also be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1). As to included offences, see s. 662. With respect to other notes concerning procedure and evidence, see CROSS-REFERENCES under ss. 229 and 230.

#### SYNOPSIS

This section *classifies* convictions for *murder* into first and second degree murder for the purpose of setting a parole eligibility date.

The effect of subsecs. (1) and (7) is that a murder which does not come within subsections (2) to (5) is second degree murder.

Subsection (2) states that murder is *first degree* murder when it is *planned and deliberate*. Subsection (3) deems conduct described in the subsection, which may be generally referred to as *contract killings*, to be planned and deliberate, and therefore, by definition, first degree murder.

The following two subsections deem murders of specified victims (subsec. (4)) or while committing or attempting to commit specified offences (subsec. (5)) to be first degree murder. Under subsec. (5), only the principal to the offence is guilty of first degree murder. The phrase "while committing" only requires proof that the underlying offence and the death were part of the same transaction, not that they occurred at the same moment.

#### ANNOTATIONS

**Subsec. (2) [Planning and Deliberation] / Meaning of planning and deliberation –**

This subsection brings back the concept of “planned and deliberate” which was formerly part of the definition of capital murder. Some of the following cases were decided under the former capital murder sections.

The word “deliberate” means “considered, not impulsive” and as used in the subsection cannot have simply the meaning “intentional” because it is only if the accused’s act was intentional that he can be guilty of murder. The subsection is creating an additional element. Psychiatric evidence that at the critical moment the accused was suffering from a depressive psychosis resulting in impairment of his ability to decide even inconsequential things would have a direct bearing on the issue of whether the act was deliberate and the trial Judge’s failure to adequately deal with this evidence in his charge to the jury necessitated a new trial: *R. v. More*, [1963] 3 C.C.C. 289, 41 C.R. 98 (5:2) (S.C.C.).

In *R. v. Mitchell*, [1965] 1 C.C.C. 155, 43 C.R. 391 (S.C.C.) the Court was unanimous (7:0) on the manner in which a trial Judge should instruct a jury to determine whether a murder, which they have found to have been committed by the accused, was “planned and deliberate”. After referring to *R. v. More*, *supra*, and *R. v. McMartin*, [1965] 1 C.C.C. 142, [1964] S.C.R. 484, 43 C.R. 403, Spence, J., wrote at p. 162 C.C.C., p. 393 C.R.:

I am of the opinion that the judgments in these two cases have as their *ratio decidendi* the principle that in determining whether the accused committed the crime of capital murder in that it was “planned and deliberate on the part of such person” the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused’s actions but of his condition, his state of mind as affected by either real or imagined insults and provoking actions of the victim and by the accused’s consumption of alcohol.

His Lordship’s judgment continued on to hold that:

- (a) the elements of planning and deliberation are separate and must both be found for capital murder;
- (b) the jury must first be instructed as to intent, which includes the question of drunkenness under the doctrine in *D.P.P. v. Beard*, [1920] A.C. 479, to commit murder and the ameliorating provision as to provocation reducing it to manslaughter and told that if they conclude on canvassing those two issues that murder was committed then they must next determine whether it was planned and deliberate;
- (c) it would be better for the trial Judge in dealing with the element of deliberation to avoid further use of the word “provocation” because the jury might feel obliged to decide the question of an insult and the accused’s state of mind as they affect deliberation within the more confined limits of his previous instruction on provocation; and
- (d) the jury should also be instructed to consider the conduct of the victim towards the accused with any evidence that his passions had been inflamed by alcohol, and also drunkenness falling short of incapacity to form the intent to kill, as having a bearing on the element of deliberation.

In *R. v. Widdifield* (1961), 6 Crim. L.Q. 152 (Ont. H.C.J.), Gale, J., charged the jury in part as follows:

I think that in the Code “planned” is to be assigned, I think, its natural meaning of a calculated scheme or design which has been carefully thought out, and the nature and consequences of which have been considered and weighed. But that does not mean, of course, to say that the plan need be a complicated one. It may be a very simple one, and the simpler it is perhaps the easier it is to formulate.

The important element, it seems to me, so far as time is concerned, is the time involved in developing the plan, not the time between the development of the plan and the doing of the act. One can carefully prepare a plan and immediately it is pre-



pared set out to do the planned act, or, alternatively, you can wait an appreciable time to do it once it has been formed.

As far as the word "deliberate" is concerned, I think that the Code means that it should also carry its natural meaning of "considered," "not impulsive," "slow in deciding," "cautious," implying that the accused must take time to weigh the advantages and disadvantages of his intended action. That is what, as it seems to me, "deliberate" means.

The direction in *R. v. Widdifield*, *supra*, as to the definition of "planned" was approved in *R. v. Reynolds* (1978), 44 C.C.C. (2d) 129, 22 O.R. (2d) 353 (C.A.).

Planning in this context requires evidence that the killing was the result of a scheme or design previously formulated. A murder committed on a sudden impulse and without prior consideration would not meet this test: *R. v. Smith* (1979), 51 C.C.C. (2d) 381, 1 Sask. R. 213 (C.A.).

The deliberation required under this subsection must occur before the act of murder commences: *R. v. Ruptash* (1982), 68 C.C.C. (2d) 182 (Alta. C.A.).

**Intoxication** – In *R. v. Reynolds* (1978), 44 C.C.C. (2d) 129, 22 O.R. (2d) 353 (C.A.) it was held that evidence of intoxication was not limited to the question of the accused's ability to plan and deliberate and that it would be open to the jury to find that the accused acted impulsively without deliberation due to the consumption of alcohol and other circumstances even though he was *able* to plan and deliberate.

In *R. v. Wallen* (1990), 54 C.C.C. (3d) 383, 75 C.R. (3d) 328, [1990] 1 S.C.R. 827 (3:2) all members of the court agreed that the trial judge must direct the jury to consider the issue of intoxication as it applies to planning and deliberation separately from the issue of intoxication as a defence to murder. However, the court divided on whether it is mandatory in all cases for the trial judge to make it clear that a lesser degree of intoxication may suffice to negative planning and deliberation than to negative the intent to kill. In any event, all members of the court agreed that such a direction will be helpful to the jury.

**Mental disorder** – The existence of a mental disorder is not incompatible with the commission of a planned and deliberate murder. In particular, the word "deliberate" has not imported a requirement that the accused's previous determination to kill the victim must have been the result of normal thinking or must have been rationally motivated: *R. v. Kirkby* (1985), 21 C.C.C. (3d) 31, 47 C.R. (3d) 97 (Ont. C.A.).

**Liability of party** – An accused sought to be made liable for first degree murder as an aider or abettor must be shown to have intended to aid a planned and deliberate murder: *R. v. Peters and Eldridge* (1985), 23 C.C.C. (3d) 171 (B.C.C.A.).

**Application to murder defined in ss. 229 and 230** – This section does not create a separate substantive offence of first degree murder, but rather constitutes a characterization, for sentencing purposes, of the substantive offence of murder in ss. 229 and 230. A murder is first degree murder within the meaning of this subsection if there is planning and deliberation in relation to the specific *mens rea* of the applicable section, which in the case of a murder described by s. 229(b) is the intent to cause the death to one person although by accident or mistake, another is killed. While there may be certain mental states specified in ss. 229 and 230 which are incompatible with planning and deliberation, the *mens rea* of s. 229(b) is not one of them: *R. v. Droste* (1984), 10 C.C.C. (3d) 404, [1984] 1 S.C.R. 208, 39 C.R. (3d) 26 (7:0).

However, the mental state described in s. 229(a)(ii) is not incompatible with planning and deliberation. There can be no doubt that a person can plan and deliberate to cause terrible bodily harm that he knows is likely to result in death. Nothing is added to the aspect of planning and deliberation by the requirement under s. 229(a)(ii) that the fatal assault be carried out in a reckless manner: *R. v. Nygaard and Schimmens* (1989), 51 C.C.C. (3d) 417, 72 C.R. (3d) 257, [1990] 1 W.W.R. 1 (S.C.C.).

**Subsec. (4) [Murder of police officer, etc.] / *Mens rea*** – In a case decided under the former s. 202A(2) it was held that knowledge by the accused that the person killed was a police officer or other person employed for the preservation and maintenance of public peace is requisite for a conviction under that section: *R. v. Shand* (1971), 3 C.C.C. (2d) 8, [1971] 3 W.W.R. 573 (Man. C.A.).

It was held in *R. v. Collins* (1989), 48 C.C.C. (3d) 343, 69 C.R. (3d) 235 (Ont. C.A.), that for the offence to constitute first degree murder pursuant to this subsection, the Crown must prove that the deceased was a person who falls within the designation of the occupations set forth in that subsection acting in the course of his duties to the knowledge of the accused or with recklessness on his part as to whether or not the deceased was such a person so acting.

**“Acting in the course of his duties”** – Evidence that the victim was a member of a police detachment and performing regular police duties, was assigned to a police cruiser and was in uniform when his body was discovered and that he made a radio transmission shortly before his death was, in the absence of evidence to the contrary, sufficient to discharge the evidentiary burden on the Crown to prove that the deceased was acting in the course of his duties, notwithstanding the lack of any evidence as to exactly what the officer was doing at the time of his death: *R. v. Fitzgerald and Schoenberger* (1982), 70 C.C.C. (2d) 87, 37 O.R. (2d) 750 (C.A.).

The term “acting in the course of his duty” while wider than the phrase “engaged in the execution of his duty” will generally encompass the whole time-span of a police officer’s tour of duty and would include any activity related to the performance of a duty or to the ability of the officer to perform his duty, including for example having lunch or receiving medical attention during a tour of duty: *R. v. Prevost* (1988), 42 C.C.C. (3d) 314, 64 C.R. (3d) 188 (Ont. C.A.), leave to appeal to S.C.C. refused January 19, 1989.

**Constitutional considerations** – The classification of murder of a police officer as first degree murder thus mandating a life sentence without eligibility for parole for 25 years does not offend the Charter of Rights and Freedoms, ss. 7, 9, 12 and 15: *R. v. Bowen* (1990), 59 C.C.C. (3d) 515, 2 C.R. (4th) 225, [1991] 1 W.W.R. 466, 76 Alta. L.R. (2d) 264 (C.A.); *R. v. Lefebvre* (1989), 71 C.R. (3d) 213 (Que. C.A.).

**Subsec. (5) / Unlawful confinement** – Notwithstanding the unlawful confinement is ancillary to some other purpose such as robbery it may still constitute a basis for a finding of first degree murder: *R. v. Dollan and Newstead* (1982), 65 C.C.C. (2d) 240, 25 C.R. (3d) 308 (Ont. C.A.); *R. v. Gourgon* (1979), 19 C.R. (3d) 272 (B.C.C.A.).

There is no basis for directing the jury that the unlawful confinement had ceased and thus that this subsection did not apply where the accused, having held the deceased and her relatives at gunpoint for a substantial period of time, shot his wife a short time after she indicated that she intended to leave: *R. v. Francella* (1990), 60 C.C.C. (3d) 96n, 41 O.A.C. 268, 114 N.R. 152 (S.C.C.) (5:0), affg 46 C.C.C. (3d) 93 (Ont. C.A.).

The transitory restraint which is implicit in the violence or threatened violence of any robbery attempt is not sufficient to trigger this subsection on the basis that there has been an unlawful confinement: *R. v. Strong* (1990), 60 C.C.C. (3d) 516, 2 C.R. (4th) 239, 111 A.R. 12 (C.A.). Where, however, during the course of a robbery, the victims are deprived of mobility and placed in an unnatural and helpless position so as to be subject to the will of their captors, such confinement may go beyond that necessarily involved in robbery and amount to an unlawful confinement: *R. v. Peer* (1995), 100 C.C.C. (3d) 251, 104 W.A.C. 161 (B.C.C.A.).

This subsection applies although the victim of the murder is not the person unlawfully confined: *R. v. Green* (1987), 36 C.C.C. (3d) 137 (Alta. C.A.).

This section is subservient to s. 229; it classifies for sentencing purposes the offences in that section as either first or second degree murder. Thus, an accused charged with second degree murder may be convicted of that offence even though the facts would support a conviction of first degree murder, as where death ensues as a result of the use of a

weapon in the course of an unlawful confinement: *R. v. Farrant* (1983), 4 C.C.C. (3d) 354, 32 C.R. (3d) 289, [1983] 1 S.C.R. 124 (5:2).

**Liability of party** – The words “when the death is caused by that person” limit the application of this subsection and a person could not be convicted of first degree murder under this subsection when his liability for murder depended solely on the combined operation of ss. 21(2) and 230. The Court noted that those words had been omitted from the French version of the Criminal Code but adopted the approach that the provision being a penal one the accused was entitled to rely on the interpretation which was most favourable to him, in this case the English version of s. 231(5): *R. v. Woods and Gruener* (1980), 57 C.C.C. (2d) 220, 19 C.R. (3d) 136 (Ont. C.A.).

The phrase, “when death is caused by that person” is broad enough to include a person who assists in the murder where that person is a substantial cause of the death. The Crown must establish that the accused has committed an act or series of acts which are of such a nature that they must be regarded as a substantial and integral cause of the death. The accused must play a very active, usually physical, role in the killing. In addition, the Crown must show that there was no intervening act of another which resulted in the accused no longer being substantially connected to the death of the victim and that the underlying offence and the murder were a part of the same transaction: *R. v. Harbottle*, [1993] 3 S.C.R. 306, 84 C.C.C. (3d) 1, 24 C.R. (4th) 137.

**“while committing”** – There need not be an exact coincidence between the act causing death and the acts constituting the underlying offence. It is sufficient if they form part of one continuous sequence of events forming a single transaction: *R. v. Pare* (1987), 38 C.C.C. (3d) 97, 60 C.R. (3d) 346, [1987] 2 S.C.R. 618 (7:0).

It was not necessary for the Crown to prove the exact time of death and that the sexual assault occurred prior to death provided it was shown that the sexual assault and the death were part of a continuous sequence of events: *R. v. Ganton* (1992), 77 C.C.C. (3d) 259, 105 Sask. R. 126 (C.A.).

This subsection does not apply where the murder was committed after the completion of the underlying offence even if to facilitate flight after commission of that offence: *R. v. Sargent* (1983), 5 C.C.C. (3d) 429, 22 Sask. R. 230 (C.A.).

**Constitutional considerations** – The combined effect of subsec. (5) and s. 742(a), requiring that a person, convicted of first degree murder where the murder is committed while committing one of the offences specified in subsec. (5), must be sentenced to life imprisonment without eligibility for parole for 25 years, does not infringe ss. 7, 9 and 12 of the Charter: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449, [1990] 2 S.C.R. 711, 79 C.R. (3d) 193, (7:0); *R. v. Arkell* (1990), 59 C.C.C. (3d) 65, 79 C.R. (3d) 207, [1990] 2 S.C.R. 695 (7:0).

## MURDER REDUCED TO MANSLAUGHTER / What is provocation / Questions of fact / Death during illegal arrest.

232. (1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted on it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section, the questions

- (a) whether a particular wrongful act or insult amounted to provocation, and
- (b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,



are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section. R.S., c. C-34, s. 215.

#### CROSS-REFERENCES

Culpable homicide is defined in s. 222. Murder is defined by ss. 229 and 230. The punishment for manslaughter is set out in s. 236. It is not unusual for the excuse of provocation to be raised in circumstances where the accused also relies on the defence of intoxication [thus see notes under ss. 8 and 229]; use of force to prevent commission of certain offences [thus see s. 27]; self defence and defence of property [thus see ss. 34 to 42].

A person convicted of manslaughter may be subject to a dangerous offender application under Part XXIV.

#### SYNOPSIS

Section 232 sets out some of the circumstances under which *murder will be reduced to manslaughter*.

The first three subsections spell out the defence of *provocation*. Before subsec. (1) becomes relevant, it must be shown that the culpable homicide would *otherwise have been murder*. Despite the use of the word “may” in the section, murder will be reduced to manslaughter if the murder was committed as a result of provocation. Provocation occurs if the person who committed the act did so in the *heat of passion caused by sudden provocation*.

Subsection (2) requires the examination of a mix of subjective and objective factors when determining if a *wrongful act or insult* constituted provocation. The *objective aspect* of the test is whether the wrongful act or insult is of such a nature as to be sufficient to deprive an ordinary man of self control. Even in this aspect of the test, there appears to be some element of subjectivity as the ordinary person may include some of the general characteristics of the accused such as sex, race or age. The *subjective aspect* of the test is that the accused *did act on the provocation* and did so *before there was time for his passion to cool*. In this second part of the test, the background, temperament, idiosyncrasies or drunkenness of the accused may be considered. The requirement of suddenness must apply both to the provocation and to the accused’s reaction to it.

Subsection (3) states that the issues of whether a particular wrongful act or insult amounted to provocation and whether the accused was deprived of his self-control as a result of the provocation are *questions of fact*. This means that the jury will ultimately determine these issues, although the judge will first consider, as a question of law, whether there is *any evidence* which could amount to provocation. The subsection makes it clear that if a person does anything which he has a legal right to do or which he does as a result of incitement by the accused to do for the purpose of providing the accused with an excuse to cause the person death or bodily harm, this does not amount to provocation. One example of a person who has a legal right to do something which might otherwise constitute provocation is a person who is justified in using force against the accused in self-defence.

Subsection (4) deals with the effect of an illegal arrest as it relates to provocation in this section. The fact that a person was arrested illegally does not necessarily reduce what would otherwise be murder to manslaughter. It also provides that an unlawful arrest of a person may constitute provocation if that person was aware of the illegality of the arrest.

## ANNOTATIONS

**Sufficiency of evidence to raise defence** – In *R. v. Parnerkar* (1973), 10 C.C.C. (2d) 253, 21 C.R.N.S.129 (S.C.C.), the Court affirmed (7:2) a Sask. C.A. order (1971), 5 C.C.C. (2d) 11, 16 C.R.N.S. 347, allowing an appeal by the Crown against a verdict of guilty of the reduced charge of manslaughter and directing a new trial upon the original charge of non-capital murder. Fauteux, C.J.C. (Abbott, Martland, Judson and Pigeon, JJ., concurring), was of the view that under this section it is not the duty of the trial Judge just to determine only whether there is any evidence of wrongful act or insult, but rather he is to determine whether there is any evidence potentially enabling a reasonable jury to find a wrongful act or insult upon which the defence of provocation could be founded. In the second majority judgment Ritchie, J. (Spence, J., concurring), was of the opinion that the trial Judge needs only to determine whether there was any evidence of a wrongful act or insult and that the accused acted upon the sudden as a result of it, but held that in this case there was no such evidence. Laskin, J., dissenting, agreed with the principle expressed by Ritchie, J., but was of the opinion that there was evidence capable of being found to be a wrongful act or insult. Hall, J., agreed with Laskin, J., on the merits of the appeal and expressed the opinion that the trial Judge is only to determine if there is evidence of wrongful act or insult and the question as to whether or not the accused acted upon the sudden is purely a matter of fact.

In *R. v. Squire* (1976), 29 C.C.C. (2d) 497, 69 D.L.R. (3d) 312 (S.C.C.), the accused's counsel at trial for non-capital murder relied only on the defence of drunkenness. On appeal against the conviction the defence of provocation was successfully raised. On further appeal by the Crown it was held (9:0) that a trial Judge is under no duty to invite a jury to consider defences of which there is no evidence or which cannot reasonably be inferred from the evidence and where, as here, it can be said that no jury acting judicially on the evidence at trial could find a wrongful act or insult sufficient to deprive an ordinary person or self-control the trial Judge was not in error in not charging the jury on the defence of provocation.

An accused, who at the time of the offence had and kept the initiative in a situation where the acts of the deceased, whether they were insults or physical acts, were predictable, cannot avail himself of the defence of "sudden" provocation within the meaning of this section: *R. v. Louison* (1975), 26 C.C.C. (2d) 266, [1975] 6 W.W.R. 289 (Sask. C.A.), affd 51 C.C.C. (2d) 479n, [1979] 1 S.C.R. 100 (9:0).

The words of the victim terminating her relationship with the accused cannot amount to a wrongful act or insult within this section: *R. v. Young* (1993), 78 C.C.C. (3d) 538, 117 N.S.R. (2d) 166 (C.A.), leave to appeal to S.C.C. refused 81 C.C.C. (3d) vi.

**Nature of objective test of "ordinary person"** – Provocation under this section is subject to a dual test. One must first consider the effect on an ordinary person of the particular wrongful act or insult relied on. This constitutes an objective test. If this first test is satisfied then the subjective test is to determine whether the accused acted actually upon the provocation, on the sudden and before there was time for his passion to cool. While the character, background, temperament, idiosyncracies, or the drunkenness of the accused are matters to be considered in the second test they are excluded from consideration in the first test: *R. v. Wright*, [1969] 3 C.C.C. 258, [1969] S.C.R. 335 (5:0); *R. v. Taylor* (1947), 89 C.C.C. 209, [1947] S.C.R. 462; *R. v. Olbey* (1979), 50 C.C.C. (2d) 257, [1980] 1 S.C.R. 1008, 14 C.R. (3d) 44 (6:1).

In relation to the objective element of the test, it is proper to consider the background of the relationship between the deceased and accused, including earlier insults which culminated in the final provocative actions or words. The "ordinary person" must be of the same age and sex, and share with the accused such other factors as would give the act or insult in question a special significance, and must have experienced the same series of acts or insults as those experienced by the accused. The defence may be available even if the insults might induce a desire for revenge so long as immediately before the last

insult, the accused did not intend to kill: *R. v. Thibert* (1996), 104 C.C.C. (3d) 1, [1996] 3 W.W.R. 1, 131 D.L.R. (4th) 675 (S.C.C.) (3:2)

The “ordinary person” test merely requires consideration of whether the ordinary person would have lost the power of self-control not whether the ordinary person would have done what the accused did: *R. v. Carpenter* (1993), 83 C.C.C. (3d) 193, 14 O.R. (3d) 641 (C.A.).

It was held in *R. v. Hill* (1986), 25 C.C.C. (3d) 322, 51 C.R. (3d) 97, [1986] 1 S.C.R. 313 (6:3) that the ordinary or reasonable person under the objective test has a normal temperament and level of self-control and is not exceptionally excitable, pugnacious or in a state of drunkenness. Further, particular characteristics that are not peculiar or idiosyncratic can be ascribed to an ordinary person without subverting the logic of the objective test. However, the jury need not be instructed that the ordinary person is, for example, someone of the same age, sex or race as the accused, since the jury will naturally as a matter of good sense ascribe to the ordinary person any general characteristics relevant to the provocation in question. For example, if the provocation is a racial slur, the jury will think of an ordinary person with the racial background that forms the substance of the insult. Features such as sex, age or race do not detract from a person’s characterization as ordinary.

**Admissibility of expert evidence** – At trial for non-capital murder where the defence was provocation the defence psychiatrist on cross-examination agreed that a normal person without the accused’s background would not have been provoked by the deceased’s insult. The accused’s appeal on the question of the admissibility of this evidence was dismissed (2:1:2) with the minority being of the view that the trier of the facts may not rely on the opinion of an expert witness in coming to a conclusion in an objective test; the majority were of the opinion that the deceased’s words were not capable of being construed by an ordinary person as an insult of sufficient nature to deprive him of self-control and accordingly took the position that while it was unnecessary to determine the admissibility question, even if that opinion evidence was improper they would apply s. 613(1)(b)(iii) [now s. 686(1)(b)(iii)]; and the fifth member of the Court, agreeing that in the context of the circumstances the words did not afford evidence of an insult of a nature sufficient to deprive an ordinary person of the power of self-control, took the position that the Crown was entitled to cross-examine the defence psychiatrist as to his standard of comparison with reference to that set out in the first part of subsec. (2) in order to test his credibility, but any further opinion evidence elicited from the psychiatrist would be superfluous: *R. v. Clark* (1974), 22 C.C.C. (2d) 1, [1975] 2 W.W.R. 385 (Alta.S.C.App.Div.).

**Charge to jury [Also see notes on “nature of objective test” above]** – It had been held in a series of cases, *R. v. Daniels* (1983), 7 C.C.C. (3d) 542, 47 A.R. 149, [1983] N.W.T.R. 193 (C.A.); *R. v. Conway* (1985), 17 C.C.C. (3d) 481 (Ont. C.A.); *R. v. Desveaux* (1986), 26 C.C.C. (3d) 88, 51 C.R. (3d) 173 (Ont. C.A.), that the jury must consider in relation to the objective test the same external pressures of insult by acts or words as were on the accused. Thus, the application of the objective test is not limited to the events which immediately triggered the attack by the accused, but also includes all of the events which put pressure on the accused and may have coloured and given meaning to the final triggering act or insult. These cases were decided prior to *R. v. Hill*, *supra*, but were not explicitly overruled. However, to the extent that these decisions like *R. v. Hill*, in the Ontario Court of Appeal (1982), 2 C.C.C. (3d) 394, 32 C.R. (3d) 88, reflect a mandatory requirement as to the component of the trial judge’s charge, they should be read with care bearing in mind the admonishment from the Supreme Court majority in *R. v. Hill* that although a direction as to the particular relevant attributes of the “ordinary person” may be helpful in clarifying the application of the ordinary person standard it is neither wise nor necessary to make this a mandatory component of all jury charges on provocation and that whenever possible the court “should retain simplicity in charges



to the jury and have confidence that the words of the Criminal Code will provide sufficient guidance to the jury". Again, it must be pointed out that the court was there only specifically considering the necessity of a mandatory direction concerning the age and sex of the "ordinary person".

The word "wrongful" only modifies "act" and not insult since an insult is always wrongful. However a reference to a "wrongful insult" while an error in English usage is not an error of law: *R. v. Murdock* (1978), 40 C.C.C. (2d) 97, [1978] 3 W.W.R. 313 (Man. C.A.).

It is misdirection to tell the jury that provocation operates to negate the intent for murder. Provocation may reduce murder to manslaughter even if the accused had the intention to kill: *R. v. Oickle* (1984), 11 C.C.C. (3d) 180, 61 N.S.R. (2d) 239 (S.C. App. Div.).

Although subsec. (1) uses the word "may" the jury does not have a discretion to return a verdict of manslaughter where provocation is made out. Accordingly, it should be made clear to the jury that if they find there is provocation or if they have a reasonable doubt in that regard then the only verdict for what otherwise might be murder is manslaughter: *R. v. Leblanc* (1985), 22 C.C.C. (3d) 126 (Ont. C.A.).

**Mistake of fact and transferred intent** – If an accused, acting under such provocation as would reduce murder to manslaughter, shoots at one person with the intention of killing him, but accidentally kills a third person, the intention extenuated by provocation is transferred from the intended victim to the actual victim and the accused is guilty of manslaughter: *R. v. Droste* (No. 2) (1981), 63 C.C.C. (2d) 418, 34 O.R. (2d) 588 (C.A.), *affd* on other grounds 10 C.C.C. (3d) 404, [1984] 1 S.C.R. 208, 39 C.R. (3d) 26 (7:0).

Similarly, mistake of fact is relevant to the objective test, if any ordinary person would also have misinterpreted the facts which confronted the accused: *R. v. Hansford* (1987), 33 C.C.C. (3d) 74, 55 C.R. (3d) 347, 75 A.R. 86 (C.A.), *leave to appeal to S.C.C. refused* 79 A.R. 239.

**Application to attempted murder** – Provocation is not a defence to a charge of attempted murder so as to reduce the offence to one of attempted manslaughter. However, there may be cases where the conduct of the victim amounting to provocation produced in the accused a state of excitement, anger or disturbance as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences: *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673 (C.A.).

**Self-induced provocation [Subsec. (3)]** – The phrase "legal right" in subsec. (3) means a right which is sanctioned by law as distinct from something which a person may do without incurring legal liability. The defence of provocation is open to someone who is "insulted", and the words or act put forward as provocation need not be words or acts which are specifically prohibited by the law: *R. v. Thibert, supra*.

In considering whether a deceased was within his legal rights his action cannot be considered in isolation and in cases of "self-induced" provocation it is only where the actions by the deceased go to extreme lengths in the circumstances that such actions can form the basis of the defence of provocation. Where the only possible interpretation of the events was that the provocative act was self-induced in circumstances in which the deceased had the legal right to use as much force as necessary to attempt to effect his escape or protect his life, then subsec. (3)(b) applied: *R. v. Louison* (1975), 26 C.C.C. (2d) 266, [1975] 6 W.W.R. 289 (Sask. C.A.), *affd* 51 C.C.C. (2d) 479n, [1979] 1 S.C.R. 100 (9:0).

**Constitutional considerations** – The fact that provocation operates as a defence only where the act or insult relied upon as provocation meets a threshold test that an ordinary person would have been deprived of self-control does not infringe the principles of fundamental justice as guaranteed by s. 7 of the Charter. This section does not impose liabil-

ity where subjective fault does not exist but reduces the liability even when that fault does exist: *R. v. Cameron* (1992), 71 C.C.C. (3d) 275, 7 O.R. (3d) 545 (C.A.).

## INFANTICIDE.

**233. A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed. R.S., c. C-34, s. 216.**

## CROSS-REFERENCES

The term “newly-born child” is defined in s. 2. When a child becomes a human being is defined by s. 223(1). The punishment for infanticide is set out in s. 237. Related offences are as follows: s. 238, killing unborn child in act of birth; s. 242, neglect to obtain assistance in child-birth; s. 243, concealing body of child; s. 215, failing to provide necessities; s. 218, abandoning child. Under s. 223(2) a person commits homicide when she causes injury to a child before or during its birth as a result of which the child dies after becoming a human being. As to other provisions respecting causation, see ss. 224 to 226.

As to included offences, see s. 662(4) which makes the offence under s. 243 an included offence. Reference should also be made to s. 663 which provides for conviction of infanticide although some of the elements of this offence are not made out.

For special provision respecting the plea of *autrefois*, see s. 610(2) and (4).

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4).

## SYNOPSIS

Section 233 defines what constitutes *infanticide*. It is one of four offences in Part VIII of the Criminal Code which deal with infants as victims of offences (also see ss. 238, 242 and 243).

The principal in this offence is the *mother* of a newly-born child. The *actus reus* occurs when the new mother, by *wilful act or omission*, causes the death of the newly-born child. The offence must occur at a time when the woman has *not fully recovered* from the effects of *giving birth and*, as a result of either those effects or lactation following the birth, her *mind is disturbed*. The child must have been born alive for this section to apply. Unlike murder and manslaughter (the other forms of culpable homicide), infanticide does not have either a minimum or maximum sentence of life imprisonment.

## ANNOTATIONS

In *R. v. Smith* (1976), 32 C.C.C. (2d) 224 (Nfld. Dist.Ct.) Cummings, D.C.J., set out the elements of infanticide as follows at pp. 227-8:

For the Crown to prove the offence of infanticide as defined by s. 216 [now s. 233] of the *Code*, it must establish beyond a reasonable doubt: (a) the accused is a female; (b) the child was born alive (s. 206 [now s. 223] of the *Code*); (c) the accused caused the death of her child; (d) the death of the child was caused by a wilful act or omission of the accused; (e) the child was newly born; (f) at the time of the act or omission the accused must not have fully recovered from the effects of giving birth to the child; and (g) by reason of giving birth to the child or of the effect of lactation consequent on the birth of the child her mind was then disturbed.

If elements (f) and (g) are not made out then s. 663 comes into play to prevent a female, who was of sound mind when she caused the death of her child by a wilful act, from going free. “Wilful” in this section requires proof that the accused acted with a bad motive or purpose or with an evil intent.

## MANSLAUGHTER.

**234. Culpable homicide that is not murder or infanticide is manslaughter. R.S., c. C-34, s. 217.**

## CROSS-REFERENCES

Murder is defined in ss. 229 and 230. Infanticide is defined in s. 233. As to included offences, see s. 662. As to special provisions respecting the plea of *autrefois*, see s. 610(2) to (4). The punishment for manslaughter is set out in s. 236.

## SYNOPSIS

This section provides that all culpable homicide which is not murder (s. 229 or 230) or infanticide (s. 233) is manslaughter. Thus, manslaughter is defined both by specific provisions which reduce murder to manslaughter (see s. 232) and by declaring the residual category of acts amounting to culpable homicide to be manslaughter. Drunkenness, which is defined by common law principles and is not dealt with in the Criminal Code, also reduces murder to manslaughter. The mental element varies depending on what principle operates to reduce a culpable homicide to manslaughter. Thus, the intention ranges from the intention to do an unlawful act (s. 222(5)(a)) to the intention to kill which is mitigated by the presence of provocation (s. 232).

## ANNOTATIONS

**Intent** – Once the jury has found that the homicide was culpable it must decide the accused's intent, and if at that stage there is a reasonable doubt that he intended to commit murder they should then consider the offence of manslaughter: *R. v. Kuzmack* (1955), 111 C.C.C. 1, 20 C.R. 377 (S.C.C.) (8:1).

Unlike the crime of murder which requires proof of a special intent to commit that offence, manslaughter only requires a general intent which, upon proof that the accused did the prohibited act, becomes a presumption which evidence of intoxication falling short of insanity in itself cannot rebut: *R. v. Mack* (1975), 22 C.C.C. (2d) 257, 29 C.R.N.S. 270 (Alta.S.C.App.Div.) (5:0).

Where there is evidence of mental illness or disorder at the time of the murder it would be prudent for the Judge to instruct the jury that it would be open for them to find that although the accused was not at the time insane, he did not have the mental capacity to form the specific intent to commit murder, but had the general intent to warrant a conviction for manslaughter: *R. v. Baltzer* (1974), 27 C.C.C. (2d) 118, 10 N.S.R. (2d) 561 (S.C. App. Div.); *R. v. Hilton* (1977), 34 C.C.C. (2d) 206 (Ont. C.A.); *R. v. Browning* (1976) 34 C.C.C. (2d) 200 (Ont. C.A.); *R. v. Lechasseur* (1977), 38 C.C.C. (2d) 319, 1 C.R. (3d) 190 (Que. C.A.).

**Unlawful act manslaughter** – The *mens rea* of unlawful act manslaughter under subsec. (5)(a) is, in addition to the *mens rea* of the underlying offence, objective foreseeability of the risk of bodily harm which is neither trivial nor transitory. In applying this objective test personal characteristics not directly relevant to an element of the offence such as experience, education and psychological defences serve as a defence only when there is an incapacity to appreciate the risk involved in the conduct. Likewise, the standard is not raised because the particular accused may have special experience or training. On the other hand, the particular activity may impose a higher *de facto* standard than others: *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632 (S.C.C.).

The unlawful act must also be objectively dangerous, that is, likely to injure another person: *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66; *R. v. Creighton*, *supra*.

**Party to manslaughter** – An accused who lacks the necessary *mens rea* for murder may be convicted of manslaughter by aiding or abetting another in the offence of murder pursuant to s. 21(1), where a reasonable person in all the circumstances would have appreci-



ated that bodily harm was the foreseeable consequence of the dangerous act which was being undertaken. Further, if the accused party did not foresee the probability of murder by the principal offender but a reasonable person in all the circumstances would have foreseen at least a risk of harm to another as a result of carrying out the common intention, the party could be found guilty of manslaughter pursuant to s. 21(2). Liability for manslaughter under s. 21(2) does not depend upon proof that a reasonable person would have foreseen the risk of death: *R. v. Jackson*, [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385, 26 C.C.C. (4th) 178.

**Manslaughter by criminal negligence** / [Also see notes under ss. 219 and 220] – On a trial for murder the verdicts left to the jury were murder, manslaughter due to intoxication and not guilty due to accident. On the accused's appeal from conviction for murder it was argued that the trial Judge should have left with the jury the verdict of manslaughter as a result of criminal negligence. The Court held however that such a theory was based on speculation, that there was no evidence to support criminal negligence as distinct from accident and, accordingly, the defence was not entitled to have this theory placed before the jury: *Charbonneau v. The Queen* (1977), 33 C.C.C. (2d) 469, [1977] 2 S.C.R. 805 (8:1).

**Constitutional considerations** – Manslaughter is not one of those offences which because of its gravity or the stigma attached to it requires proof of a minimum *mens rea* of foreseeability of death to comply with s. 7 of the Charter. Thus, the offence of unlawful act manslaughter as interpreted by the courts and requiring only objective foreseeability of the risk of bodily harm does not violate s. 7. Thus, the so-called “thin skull” rule which renders offenders liable for the unforeseen consequences of their dangerous acts as well does not violate s. 7: *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632 (S.C.C.).

#### PUNISHMENT FOR MURDER / Minimum punishment.

**235. (1) Every one who commits first degree murder or second degree murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.**

**(2) For the purposes of Part XXIII, the sentence of imprisonment for life prescribed by this section is a minimum punishment. R.S., c. C-34, s. 218; 1973-74, c. 38, s. 3; 1974-75-76, c. 105, s. 5.**

#### CROSS-REFERENCES

Murder is defined in ss. 229 and 230 and classified as first or second degree murder by s. 231. The determination of parole ineligibility is made in accordance with ss. 742 to 747. That scheme as applied to adults may, however, be briefly summarized as follows. A person convicted of first degree murder is liable to imprisonment for life without eligibility for parole for 25 years [s. 742(a)], but may apply for judicial review of the period of ineligibility after 15 years [s. 745]. A person convicted of second degree murder is liable to imprisonment for life without eligibility for parole for a period between 10 and 25 years [s. 742(b)]. This period is set by the trial judge under s. 744 after taking the recommendation, if any, from the jury [where the case has been tried by a jury] pursuant to s. 743. Note, however, that where an accused is convicted of second degree murder, the period of parole ineligibility must be set at 25 years where the accused was previously convicted of murder however described under the Criminal Code [s. 742(a.1)] [Note s. 664 which prohibits reference in the indictment to the previous conviction. However, s. 665 which requires service of notice of intention to seek greater punishment does not apply.] Again, the accused may apply for judicial review of the period of ineligibility after 15 years where the period set under s. 744 exceeds 15 years [s. 745]. A person convicted of murder will also be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1). Pursuant to s. 744.1, where the accused was under 18 years of age at the time of the offence but has been transferred to the ordi-

nary courts then the period of parole ineligibility may be between five and ten years whether the accused is convicted of first or second degree murder.

Section 17 limits the availability of the statutory defence of compulsion by threats. As to other notes respecting defences to murder, see ss. 229 and 230. As to included offences, see s. 662.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance by reason of s. 487.01(5), and falls within the definition of "enterprise crime offence" in s. 462.3 for the purposes of Part XII.2.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 [official premises, etc.]. A threat to commit an offence under this section against an internationally protected person (defined in s. 2) is an offence under s. 424.

Special provision respecting the plea of *autrefois* see s. 610(2) to (4).

Pursuant to s. 582, no person may be convicted of first degree murder unless he is specifically charged with that offence in the indictment. Under s. 589, no count that charges an offence other than murder shall be joined in an indictment to a count that charges murder.

Trial of murder is by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

## SYNOPSIS

This section sets out the *punishment* for committing *murder*. All murders, both first and second degree, attract a *minimum punishment of life imprisonment*. There are also provisions in the Criminal Code which set out minimum periods of imprisonment before a person convicted of murder may be considered eligible for parole (see. s. 742).

## MANSLAUGHTER.

**236. Every person who commits manslaughter is guilty of an indictable offence and liable**

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life. R.S., c. C-34, s. 219; 1995, c. 39, s. 142.

## CROSS-REFERENCES

Manslaughter is defined by ss. 232, 234 and 263(3).

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 432 [official premises, etc.]. Firearm is defined in s. 2.

As to included offences see s. 662(5). For special provision respecting the plea of *autrefois*, see s. 610(2) to (4).

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. An accused convicted of this offence may, pursuant to s. 259, be ordered prohibited from operating a motor vehicle, vessel, aircraft or railway equipment for during any period that the court considers proper, where the offence under this section was committed by means of a motor vehicle, vessel, aircraft or railway equipment. The procedure respecting the making of that

order of prohibition is found in s. 260. In some circumstances, the accused will also be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1).

## SYNOPSIS

Section 236 provides that the *maximum sentence* upon conviction for *manslaughter* is *life imprisonment*. This is to be contrasted to the punishment for murder for which the minimum sentence is life, and for which there are restrictions in the Criminal Code regarding eligibility for parole. There is no minimum sentence for manslaughter except where a firearm is used in the commission of the offence. In such a case, the minimum punishment is four years' imprisonment.

## PUNISHMENT FOR INFANTICIDE.

**237. Every female person who commits infanticide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 220.**

## CROSS-REFERENCES

Infanticide is defined in ss. 233 and 663.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. In some circumstances, the accused will also be liable to the discretionary prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(2).

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4). For other notes concerning the offence of infanticide, see s. 233.

## ANNOTATIONS

Where the expert evidence indicated that the accused was seriously mentally ill at the time of the offence (even raising doubts as to her liability for this offence) the court on appeal against a prison sentence allowed the appeal and substituted a conditional discharge. The principle of deterrence simply had no application in the circumstances, the only real consideration being rehabilitation: *R. v. Szola* (1977), 33 C.C.C. (2d) 572 (Ont. C.A.).

## KILLING UNBORN CHILD IN ACT OF BIRTH / Saving.

**238. (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.**

**(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of that child. R.S., c. C-34, s. 221.**

## CROSS-REFERENCES

As to when a child becomes a human being, see s. 223(1). The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. Murder is defined in ss. 229 and 230. The offence of infanticide is defined in s. 233. Related offences are as follows: s. 243, neglect to obtain assistance in child-birth; s. 243, concealing body of child; s. 215, failing to provide necessities; s. 218, abandoning child.

## SYNOPSIS

This section creates the indictable offence of *killing an unborn child in the act of birth*. This offence applies in circumstances where the death was caused in such a way that, had the child become a human being (see s. 223), the crime would have been murder. The maximum sentence upon conviction is imprisonment for life.

Section 238(2) provides an exception to liability for such acts dealing with cases in



which the act, resulting in the death of the unborn child, was done to save the life of the mother. The person doing the act must consider *in good faith* that such act was necessary for that purpose.

### ATTEMPT TO COMMIT MURDER.

239. Every person who attempts by any means to commit murder is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life. R.S., c. C-34, s. 222; 1995, c. 39, s. 143.

### CROSS-REFERENCES

Attempt is defined in s. 24. Firearm is defined in s. 2.

Section 17 limits the availability of the statutory defence of compulsion by threats. Under s. 662(2), an accused may be convicted of "attempted second degree murder" on an indictment charging first degree murder. Presumably, where the indictment charges second degree murder then the accused can be convicted of attempted second degree murder by virtue of s. 662(1)(b). Under s. 661, where an attempt is charged but the evidence proves commission of the full offence, the accused may be convicted of the attempt.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of attempted murder will be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1). While s. 239 is not listed in s. 183 as an "offence" for the purposes of obtaining an authorization to intercept private communications, an authorization may be obtained in respect of an attempt to commit any of the offences listed in s. 183 and "235 (murder)" is listed in s. 183. Similarly, while s. 239 is not listed in s. 462.3 as an "enterprise crime offence" for the purposes of Part XII.1, "section 235 (punishment for murder)" is listed in s. 462.3 and s. 462.3(c) provides that an attempt to commit any of the offences listed in the section is as well an enterprise crime offence. A person convicted of attempted murder may be subject to a dangerous offender application under Part XXIV.

### SYNOPSIS

Section 239 makes it an indictable offence to *attempt to commit murder*. This part of the section is redundant as s. 24(1) would create such an offence. The key aspect of this section provides that the *maximum* sentence upon conviction is *life imprisonment*. This is a departure from the general rule expressed in s. 463(a) that a person is liable to a sentence of 14 years upon conviction for attempting to commit an offence which would be punishable by life imprisonment upon completion of the full offence. No minimum sentence is prescribed except where a firearm is used in the commission of the offence, in which case the minimum sentence is four years. The mental element for this offence is the *intention to kill*.

### ANNOTATIONS

**Intent** – A conviction for attempted murder requires proof of the specific intent to kill. No lesser *mens rea* will suffice, and in particular a conviction under this section may not be based on the lesser intents described in s. 229(a)(ii) or s. 230: *R. v. Ancio* (1984), 10 C.C.C. (3d) 385, [1984] 1 S.C.R. 225, 39 C.R. (3d) 1 (7:1).

Neither excessive force in self-defence nor provocation are defences to this charge so as to reduce the offence to one of attempted manslaughter. However, the conduct of the victim may be a relevant piece of evidence on the question of whether the accused had

the requisite intent to kill if the provocation by the victim produced in the accused a state of anger, excitement or disturbance to the extent that he did not contemplate the consequences of his act and did not intend those consequences: *R. v. Campbell* (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673 (C.A.).

To make out the offence under this section the Crown must prove that the accused, having the specific intent to cause the death of a human being, did anything for the purpose of carrying out that intent, by any means. The Crown need not prove that the accused had the specific intent to murder each of the victims, specified in the indictment, by name in a case where the accused intending to kill an occupant of a tavern returned to the tavern and opened fire on the area in which a number of patrons were standing: *R. v. Marshall* (1986), 25 C.C.C. (3d) 151 (N.S.C.A.).

**Liability of party** – A party cannot be convicted of this offence based on the objective foreseeability under s. 21(2). Accordingly, the words “ought to have known” in s. 21(2) are inoperative where liability is sought to be imposed on a party for the offence in this section: *R. v. Logan* (1990), 58 C.C.C. (3d) 391, 73 D.L.R. (4th) 40 (S.C.C.).

**Included offences** – An indictment charging attempted murder *simpliciter* only includes the offence of attempting to unlawfully cause bodily harm: *R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122, 20 C.R. (3d) 36 (Ont. C.A.); *R. v. Colburne* (1991), 66 C.C.C. (3d) 235, [1991] R.J.Q. 1199 (C.A.).

## ACCESSORY AFTER FACT TO MURDER.

**240. Every one who is an accessory after the fact to murder is guilty of an indictable offence and liable to imprisonment for life. R.S., c. C-34, s. 223.**

### CROSS-REFERENCES

The definition of accessory after the fact is in s. 23. Sections 23.1 and 592 deal with the trial of and charging of the accessory although the principal has not or cannot be convicted. Murder is defined in ss. 229 and 230.

Trial of accessory after the fact to murder is by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522, only a judge of the superior court of criminal jurisdiction may release an accused charged with this offence. A person convicted of this offence may be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1).

While s. 240 is not listed in s. 183 as an “offence” for the purposes of obtaining an authorization to intercept private communications, an authorization may be obtained for being an accessory after the fact in relation to any of the offences listed in s. 183 and “235 (murder)” is listed in s. 183. Similarly, while s. 240 is not listed in s. 462.3 as an “enterprise crime offence” for the purposes of Part XII.1, “section 235 (punishment for murder)” is listed in s. 462.3 and s. 462.3(c) provides that being an accessory after the fact in relation to any of the offences listed in the section is as well an enterprise crime offence.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) where the victim is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

### SYNOPSIS

This section provides that it is an indictable offence to be an *accessory after the fact* to the commission of a *murder*. This aspect of the section is redundant in light of s. 23 of the Criminal Code. The important aspect of the section is one which places the *maximum sentence*, upon conviction, at *life imprisonment*. This is an exception to the general rule as stated in s. 463(a) that the punishment for being an accessory after the fact is punishable by 14 years, if the sentence, to which the principal accused is subject, is life imprisonment. For a description of what constitutes being an accessory after the fact, see s. 23.

## ANNOTATIONS

The offence of being an accessory after the fact to manslaughter under s. 463(1) is a lesser and included offence to that of being an accessory after the fact to murder: *R. v. Webber* (1995), 102 C.C.C. (3d) 248, 106 W.A.C. 161 (B.C.C.A.).

## Suicide

## COUNSELLING OR AIDING SUICIDE.

## 241. Every one who

(a) counsels a person to commit suicide, or

(b) aids or abets a person to commit suicide,

whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 224; R.S.C. 1985, c. 27 (1st Supp.), s. 7(3).

## CROSS-REFERENCES

"Counsel" is defined in s. 22(3). Note that s. 14 provides that no person is entitled to consent to have death inflicted on him and such consent does not affect the criminal responsibility of any person, by whom death may be inflicted, on the person, by whom consent is given. While s. 14 would seem to make a person who aids suicide guilty of culpable homicide, including first degree murder, apparently the predecessor to this offence was inserted in the 1892 Code expressly to avoid the problem that, at common law, suicide was murder and thus, a person who aided suicide was guilty of murder and liable to the death penalty. [See excerpt from Report of the Imperial Commissioners, respecting the English Draft Code of 1878, quoted in *Martin's Criminal Code*, 1955 at p. 397.] and in *London Life Insurance Co. v. Lang Shirt Co.'s Trustee*, [1929] S.C.R. 117, [1929] 1 D.L.R. 328, it was held that a successful suicide was not a "homicide" within what is now s. 222.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

## SYNOPSIS

This section makes it an indictable offence to *counsel the act of suicide or to assist* in such an act. At one time, attempting suicide was an offence, but this section has been repealed so that the person who attempts to commit suicide does not commit an offence: only the person who counsels or assists is guilty of a crime. The offence is made out, regardless of whether the suicide ensues. A person convicted of this offence is liable to imprisonment for a period of not more than 14 years.

## ANNOTATIONS

On a charge of aiding suicide, the Crown must prove an intent to aid suicide and drunkenness is a defence to the charge: *R. v. Loomes* (unreported January 6, 1975, (Ont. C.A.)).

This section does not violate the rights of a terminally ill person under s. 7 of the Charter by prohibiting a physician from assisting suicide: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 85 C.C.C. (3d) 15, 24 C.R. (4th) 281 (5:4).

In the case of a genuine suicide pact, the surviving party should have a defence to murder. This defence will only be available when the parties are in such a mental state that they have formed a common and irrevocable intent to commit suicide together simultaneously and by the same act where the risk of death is identical and equal for both. The survivor may, however, be liable to be convicted of the offence under this section: *R. v. Gagnon* (1993), 84 C.C.C. (3d) 143 (Que. C.A.).



## *Neglect in Child-birth and Concealing Dead Body*

### NEGLECT TO OBTAIN ASSISTANCE IN CHILD-BIRTH.

**242.** A female person who, being pregnant and about to be delivered, with intent that the child shall not live or with intent to conceal the birth of the child, fails to make provision for reasonable assistance in respect of her delivery is, if the child is permanently injured as a result thereof or dies immediately before, during or in a short time after birth, as a result thereof, guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 226.

### CROSS-REFERENCES

Related offences are infanticide, defined in s. 237, killing unborn child in act of birth in s. 238 and concealing body of child in s. 243. See s. 223(2) as to when causing death to child during or before birth amounts to homicide.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

A person convicted of this offence may be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1).

### SYNOPSIS

Section 242 makes it an indictable offence to *neglect to obtain help in child-birth* if the act or omission is done with the requisite intent, and the consequences to the child are as specified in the section. The *pregnant woman is liable as a principal* if she is about to give birth and fails to make provision for reasonable assistance for the delivery. This liability only attaches if the woman fails to get assistance *with the intention that the child should not live or to conceal the birth* and certain results follow. The *consequences* which must be proven are that the *child dies* immediately before, during or in a short time after the birth or is permanently injured *as result of the woman's failure to obtain assistance*. The maximum sentence on conviction for this offence is five years' imprisonment.

### ANNOTATIONS

The death or injury must be a direct result of deliberate failure to obtain reasonable assistance at birth: *R. v. Bryan* (1959), 123 C.C.C. 160, [1959] O.W.N. 103 (C.A.) (2:1).

### CONCEALING BODY OF CHILD.

**243.** Every one who in any manner disposes of the dead body of a child, with intent to conceal the fact that its mother has been delivered of it, whether the child died before, during or after birth, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 227.

### CROSS-REFERENCES

By virtue of s. 662(4), this offence is an included offence where a count charges murder of a child or charges infanticide.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Related offences are infanticide, defined in s. 237, killing unborn child in act of birth in s. 238 and neglecting to obtain assistance in child birth in s. 243.

## *Bodily Harm and Acts and Omissions Causing Danger to the Person*

### CAUSING BODILY HARM WITH INTENT — FIREARM.

244. Every person who, with intent

(a) to wound, maim or disfigure any person,

(b) to endanger the life of any person, or

(c) to prevent the arrest or detention of any person,

discharges a firearm at any person, whether or not that person is the person mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of four years. R.S., c. C-34, s. 228; 1980-81-82-83, c. 125, s. 17; 1995, c 39, s. 144.

### CROSS-REFERENCES

The term "firearm" is defined in s. 2. Related offences are as follows: s. 239, attempted murder; s. 129, resisting arrest; s. 270(1)(b) assault with intent to resist arrest; s. 267, assault causing bodily harm and assault with a weapon; s. 268, aggravated assault; s. 269, unlawfully causing bodily harm; s. 272, sexual assault with a weapon and sexual assault causing bodily harm; s. 273, aggravated sexual assault.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

A person convicted of this offence may be liable to the mandatory or discretionary prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1) or (2) respectively, depending on the circumstances. A person convicted of this offence may be subject to a dangerous offender application under Part XXIV.

### SYNOPSIS

This section makes it an indictable offence to *discharge a firearm with one of the intentions* specified in the section. The doing of any of the aforementioned acts with any of the intentions set out in paras. (a) to (c), namely, *wounding, maiming or disfiguring* any person, *endangering the life* of anyone or of *preventing the arrest* of a person, makes out the offence. The offence is made out even if the person referred to in paras. (a) or (b) is not the person who was in fact fired at. *Quaere* whether this section would apply to an attempted suicide by firearm. The maximum punishment to which one is liable upon conviction is fourteen years and the minimum punishment is four years' imprisonment.

### ANNOTATIONS

In *R. v. Schultz* (1962), 133 C.C.C. 174, 38 C.R. 76 (Alta. S.C. App. Div.), the Court considered various definitions of the word "maim" all to the effect that the person is maimed when he is rendered less able to fight. In that case it was held that the breaking of a man's leg is a sufficiently serious injury to amount to a maiming.

In *R. v. Innes and Brochie* (1972), 7 C.C.C. (2d) 544 (B.C.C.A.), Robertson J.A., considered various definitions of the words "wound, maim or disfigure" including that "maim" means to render the victim less able to defend himself and "disfigure" denotes more than a temporary marring of the figure or appearance of a person.

An acquittal on a charge of attempted murder and a conviction on a charge of discharging a firearm with intent to endanger life are not inconsistent verdicts as the intent to endanger life is different from the intent to murder: *R. v. Boomhower* (1974), 20 C.C.C. (2d) 89, 27 C.R.N.S. 188 (Ont. C.A.).

Assault as defined by s. 265(1)(b) is an included offence of this offence: *R. v. Colburne* (1991), 66 C.C.C. (3d) 235, [1991] R.J.Q. 1199 (C.A.).

**CAUSING BODILY HARM WITH INTENT — AIR GUN OR PISTOL.****244.1. Every person who, with intent**

- (a) to wound, maim or disfigure any person,
- (b) to endanger the life of any person, or
- (c) to prevent the arrest or detention of any person,

discharges an air or compressed gas gun or pistol at any person, whether or not that person is the person mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. 1995, c. 39, s. 144.

**CROSS-REFERENCES**

The comparable offence where a firearm is used is found in s. 244. The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of this offence may be liable to the firearms prohibition under s. 100.

**SYNOPSIS**

This section makes it an indictable offence to discharge an air gun or pistol at any person with one of the intentions specified in the section. The offence is made out even if the person referred to in paras. (a) or (b) is not the person who was in fact fired at. The maximum punishment to which the offender is liable upon conviction is fourteen years.

**ADMINISTERING NOXIOUS THING.**

**245. Every one who administers or causes to be administered to any person or causes any person to take poison or any other destructive or noxious thing is guilty of an indictable offence and liable**

- (a) to imprisonment for a term not exceeding fourteen years, if he intends thereby to endanger the life of or to cause bodily harm to that person; or
- (b) to imprisonment for a term not exceeding two years, if he intends thereby to aggrieve or annoy that person. R.S., c. C-34, s. 229.

**CROSS-REFERENCES**

The term “bodily harm” is defined in s. 2.

The offence of supplying a noxious thing intended to procure a miscarriage is found in s. 288.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498 where charged with the offence under para. (b).

A person convicted of the offence under para. (a) may be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1) and a person found guilty of the offence under para. (b) liable to the discretionary prohibition order under s. 100(2). A person convicted of the offence under para. (a) may be subject to a dangerous offender application under Part XXIV.

**SYNOPSIS**

Section 245 makes it an indictable offence to administer a noxious thing. The *actus reus* of the offence consists of administering, causing to be administered or causing to be taken a noxious thing, poison or destructive thing. To be guilty of an offence under this section, it must be proven that the accused intended to do the physical acts described. However, for sentencing purposes, a distinction is made between different intentions. If the accused intended that, by doing any of the acts described, he would endanger the life of another or cause that person bodily harm, the maximum sentence is 14 years. If the accused does any of the acts to aggrieve or annoy that person, the maximum sentence is two years.



## ANNOTATIONS

The *mens rea* required by this section is proof that the accused intended a consequence defined in the section. A "noxious thing" is any substance which in the light of all the circumstances attendant upon its administration is capable of effecting or, in the normal course of events, will effect one of the defined consequences. Even an innocuous substance may in some circumstances come within the section. The Crown need not prove that the accused knew the substance was noxious, although this would be relevant in establishing intent, but only that the substance was in fact noxious: *R. v. Burkholder* (1977), 34 C.C.C. (2d) 214, [1977] 1 W.W.R. 627 (Alta. S.C. App. Div.).

To a similar effect as to the meaning of "noxious thing" in s. 24 of the Offences Against the Person Act, 1861, see: *R. v. Marcus* (1981), 73 Cr. App. R. 49 (C.A.).

## OVERCOMING RESISTANCE TO COMMISSION OF OFFENCE.

**246. Every one who, with intent to enable or assist himself or another person to commit an indictable offence,**

(a) attempts, by any means, to choke, suffocate or strangle another person, or by any means calculated to choke, suffocate or strangle, attempts to render another person insensible, unconscious or incapable of resistance, or

(b) administers or causes to be administered to any person, or attempts to administer to any person, or causes or attempts to cause any person to take a stupefying or overpowering drug, matter or thing,

is guilty of an indictable offence and liable to imprisonment for life. R.S., c. C-34, s. 230; 1972, c. 13, s. 70.

## CROSS-REFERENCES

An "indictable offence" will include a hybrid offence, punishable on indictment or on summary conviction: Interpretation Act, R.S.C. 1985, c. I-21, s. 34(1)(a).

Note that where death is caused in the commission of certain offences by means similar to those referred to in this section then the accused will be liable to be convicted of murder under s. 230(b) or (c) [constructive murder]. The related offence of administering a noxious thing is found in s. 245.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of this offence will be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1). A person convicted of this offence may be subject to a dangerous offender application under Part XXIV.

## SYNOPSIS

This section makes it an indictable offence for any person to *overcome resistance for the purpose of committing an indictable offence* or to do so to assist another person. The offence is made out by proving that the accused did any of the acts described in paras. (a) or (b) for this purpose. The maximum sentence upon conviction is life imprisonment.

## TRAPS LIKELY TO CAUSE BODILY HARM / Permitting traps on premises.

**247. (1) Every one who, with intent to cause death or bodily harm to persons, whether ascertained or not, sets or places or causes to be set or placed a trap, device or other thing whatever that is likely to cause death or bodily harm to persons is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

(2) A person who, being in occupation or possession of a place where anything mentioned in subsection (1) has been set or placed, knowingly and wilfully permits it to remain at that place, shall be deemed, for the purposes of that subsection, to have set or placed it with the intent mentioned therein. R.S., c. C-34, s. 231.

**CROSS-REFERENCES**

The term “property” is defined in s. 2. The term “bodily harm” is not defined in this section. Some assistance may, however, be obtained from the definition of “bodily harm” in s. 267(2).

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498. A person found guilty of this offence may be liable to the discretionary prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(2), depending on the circumstances in which the offence was committed.

The related offences of criminal negligence causing death and causing bodily harm are found in ss. 220 and 221, respectively. The offences of failing to guard an opening in the ice and failing to guard excavations are found in s. 263.

**SYNOPSIS**

This section makes it an indictable offence to *set or permit traps and other similar devices which are likely to cause death or bodily harm* to any person.

The physical acts which make up the offence are setting, placing a trap, device or other thing or causing this to occur, if the device is likely to cause death or bodily harm to any person. The harm likely to result is to be judged on an objective standard. The requisite intent is to cause death or bodily harm. The offence carries a five year maximum term of imprisonment.

Subsection (2) will result in the *intention* to commit the offence being *deemed to have existed*, if a person who was either in occupation or possession of a place where a device was placed *knowingly and wilfully* permits it to remain.

**ANNOTATIONS**

**Subsec. (2)** – This subsection does not set up a rebuttable presumption but rather imposes absolute liability once it has been shown that the land occupier knowingly and wilfully permitted the trap or device on his land: *R. v. Besse* (1975), 26 C.C.C. (2d) 140 (B.C. Prov. Ct.).

**INTERFERING WITH TRANSPORTATION FACILITIES.**

**248.** Every one who, with intent to endanger the safety of any person, places anything on or does anything to any property that is used for or in connection with the transportation of persons or goods by land, water or air that is likely to cause death or bodily harm to persons is guilty of an indictable offence and liable to imprisonment for life. R.S., c. C-34, s. 232.

**CROSS-REFERENCES**

The term “bodily harm” is not defined in this section. Some assistance may, however, be obtained from the definition of “bodily harm” in s. 267(2). Related offences are as follows: ss. 76 to 78, offences involving aircraft; ss. 80 to 82, offences involving explosives; ss. 220 to 222, criminal negligence; s. 247, setting trap with intent; ss. 430 to 436, damage to property.

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of this offence may be liable to the mandatory prohibition order respecting firearms, ammunition and explosives by virtue of s. 100(1), depending on the circumstances in which the offence was committed.

**SYNOPSIS**

Section 248 creates the indictable offence of *interfering with transportation facilities* with the *intention of endangering the safety* of any person. The physical acts outlined in the section are placing anything on, or doing anything to property used in connection with transporting people or goods by land, water or air. In addition to proof of the physical act and the intention, it must be established that the act is likely to cause death or bodily harm. The maximum sentence for this offence is life imprisonment.

## *Motor Vehicles, Vessels and Aircraft*

**Editor's Note:** The above heading and ss. 249 to 261 were substituted for old heading and ss. 233 to 243.1 by the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.), s. 36. The provisions were proclaimed in force December 4, 1985, with the following exceptions:

- (a) section 258(1)(c)(i) and (g)(iii)(A) is to come into force on proclamation,
- (b) section 255(5) proclaimed in force December 4, 1985 in New Brunswick, Manitoba, Prince Edward Island, Alberta, Saskatchewan, Yukon Territory and Northwest Territories, proclaimed in force January 1, 1988 in Nova Scotia; to come into force on proclamation in the remaining provinces.

**DANGEROUS OPERATION OF MOTOR VEHICLES, VESSELS AND AIRCRAFT / Punishment / Dangerous operation causing bodily harm / Dangerous operation causing death.**

**249. (1) Every one commits an offence who operates**

- (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;
- (b) a vessel or any water skis, surf-board, water sled or other towed object on or over any of the internal waters of Canada or the territorial sea of Canada, in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of those waters or sea and the use that at the time is or might reasonably be expected to be made of those waters or sea;
- (c) an aircraft in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of that aircraft or the place or air space in or through which the aircraft is operated; or
- (d) railway equipment in a manner that is dangerous to the public, having regard to all the circumstances, including the nature and condition of the equipment or the place in or through which the equipment is operated.

**(2) Every one who commits an offence under subsection (1)**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) is guilty of an offence punishable on summary conviction.

**(3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.**

**(4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 57; 1994, c. 44, s. 11.**

### **CROSS-REFERENCES**

The terms "motor vehicle" and "railway equipment" are defined in s. 2. The terms "aircraft", "vessel" and "operates" are defined in s. 214. The term "bodily harm" is defined in s. 2.

With respect to the offence in subsec. (4) and the issue of causation, see ss. 224 to 227. For special jurisdictional rules relating to offences committed on the water or on aircraft in the course of a flight see s. 476. Also see s. 477 respecting offences committed on the territorial sea or on internal waters [defined in s. 3 of the Territorial Sea and Fishing Zones Act, R.S.C. 1985, c. T-8]. Section 662(5) makes the offences under this section included offences where the count charges an offence of criminal negligence causing death [s. 220], criminal negligence causing bodily harm [s. 221] or



manslaughter [s. 236] arising out of the operation of a vehicle or navigation of a vessel or aircraft. The related offences of impaired driving causing death and bodily harm are found in s. 255. The offence of failing to stop at the scene of an accident is found in s. 252.

Where the prosecution elects to proceed by indictment on the offence in subsec. (2), dangerous operation, *simpliciter*, then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The accused has an election as to mode of trial of the offences in subssecs. (3) and (4) pursuant to s. 536(2). Release pending trial is determined by s. 515.

An accused found guilty of these offences may, pursuant to s. 259, be ordered prohibited from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be, where the offence under this section was committed by means of a motor vehicle, vessel, aircraft or railway equipment. The length of the prohibition order is as follows: offence under subsec. (2), during any period not exceeding 3 years; offence under either subsec. (3) or (4), during any period not exceeding 10 years. The procedure respecting the making of the order of prohibition is found in s. 260.

## SYNOPSIS

Section 249 makes it an offence to operate motor vehicles, vessels or aircraft in a dangerous manner and provides for punishment upon conviction for these offences.

Section 249(1)(a) makes it an offence to *operate a motor vehicle* in a manner that is *dangerous*. To determine if the driving is dangerous, the paragraph indicates that one must *consider all of the circumstances* such as the nature, condition and the use of the place as well as the amount of traffic that is or might reasonably be expected to be present. In addition, it is essential that there be *danger to the public* who either were *present or who might have been expected to be present*. A passenger in the car is part of the public. The mental element for the offence requires proof of an intention to operate the vehicle in a way which, objectively viewed, constitutes a departure from the standard of care expected of a prudent driver in the circumstances.

Section 249(1)(b) creates a parallel offence in relation to the *dangerous operation of a vessel or water skis, surf board, water sled or other towed object*. The offence may be committed in the internal waters of Canada or on its territorial seas. Section 249(1)(c) creates a parallel offence in relation to the dangerous operation of an aircraft. Finally, s. 249(1)(d) sets out the similar offence of dangerous operation of railway equipment.

Subsection (2) provides that the aforementioned offences may be tried by way of summary conviction procedure or by way of indictment. In the latter case, the maximum sentence is five years' imprisonment.

Subsections (3) and (4) create more *aggravated* indictable offences which occur when a *particular consequence* flows from the commission of any of the offences described in subsec. (1). Subsection (3) applies if the acts described in subsec. (1) *result in bodily harm* to another person and it provides for a maximum sentence not exceeding 10 years. Subsection (4) creates the offence of doing one of the acts described in subsec. (1), when this *causes the death* of another person. A person convicted pursuant to subsec. (4) is liable to up to 14 years imprisonment. In both subssecs. (3) and (4), there must be a *link proven between the accused's acts and the result*. Though it is not yet clearly defined how strong a link need be proven, the accused's act must at least be a cause of the consequences.

## ANNOTATIONS

**Elements of offence of dangerous operation** – In *R. v. Peda*, [1969] 4 C.C.C.245, 7 C.R.N.S.243 (S.C.C.), Judson, J. (Fauteaux, Abbott, Martland and Ritchie, JJ., concurring), held that subsec. (1)(a) contains its own definition of dangerous driving, and a court is not required to charge the jury other than in terms of the subsection itself.

In considering whether the manner of driving endangered the public, it was an error for the trial judge to simply consider the absence of other traffic in the course of a high speed police chase. The passenger in the accused's car and the officer in the police cruiser were included in the public contemplated by this section: *R. v. Edlund* (1990), 23 M.V.R. (2d) 37, 104 A.R. 354 (C.A.).

It is unnecessary for the Crown to prove that the lives or safety of others were actually endangered. The offence is proved where the Crown establishes that the driving complained of was dangerous to the public, that is, either the public actually present at the time of the offence or the public which might reasonably have been expected to be in the particular vicinity at the time: *R. v. Mueller* (1975), 29 C.C.C. (2d) 243, 32 C.R.N.S. 188 (Ont. C.A.).

This offence requires proof of a "marked" departure from prudent conduct: *R. v. Rajic* (1993), 80 C.C.C. (3d) 533, 21 C.R. (4th) 208, 43 M.V.R. (2d) 201 (Ont. C.A.), leave to appeal to S.C.C. refused 83 C.C.C. (3d) vi; *R. v. Rai* (1993), 86 C.C.C. (3d) 122, 50 M.V.R. (2d) 214, 60 W.A.C. 211 (B.C.C.A.).

**Mens rea [fault]** – The appropriate *mens rea* for this offence is based on a modified objective test. As a general rule, personal factors need not be taken into account and the accused may be convicted if it is proven that, viewed objectively, the accused was driving in a manner that was dangerous to the public, having regard to all of the circumstances. In making this assessment, the court should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation. An explanation, such as the sudden onset of an unexpected illness would negative liability if a reasonable person in the position of the accused would not have been aware of the risk: *R. v. Hundal* (1993), 79 C.C.C. (3d) 97, 19 C.R. (4th) 169, [1993] 1 S.C.R. 867.

In a series of cases the Supreme Court of Canada had occasion to explore the fault element in cases of so-called "penal negligence" apparently as distinguished from criminal negligence. Dangerous driving would be one of these offences. In *R. v. Creighton* (1993), 83 C.C.C. (3d) 346, 105 D.L.R. (4th) 632 (S.C.C.) McLachlin J. writing for a majority of the court suggested the following approach to proof of such offences. The first question is whether the *actus reus* is established. This requires that the negligence constitute a marked departure from the standards of a reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so. The next question is whether the *mens rea* is established. Normally the *mens rea* for objective foresight of risking harm is inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. The normal inference that a person who committed a manifestly dangerous act failed to direct their mind to the risk and the need to take care may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. Short of incapacity, personal factors are not relevant whether those factors might indicate, for example, either a lack of experience or a special experience. Also see: *R. v. Gosset* (1993), 83 C.C.C. (3d) 494, 105 D.L.R. (4th) 681 (S.C.C.); *R. v. Naglik* (1993), 83 C.C.C. (3d) 526, 105 D.L.R. (4th) 712 (S.C.C.); and *R. v. Finlay* (1993), 83 C.C.C. (3d) 513, 105 D.L.R. (4th) 699, [1993] 7 W.W.R. 513 (S.C.C.).

**Constitutional considerations** – The offence created by para. (1)(a) is not unconstitutionally vague in violation of s. 7 of the Charter of Rights and Freedoms: *R. v. Demeyer* (1986), 27 C.C.C. (3d) 575, 40 M.V.R. 231 (Alta. C.A.).

Imposing liability for this offence on the basis of a modified objective test for fault does not infringe s. 7 of the Charter: *R. v. Hundal*, *supra*.

**Causation [subsecs. (3) and (4)]** – In considering the causation problems that may arise under subsec. (3) reference may be made to decisions under s. 285 of the Criminal Code, R.S.C. 1927, c. 36, which created an offence of causing bodily harm by wanton driving:

*R. v. Wilmot* (1929), 52 C.C.C. 336, [1930] 1 D.L.R. 778 (Ont. C.A.); *R. v. Dahl* (1936), 67 C.C.C. 37, [1936] 3 W.W.R. 385 (Alta. C.A.).

It was held in relation to the offence of criminal negligence causing death that the element of causation is satisfied if the evidence shows that the criminally negligent conduct of the accused was at least a contributing cause of death outside the *de minimis* range. It is misdirection to instruct the jury that the conduct must be shown to be a substantial cause: *R. v. Pinske* (1988), 6 M.V.R. (2d) 19, 30 B.C.L.R. (2d) 114 (C.A.), affd 100 N.R. 399 (S.C.C.) (7:0).

In *R. v. F.(D.)* (1989), 52 C.C.C. (3d) 357, 73 C.R. (3d) 391, 18 M.V.R. (2d) 62, 100 A.R. 122 (C.A.), the court held that the words “thereby caused” in subsecs. (3) and (4) must demand at least that the unlawful operation of the accused’s vehicle was a real and truly contributing cause of any ensuing injury or death. The court should be chary of allowing speculative inferences alone to stand as the causative link between the driving and the injury. The unlawful driving must demonstrably influence the actual injury accident beyond serving as its backdrop. The court appeared to accept that this was not consistent with the test enunciated in *R. v. Smithers* (1978), 34 C.C.C. (2d) 427, [1978] 1 S.C.R. 506, 75 D.L.R. (3d) 321 (a manslaughter case noted under s. 222), that the unlawful act must be “at least a contributing cause of death, outside the *de minimis* range”, which test must be held to represent the law on trial of offences under this section and s. 255 in view of the decision of the Supreme Court of Canada affirming *R. v. Pinske*, *supra*. The *Smithers* test has also been adopted in the following cases: *R. v. Larocque* (1988), 5 M.V.R. (2d) 221 (Ont. C.A.); *R. v. Halkett* (1988), 73 Sask. R. 241, 11 M.V.R. 109 (C.A.); *R. v. Singhal* (1988), 5 M.V.R. (2d) 172 (B.C.C.A.); *R. v. Arsenault* (1992), 16 C.R. (4th) 301 (P.E.I.C.A.). Moreover, the Alberta Court of Appeal has itself applied the *Smithers* test in the following cases: *R. v. Colby* (1989), 52 C.C.C. (3d) 321, 18 M.V.R. (2d) 73, 100 A.R. 142 (C.A.), and *R. v. Ewart* (1989), 53 C.C.C. (3d) 153, 18 M.V.R. (2d) 55, 100 A.R. 118 (C.A.).

#### FAILURE TO KEEP WATCH ON PERSON TOWED / Towing of person after dark.

**250. (1) Every one who operates a vessel while towing a person on any water skis, surf-board, water sled or other object, when there is not on board such vessel another responsible person keeping watch on the person being towed, is guilty of an offence punishable on summary conviction.**

**(2) Every one who operates a vessel while towing a person on any water skis, surf-board, water sled or other object during the period from one hour after sunset to sunrise is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 27 (1st Supp.), s. 36.**

#### CROSS-REFERENCES

The term “vessel” is defined in s. 214. For special jurisdictional rules relating to offences committed on the water see s. 476. Also see s. 477 respecting offences committed on the territorial sea or on internal waters [defined in s. 3 of the Territorial Sea and Fishing Zones Act, R.S.C. 1985, c. T-8].

The trial of these offences is conducted by a summary convictions court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. An accused convicted of this offence may, pursuant to s. 259, be ordered prohibited from operating a vessel during any period not exceeding 3 years. The procedure respecting the making of that order of prohibition is found in s. 260.

#### SYNOPSIS

A person who operates a vessel while towing another person on water skis, surf-board, water sled or other object is guilty of a summary conviction offence: (1) if there is not



another responsible person watching the person being towed; or (2) if the towing takes place during the period from one hour after sunset to sunrise.

## ANNOTATIONS

Subsection (1) does not apply to an accused being towed behind a remote controlled water-skiing device. While such device is a "vessel" within the meaning of the section, the provision contemplates that "every one" is a person who is actually on board the vessel: *R. v. Gatt* (1992), 72 C.C.C. (3d) 146 (B.C.S.C.).

## UNSEAWORTHY VESSEL AND UNSAFE AIRCRAFT / Defences / Consent of Attorney General.

### 251. (1) Every one who knowingly

(a) sends or being the master takes a vessel that is registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament and that is unseaworthy

(i) on a voyage from a place in Canada to any other place in or out of Canada, or

(ii) on a voyage from a place on the inland waters of the United States to a place in Canada,

(b) sends an aircraft on a flight or operates an aircraft that is not fit and safe for flight, or

(c) sends for operation or operates railway equipment that is not fit and safe for operation

and thereby endangers the life of any person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) An accused shall not be convicted of an offence under this section where the accused establishes that,

(a) in the case of an offence under paragraph (1)(a),

(i) the accused used all reasonable means to ensure that the vessel was seaworthy, or

(ii) to send or take the vessel while it was unseaworthy was, under the circumstances, reasonable and justifiable;

(b) in the case of an offence under paragraph (1)(b),

(i) the accused used all reasonable means to ensure that the aircraft was fit and safe for flight, or

(ii) to send or operate the aircraft while it was not fit and safe for flight was, under the circumstances, reasonable and justifiable; and

(c) in the case of an offence under paragraph (1)(c),

(i) the accused used all reasonable means to ensure that the railway equipment was fit and safe for operation, or

(ii) to send the railway equipment for operation or to operate it while it was not fit and safe for operation was, under the circumstances, reasonable and justifiable.

(3) No proceedings shall be instituted under this section in respect of a vessel or aircraft, or in respect of railway equipment sent for operation or operated on a line of railway that is within the legislative authority of Parliament, without the consent in writing of the Attorney General of Canada. R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 58.

## CROSS-REFERENCES

The terms "aircraft", "vessel" and "operates" are defined in s. 214. The term "railway equipment" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [For notes on consent see

s. 583.] The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

An accused convicted of this offence may, pursuant to s. 259, be ordered prohibited from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be, during any period not exceeding 3 years. The procedure respecting the making of that order of prohibition is found in s. 260.

## SYNOPSIS

This section makes it an indictable offence to endanger the life of any person by knowingly sending or taking a licensed or registered vessel that is unseaworthy on a voyage from a place in Canada to another place in or out of Canada or from a place on the inland waters of the United States to a place in Canada. Similarly, it is an indictable offence to endanger the life of any person by sending or operating an unfit or unsafe aircraft on a flight or by sending or operating railway equipment that is not fit and safe for operation. The maximum penalty for this offence is a term of imprisonment of five years. Subsection (2) provides that no criminal liability will attach to an accused person who establishes that he/she used all reasonable means to ensure that the vessel was seaworthy or that the aircraft or railway equipment was fit and safe. Furthermore, if an accused can establish that the operation of the unseaworthy vessel, or the unfit or unsafe aircraft or railway equipment was, under the circumstances, reasonable and justifiable, he/she cannot be convicted of this offence. The written consent of the Attorney General of Canada is necessary before any proceedings are instituted under this section.

## FAILURE TO STOP AT SCENE OF ACCIDENT / Evidence.

**252. (1) Every person who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with**

**(a) another person,**

**(b) a vehicle, vessel or aircraft, or**

**(c) in the case of a vehicle, cattle in the charge of another person,**

**and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, where possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.**

**(2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability. R.S.C. 1985, c. 27 (1st Supp.), s. 36; 1994, c. 44, s. 12.**

## CROSS-REFERENCES

The term “vehicle” is not defined, although “motor vehicle” is defined in s. 2. The terms “aircraft” and “vessel” are defined in s. 214.

Where the prosecution elects to proceed by indictment on the offence in subsec. (1) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Where the offence involved the operation of a motor vehicle, vessel, aircraft or railway equipment then an accused found guilty of this offence may, pursuant to s. 259, be ordered

prohibited from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be, during any period not exceeding 3 years. The procedure respecting the making of that order of prohibition is found in s. 260. Related offences: s. 249, dangerous operation; ss. 253 and 255, impaired operation and "over 80"; s. 254, failing to comply with screening device or breathalyzer demand; ss. 220 and 221, criminal negligence causing death or bodily harm.

## SYNOPSIS

This section makes it an offence, for any person who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with another person, vehicle, vessel or aircraft, to fail to stop at the scene of the accident in order to avoid civil or criminal liability. The person who is involved in the accident must give his name and address and, if there are injuries, offer assistance. By subsec. (2), uncontroverted evidence of his failure to do so is proof of an intent to escape civil or criminal liability. The offence is hybrid and punishable on indictment by a maximum term of imprisonment of two years.

## ANNOTATIONS

**Elements of offence generally** – The offence is made out when it is established that the defendant failed to perform any one of the three statutory duties set out in the information. Furthermore, naming the defendant as the driver in the charge is within the designation of one who has care and control of the vehicle: *R. v. Steere* (1972), 6 C.C.C. (2d) 403, 19 C.R.N.S.115 (B.C.C.A.).

Contemporaneous knowledge of the accident by the accused is an element of this offence which the Crown must prove. It is not sufficient that the accused "should have known" of the accident: *R. v. Slessor*, [1970] 2 C.C.C. 247, 7 C.R.N.S. 379 (Ont. C.A.); *R. v. Faulkner* (No. 2) (1977), 37 C.C.C. (2d) 217 (N.S. Co.Ct.).

In *R. v. Slessor*, *supra*, the majority divided on the liability of a passenger under this subsection. Gale, C.J.O., held that a passenger in the vehicle, including the owner, who is asleep or otherwise unconscious at the time of an accident cannot be convicted of this offence unless, after the automobile has in fact been stopped in compliance with the section, the owner, upon regaining consciousness causes it to be driven off before the other requisites of the section are met. Further, *per* Gale, C.J.O., apart from joint ventures, only one person in the car would have care, charge or control and if that person is the passenger he must have a degree of exercisable or exercised control over the actual driver. His Lordship would leave open the question whether the subsection is directed solely to the person who has care, charge or control at the moment of impact. Laskin, J.A., held that the subsection could not apply to a person who did not have care, charge or control at the time the car was involved in the accident. Schroeder, J.A., dissenting, held that if both the driver and the owner/passenger had care and control at the relevant time both could be liable for failing to comply with the subsection.

The Court in *R. v. Shea* (1982), 17 M.V.R. 40, 37 Nfld. & P.E.I.R. 457 (Nfld. C.A.) considered that the law was correctly stated by Gale, C.J.O. in *R. v. Slessor*, *supra*, and affirmed the acquittal of the owner of the vehicle because of the trial Judge's finding that he only took over driving of the car some distance, albeit a short distance, from the accident scene.

In *R. v. Saletes* (1985), 39 M.V.R. 41 (Que. S.C.), the accused, a passenger in her own car, was convicted of this offence. While the vehicle was driven by a friend of hers the evidence established that she was in care, charge or control of the vehicle.

**Civil or criminal liability** – The "civil or criminal liability" contemplated by this offence relates to liability which could arise from the accident not to some liability which the accused may have incurred prior to the accident, such as the risk of being arrested for a robbery: *Fournier v. The Queen* (1979), 8 C.R. (3d) 248 (Que. C.A.). Or the risk of being arrested on outstanding warrants for unpaid fines: *R. v. Hofer* (1982), 2 C.C.C. (3d) 236, 18 M.V.R. 230 (Sask. C.A.). Similarly, *R. v. MacLean* (1982), 40 Nfld. & P.E.I.R. 275,



18 M.V.R. 275 (P.E.I.S.C.) risk of being charged for driving while suspended. *Contra: R. v. Benson* (1987), 50 M.V.R. 131 (Ont. Dist. Ct.).

**“Accident”** – A deliberate act of mischief by the accused in relation to property, here lining up his car behind the car of another and then deliberately pushing it into a wall is not an “accident” within the meaning of this section: *R. v. O’Brien* (1987), 39 C.C.C. (3d) 528, 67 Nfld. & P.E.I.R. 68 (Nfld. S.C.T.D.).

However, it was held in *R. v. Hansen* (1988), 46 C.C.C. (3d) 504 (B.C.C.A.), that an “accident” means any incident in which a person operates a motor vehicle so as to cause injury to another person or damage to a vehicle.

This section does not apply where the accident involves the accused’s car and a pole. The reference in subsec. (1)(b) is to another vehicle: *R. v. Yellow* (1990), 27 M.V.R. (2d) 59 (Ont. Ct. (Prov. Div.)).

**Admissibility of statement** – The existence of the statutory duty under this subsection does not dispense with the onus upon the Crown to establish that any statement made was not otherwise involuntary: *R. v. Fex* (1973), 14 C.C.C. (2d) 188, 23 C.R.N.S.368 (Ont. C.A.), and *R. v. Cleavelly* (1966), 49 C.R. 326, 57 W.W.R. 301 (Sask. Q.B.). *Contra: R. v. Smith* (1973), 15 C.C.C. (2d) 113, 25 C.R.N.S.246 (Alta. C.A.).

**Presumption of intent [subsec. (2)]** – This subsection is to be read disjunctively and thus the presumption applies where the accused fails to perform any of the three duties imposed on him: *R. v. Roche* (1983), 3 C.C.C. (3d) 193, 34 C.R. (3d) 141, [1983] 1 S.C.R. 491 (7:0).

As to the meaning of the phrase “in the absence of any evidence to the contrary” see: *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 91 D.L.R. (3d) 449, 5 C.R. (3d) 21 (S.C.C.) noted under s. 348, *infra*.

Evidence which is not rejected by the trier of fact and which tends to show that the accused may not have had the requisite intent is evidence to the contrary. Evidence of drunkenness may constitute evidence to the contrary: *R. v. Nolet (Charette)* (1980), 4 M.V.R. 265 (Ont. C.A.).

Evidence that the accused, prior to walking away from the scene of the accident, was under the influence of alcohol and unresponsive to questions was capable of being evidence to the contrary and thus rebut the presumption: *R. v. Adler* (1981), 59 C.C.C. (2d) 517, [1981] 4 W.W.R. 379 (Sask. C.A.).

**Constitutional considerations** – This subsection is not an unconstitutional infringement on the guarantee to the presumption of innocence in s. 11(d) of the Canadian Charter of Rights and Freedoms: *R. v. T* (1985), 18 C.C.C. (3d) 125, 43 C.R. (3d) 307, 16 D.L.R. (4th) 753 (N.S.S.C. App. Div.); *R. v. Gosselin* (1988), 45 C.C.C. (3d) 568, 9 M.V.R. (2d) 290 (Ont. C.A.).

## OPERATING WHILE IMPAIRED.

**253. Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,**

- (a) while the person’s ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
- (b) having consumed alcohol in such a quantity that the concentration in the person’s blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood. R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 59.

## CROSS-REFERENCES

The terms “motor vehicle” and “railway equipment” are defined in s. 2. The terms “aircraft”, “vessel” and “operates” are defined in s. 214. The presumption respecting “care or control” is

found in s. 258(1)(a). Procedure for making a breathalyzer or approved screening device [A.L.E.R.T.] demand is found in s. 254 and for obtaining a warrant to obtain blood samples in s. 256. The adverse inference respecting the impaired offence for failing to comply with a demand under s. 254 is found in s. 258(3). The presumption respecting the accused's blood alcohol level arising from analysis of a breath sample or blood sample is found in s. 258(1)(c) and (d). Procedure for admission of certificates of an analyst, qualified technician and medical practitioner is in s. 258(1)(e) to (i) and (6) and (7).

The punishment for these offences is set out in s. 255. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Where the accused is charged with impaired operation causing death or causing bodily harm under s. 255(2) or (3) then he has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515. An accused found guilty of this offence is subject to an order prohibiting him from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be. The length of the order is as follows: for a first offence, during a period of not more than three years and not less than three months; for a second offence, during a period of not more than three years and not less than six months; for each subsequent offence, during a period of not more than three years and not less than one year. For prohibition order where the accused is convicted of the offence of impaired causing bodily harm or causing death, see notes under s. 255. The procedure respecting the making of that order of prohibition is found in s. 260.

## ANNOTATIONS

**Proof of care or control** [Also see notes under s. 258(1)(a)] – An intention to drive is not an element of the care or control offence. Care or control may be exercised without such intent where the accused performs some act or series of acts involving the use of the car, its fittings or equipment, whereby the vehicle may unintentionally be set in motion creating the danger this section is designed to prevent: *R. v. Ford* (1982), 65 C.C.C. (2d) 392, 13 M.V.R. 237 (S.C.C.) (7:2).

To convict the accused of the care or control offence, it is not necessary to establish some overt action on the part of the accused to indicate that he was involved with the vehicle in a way as to cause danger to the public. Where the accused had the immediate capacity and means of operating the vehicle, there existed the risk that he would put it in motion and become a danger to the public, even though at the time he was found by the police he was asleep in the front seat of the vehicle: *R. v. Diotte* (1991), 64 C.C.C. (3d) 209 (N.B.C.A.).

**Motor vehicle** – The decision of the Supreme Court of Canada in *R. v. Saunders*, [1967] 3 C.C.C. 278, 1 C.R.N.S. 249, that the definition of a motor vehicle in s. 2 contemplates a kind of vehicle, not whether a vehicle is actually operable or effectively functionable, now renders irrelevant all the previous decisions on when a motor vehicle is a motor vehicle in spite of internal or external conditions causing malfunctioning or immobilization of the vehicle.

An automobile which is out of gas is still a motor vehicle for the purposes of this section: *R. v. Lloyd*, [1988] 4 W.W.R. 423, 6 M.V.R. (2d) 240, 66 Sask. R. 100 (C.A.).

On this issue, also see the note by J. Watson, "Proving the Actus Reus of Motor Vehicle Crimes: What is a Motor Vehicle?", 21 M.V.R. (2d) 93.

**Operation of vessel** – In *R. v. Wade* (1975), 23 C.C.C. (2d) 572 (N.S.Co.Ct.), it was considered that a dragger immobilized by its fishing nets being entangled around other vessels' mooring cables was not then navigated or operated by its captain.

However, a person "operates" a vessel which is merely drifting with its engine turned off: *R. v. Ernst* (1979), 50 C.C.C. (2d) 320, 34 N.S.R. (2d) 318 (S.C. App. Div.).

**Proof of impairment [para. (a)]** – The Criminal Code does not prescribe any special test for determining impairment such as a “marked departure” from normal behaviour. If the evidence of impairment establishes any degree of impairment ranging from slight to great, the offence is made out: *R. v. Stellato* (1993), 78 C.C.C. (3d) 380, 18 C.R. (4th) 127, 43 M.V.R. (2d) 120 (Ont. C.A.), affd [1994] 2 S.C.R. 478n, 90 C.C.C. (3d) 160n, 31 C.R. (4th) 60n.

It cannot be assumed, however, that, where a person’s functional ability is affected in some respects by the consumption of alcohol, his ability to drive is also automatically impaired. Where the proof of impairment consists of observations of conduct, in most cases, if the conduct is a slight departure from normal conduct, it would be unsafe to conclude beyond a reasonable doubt that the ability to drive was impaired by alcohol: *R. v. Andrews* (unreported, January 8, 1996, Alta. C.A.) [096/016/087].

An accused may be convicted of this offence although his impaired condition is due partly to fatigue and partly to the consumption of alcohol: *R. v. Pelletier* (1989), 51 C.C.C. (3d) 161 (Sask. Q.B.).

The Court is not entitled to take judicial notice that at a certain blood-alcohol level the accused’s ability to drive would be impaired: *R. v. Ostrowski* (1958), 122 C.C.C. 196, 29 C.R. 109 (Ont. H.C.J.).

On a charge of impaired driving the trial judge was, however, entitled to take the certificate of analysis into account as part of the whole case and as evidence that prior to being stopped the accused most likely had consumed alcohol. In so doing the judge was not drawing on any technical or special knowledge: *R. v. Dinelle* (1986), 44 M.V.R. 109 (N.S.C.A.).

The word “drug” includes not only drugs in the medicinal sense, but any substance consumed which will bring about the impairment contemplated by this section. In particular the word includes the ingredient in glue which produces a “high” from glue sniffing and which may impair a person’s ability to drive: *R. v. Marionchuk* (1978), 42 C.C.C. (2d) 573, 4 C.R. (3d) 178 (Sask. C.A.).

Even if the accused’s rights under ss. 8 and 10(b) of the Charter were infringed in the obtaining of a blood sample, there was no basis for excluding under s. 24(2) of the Charter evidence as to the accused’s impairment obtained prior to the alleged infringements. This evidence, observations by a physician as to the accused’s apparent state of impairment, was not obtained in a manner that infringed any of the accused’s Charter rights: *R. v. MacDonald* (1988), 41 C.C.C. (3d) 75, 5 M.V.R. (2d) 283, 83 N.S.R. (2d) 210 (C.A.).

**Admissibility of opinion evidence of impairment** – A qualified breathalyzer technician is not, without further credentials, capable of relating the defendant’s reading to his ability to operate a motor vehicle: *R. v. Edson* (1976), 30 C.C.C. (2d) 470, [1976] 3 W.W.R. 695 (B.C.Co.Ct.).

A layman or police officer may give his opinion based on his own observations as to whether or not the accused’s ability to drive was impaired. However, a police officer’s opinion is entitled to no special regard: *R. v. Graat* (1982), 2 C.C.C. (3d) 365, 31 C.R. (3d) 289, [1982] 2 S.C.R. 819 (7:0).

*R. v. Graat, supra*, was applied in *R. v. Polturak* (1988), 9 M.V.R. (2d) 89, 90 A.R. 158 (C.A.) upholding the admission of the opinion of police officers with experience in narcotics control that the accused’s ability to drive was impaired by drugs or drugs and alcohol.

**Mens rea of impairment offence** – In *R. v. King* (1962), 133 C.C.C. 1, 38 C.R. 52 (S.C.C.), an appeal by the Crown, affirming 129 C.C.C. 391, 34 C.R. 264, the question before the Court was whether *mens rea* relating to both the act of driving and to the state of being impaired by alcohol or a drug is an essential ingredient of the offence of impaired driving. Ritchie, J. (Martland, J., concurring), decided that neither necessary



implication nor express language disclosed any intention of Parliament to rule out *mens rea* as an essential ingredient of this offence but was of the opinion that (at p. 19 C.C.C.):

... that element need not necessarily be present in relation both to the act of driving and to the state of being impaired in order to make the offence complete. That is to say, that a man who becomes impaired as the result of taking a drug on medical advice without knowing its effect cannot escape liability if he became aware of his impaired condition before he started to drive his car just as a man who did not appreciate his impaired condition when he started to drive cannot escape liability on the ground that his lack of appreciation was brought about by voluntary consumption of liquor or drug.

The *mens rea* for the care or control offence is the intent to assume care or control after the voluntary consumption of alcohol or a drug and the *actus reus* is the act of assumption of care or control when the voluntary consumption of alcohol or a drug has impaired the ability to drive: *R. v. Toews* (1985), 21 C.C.C. (3d) 24, 47 C.R. (3d) 213, [1985] 2 S.C.R. 119 (7:0).

Thus, the necessary *mens rea* was established where the accused voluntarily consumed a sedative drug which he knew might impair his ability to drive even if the accused as a result of previous experience believed the drug would not take effect until he completed driving: *R. v. Murray* (1985), 22 C.C.C. (3d) 502, 36 M.V.R. 12 (Ont. C.A.).

Drunkenness is no defence to the charge of impaired care or control under para. (a). The only mental element involved in the offence is voluntary intoxication: *R. v. Penno* (1990), 59 C.C.C. (3d) 344, [1990] 2 S.C.R. 865, 80 C.R. (3d) 97 (7:0).

Even where the accused is in a state of automatism or "near automatism" brought about by the consumption of intoxicants, it would seem that this is no defence to the charge: *R. v. Honish* (1991), 68 C.C.C. (3d) 329 (Alta. C.A.).

***Mens rea* of "over 80" offence [para. (b)]** – The requirement and the actual proof of *mens rea* are two different matters. This offence requires *mens rea*, but once there is established driving with an excessive amount of alcohol in his system the defendant then faces the rebuttable presumption of *mens rea* which may be negated by defence evidence. A mistaken belief by the accused, based on an inaccurate chart as to the progressive absorption of alcohol into the blood, that his blood-alcohol would not exceed .08 was held not to be a defence to this charge: *R. v. Penner* (1974), 16 C.C.C. (2d) 334, [1974] 3 W.W.R. 176 (Man. C.A.).

The requisite *mens rea* or fault for this offence is supplied by proof of the accused's voluntary consumption of alcohol. It is not necessary to prove that the accused either knew or was reckless to the fact that his blood-alcohol exceeded the legal limit: *R. v. MacCannell* (1980), 54 C.C.C. (2d) 188, 6 M.V.R. 19 (Ont. C.A.). Fold: *R. v. Lynch* (1982), 69 C.C.C. (2d) 88, 38 Nfld. & P.E.I.R. 267 (Nfld. C.A.); *R. v. Patterson* (1982), 69 C.C.C. (2d) 274, 15 M.V.R. 283 (N.S. C.A.).

**Proof of "over 80" offence** – Where the Crown is unable to rely on the presumption in s. 258(1)(c) the Court cannot take judicial notice of the progressive absorption of alcohol into the blood to prove that a blood-alcohol reading which exceeded .08 at the time of the test exceeded .08 at the time of the offence: *R. v. Stevenson* (1972), 14 C.C.C. (2d) 412 (B.C.C.A.); *R. v. McBurney* (1974), 21 C.C.C. (2d) 207, [1975] 2 W.W.R. 448 (Man. C.A.); *R. v. Chandok* (1973), 12 C.C.C. (2d) 500 (N.S.Co. Ct.); *R. v. Wolff* (1976), 31 C.C.C. (2d) 337 (Ont. H.C.J.). In the latter case it was also held that the evidence that the accused displayed obvious signs of impairment likewise did not prove the offence under this section, following *R. v. Coach* (1971), 4 C.C.C. (2d) 333, [1971] 3 O.R. 466 (H.C.J.). Similarly, *R. v. Robertson* (1979), 47 C.C.C. (2d) 159 (B.C.C.A.).

In *R. v. Perossa* (1974), 19 C.C.C. (2d) 553 (B.C.S.C.) a conviction for this offence was upheld despite the lack of expert evidence relating the results of analysis of a blood sample back to the time of the offence where there was evidence of erratic driving and a high degree of intoxication. In view of this other evidence the Court distinguished *R. v. Stevenson*, *supra*.

**Included offences** – The care or control offence is included in the offence of driving and thus an accused charged with the driving offence may be convicted of the care and control offence: *R. v. Drolet* (1988), 14 M.V.R. (2d) 50, 20 Q.A.C. 94, [1989] R.J.Q. 295 (C.A.), affd [1990] 2 S.C.R. 1107n, 26 M.V.R. (2d) 169. Where the charge is care or control evidence that the accused was in fact driving may be sufficient to sustain the conviction on the charge as laid: *R. v. Coults* (1982), 66 C.C.C. (2d) 385, 29 C.R. (3d) 189 (Ont. C.A.); *R. v. Pielie* (1982), 18 M.V.R. 46 (B.C.S.C.).

However, where the Crown's case on a charge of care or control is based on evidence of the finding of the accused in the driver's seat, a conviction may not be entered on an admission by the accused that at some time prior to his arrest he had been driving the vehicle. The Crown is bound by the case it presents to the Court and when it fails to prove that case, the accused having successfully rebutted the presumption in s. 258(1)(a), it cannot ask for a conviction of another offence disclosed by the accused's own evidence: *R. v. Pendleton* (1982), 1 C.C.C. (3d) 228, 18 M.V.R. 78 (Ont. C.A.).

In a case subsequent to the enactment of this section it has been held that para. (b) creates two separate offences, of operating and have care and control, of equal gravity and the care or control offence is not included in the operating offence: *R. v. Piicher* (1988), 6 M.V.R. (2d) 51, 70 Nfld. & P.E.I.R. 96 (Nfld. C.A.).

Where the trial Judge finds that although the accused has consumed alcohol he has a reasonable doubt as to her impairment and thus acquits on the charge contrary to para (a), he may still convict on the charge under para. (b). In such circumstances the doctrine of issue estoppel has no application so as to bar a conviction on the latter offence: *R. v. Casson* (1976), 30 C.C.C. (2d) 506, [1976] 4 W.W.R. 561 (Alta. C.A.).

**Multiple convictions** – A motorist cannot be convicted of both offences under this section occurring at one time: *R. v. Houchen* (1976), 31 C.C.C. (2d) 274, 71 D.L.R. (3d) 739 (2:1) (B.C.C.A.); *R. v. Boivin* (1976), 34 C.C.C. (2d) 203, 34 C.R.N.S. 227 (Que. C.A.).

A motorist may not choose which of the over-eighty or ability-impaired charges he will plead guilty to; the Court will first dispose of the charge on which the Crown seeks a conviction: *R. v. Butler* (1975), 27 C.C.C. (2d) 26, [1975] W.W.D. 173 (B.C.Prov.Ct.).

A 24-hour driving suspension imposed under provincial legislation does not bar a conviction under this section although the suspension and the charge under this section arose out of the same incident: *R. v. Art* (1987), 39 C.C.C. (3d) 563, 61 C.R. (3d) 204, 7 M.V.R. (2d) 132 (B.C.C.A.).

**Charging offence** – In *R. v. Hawryluk*, [1967] 3 C.C.C. 356, 1 C.R.N.S. 143 (Sask. C.A.), an information that followed the wording of the statute, "... while his ability to drive a motor vehicle was impaired by alcohol or a drug, did unlawfully drive a motor vehicle ...", was held to be valid as it only charged one of the two alternative offences of driving while impaired or having the care or control of a motor vehicle while impaired, and as each offence may be committed in more than one way it is proper to set out both factors, "by alcohol or drug", in the charge.

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**DEFINITIONS** / "analyst" / "approved container" / "approved instrument" / "approved screening device" / "qualified medical practitioner" / "qualified technician" / Testing for presence of alcohol in the blood / Samples of breath or blood where reasonable belief of commission of offence / Exception / Failure or refusal to provide sample / Only one conviction for failure to comply with demand.

**254. (1)** In this section and sections 255 to 258,

"analyst" means a person designated by the Attorney General as an analyst for the purposes of section 258;

"approved container" means

(a) in respect of breath samples, a container of a kind that is designed to receive a

- sample of the breath of a person for analysis and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada, and
- (b) in respect of blood samples, a container of a kind that is designed to receive a sample of the blood of a person for analysis and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada;

#### REGULATIONS: APPROVED BLOOD SAMPLE CONTAINER ORDER

##### *Approved Container*

2. The container, Vacutainer® XF947, being a container of a kind that is designed to receive a sample of the blood of a person for analysis, is hereby approved as suitable, in respect of blood samples, for the purposes of section 258 of the *Criminal Code*.  
SI/85-199, *Can. Gaz. Part II*, 27/11/85, p. 4690.

“approved instrument” means an instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person and is approved as suitable for the purposes of section 258 by order of the Attorney General of Canada;

#### REGULATIONS: APPROVED BREATH ANALYSIS INSTRUMENTS ORDER

##### *Approved Instruments*

2. The following instruments, each being an instrument of a kind that is designed to receive and make an analysis of a sample of the breath of a person in order to measure the concentration of alcohol in the blood of that person, are hereby approved as suitable for the purposes of section 258 of the *Criminal Code*:

- (a) Breathalyzer®, Model 800;
- (b) Breathalyzer®, Model 900;
- (c) Breathalyzer®, Model 900A;
- (d) Intoximeter Mark IV;
- (e) Alcolmeter AE-D1;
- (f) Intoxilyzer 4011AS;
- (g) Alcotest® 7110;
- (h) Intoxilyzer® 5000C;
- (i) Breathalyzer®, Model 900B;
- (j) Intoxilyzer 1400;
- (k) BAC Datamaster C; and
- (l) Alco-Sensor IV-RBT IV.

SI/85-201, *Can. Gaz. Part II*, 27/11/85, p. 4692; SI/92-105, *Can. Gaz. Part II*, 17/6/92, p. 2577; SI/92-167, *Can. Gaz. Part II*, 23/9/92, p. 3807; SI/93-61, *Can. Gaz., Part II*, 5/5/93, p. 2198; SI/93-175, *Can. Gaz., Part II*, 8/9/93, p. 3714; SOR/94-422, *Can. Gaz., Part II*, 15/6/94, p. 2451; SOR/94-572, *Can. Gaz., Part II*, 7/9/94, p. 3132; SOR/95-312, *Can. Gaz., Part II*, 12/7/95, p. 1885.

“approved screening device” means a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person and that is approved for the purposes of this section by order of the Attorney General of Canada;

#### REGULATIONS: APPROVED SCREENING DEVICES ORDER

##### *Approved Screening Devices*

2. The following devices, each being a device of a kind that is designed to ascertain the presence of alcohol in the blood of a person, are hereby approved for the purposes of section 254 of the *Criminal Code*:

- (a) Alcolmeter S-L2; and
- (b) Alco-Sûr;
- (c) Alcotest® 7410 PA3;
- (d) Alcotest® 7410 GLC;



(e) Alco-Sensor IV DWF; and

(f) Alco-Sensor IV PWF.

SI/85-200, *Can. Gaz. Part II*, 27/11/85, p. 4691; SI/88-136, *Can. Gaz. Part II*, 28/9/88, p. 4074; SOR/93-263, *Can. Gaz., Part II*, 2/6/93, p. 2403; SOR/94-193, *Can. Gaz., Part II*, 9/3/94, p. 1232; SOR/94-423, *Can. Gaz., Part II*, 15/6/94, p. 2453; SOR/96-81, *Can. Gaz., Part II*, 24/1/96, p. 609.

**“qualified medical practitioner”** means a person duly qualified by provincial law to practise medicine;

**“qualified technician”** means,

- (a) in respect of breath samples, a person designated by the Attorney General as being qualified to operate an approved instrument, and
- (b) in respect of blood samples, any person or person of a class of persons designated by the Attorney General as being qualified to take samples of blood for the purposes of this section and sections 256 and 258.

(2) Where a peace officer reasonably suspects that a person who is operating a motor vehicle or vessel or operating or assisting in the operation of an aircraft or of railway equipment or who has the care or control of a motor vehicle, vessel or aircraft or of railway equipment, whether it is in motion or not, has alcohol in the person's body, the peace officer may, by demand made to that person, require the person to provide forthwith such a sample of breath as in the opinion of the peace officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of breath to be taken.

**Note:** The wording in the following subsec. (3) does not conform to the R.S.C. 1985 convention which converts the former reference in the phrase “on reasonable and probable grounds” to “on reasonable grounds”. A corrective statute is expected to be enacted in the near future.

(3) Where a peace officer believes on reasonable and probable grounds that a person is committing, or at any time within the preceding two hours has committed, as a result of the consumption of alcohol, an offence under section 253, the peace officer may, by demand made to that person forthwith or as soon as practicable, require that person to provide then or as soon thereafter as is practicable

(a) such samples of the person's breath as in the opinion of a qualified technician,  
or

(b) where the peace officer has reasonable and probable grounds to believe that, by reason of any physical condition of the person,

(i) the person may be incapable of providing a sample of his breath, or

(ii) it would be impracticable to obtain a sample of his breath,

such samples of the person's blood, under the conditions referred to in subsection (4), as in the opinion of the qualified medical practitioner or qualified technician taking the samples

are necessary to enable proper analysis to be made in order to determine the concentration, if any, of alcohol in the person's blood, and to accompany the peace officer for the purpose of enabling such samples to be taken.

(4) Samples of blood may only be taken from a person pursuant to a demand made by a peace officer under subsection (3) if the samples are taken by or under the direction of a qualified medical practitioner and the qualified medical practitioner is satisfied that the taking of those samples would not endanger the life or health of the person.

(5) Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer under this section.

**(6) A person who is convicted of an offence committed under subsection (5) for a failure or refusal to comply with a demand made under subsection (2) or paragraph (3)(a) or (b) in respect of any transaction may not be convicted of another offence committed under subsection (5) in respect of the same transaction.** R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 1 (4th Supp.), s. 14; c. 32 (4th Supp.), s. 60.

#### CROSS-REFERENCES

The terms “peace officer”, “motor vehicle” and “railway equipment” are defined in s. 2. The terms “aircraft”, “vessel” and “operates” are defined in s. 214. The procedure for obtaining a warrant to obtain blood samples is set out in s. 256. The adverse inference respecting the impaired offence for failing to comply with a demand under this section is found in s. 258(3). The presumption respecting the accused’s blood alcohol level arising from analysis of a breath sample or blood sample is found in s. 258(1)(c) and (d). Procedure for admission of certificates of an analyst, qualified technician and medical practitioner is set out in s. 258(1)(e) to (i) and (6) and (7). Note s. 258(4) which provides for summary application to a judge within 3 months of the date the blood sample was taken for an order releasing one of the samples for the purpose of testing by the defence.

The punishment for this offence is set out in s. 255. Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. An accused found guilty of this offence is subject to an order prohibiting him from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be, where the accused was operating or had the care or control of a motor vehicle, vessel, aircraft or railway equipment or was assisting in the operation of an aircraft or of railway equipment at the time the offence was committed or within the two hours preceding that time. The length of the order is as follows: for a first offence, during a period of not more than three years and not less than three months; for a second offence, during a period of not more than three years and not less than six months; for each subsequent offence, during a period of not more than three years and not less than one year. The procedure respecting the making of that order of prohibition is found in s. 260.

Related offences: s. 249, dangerous operation; s. 252, failing to stop at scene of accident; ss. 253 and 255, impaired operation and “over 80”; ss. 220 and 221, criminal negligence causing death or bodily harm.

Section 257 protects the medical practitioner and qualified technician from criminal and civil liability when proceeding under this section.

#### SYNOPSIS

Subsection (1) defines certain terms relating to breath and blood demands. Subsection (2) states that a peace officer may make a demand for a breath sample from a person who is operating a motor vehicle, vessel, aircraft or railway equipment and whom he *reasonably suspects* has ingested alcohol [the approved screening device or “ALERT” demand]. Under subsec. (3), if the peace officer has *reasonable and probable grounds* to believe that a person is or has, during the preceding two hours, committed an offence under s. 253, the peace officer may make a demand of that person for breath samples [the breathalyzer demand]. When the peace officer has *reasonable and probable grounds* to believe that the physical condition of the person is such that he may not be capable of providing the breath sample or that it would be impractical to do so, a demand may be made that *blood samples* be taken by or under the supervision of a qualified physician as long as the physician is satisfied that this procedure would not endanger the life of the person [blood demand]. It is an offence to refuse to comply with a peace officer’s demand under this section, pursuant to subsec. (5). Pursuant to subsec. (6), an accused can only be convicted of an offence under this section arising out of the same transaction.

## ANNOTATIONS

**Editor's Note:** While some of the decisions noted below were decided under the predecessor legislation, they were felt to be relevant to these provisions.

**Note respecting right to counsel annotations** – The Canadian Bill of Rights, s. 2(c)(ii), guarantees a person who has been arrested or detained the right to retain and instruct counsel without delay. There was no requirement that the detainee be informed of this right. Further, the absence of an enforcement mechanism for violations of the Canadian Bill of Rights and the fact that it was, at best, a *quasi*-constitutional document limited the impact of the Bill of Rights on criminal procedure generally and especially in respect of the admission of evidence. Virtually the only impact that the Canadian Bill of Rights had was that, in some circumstances, violation of s. 2(c)(ii) might constitute a reasonable excuse for refusing to comply with the breathalyzer demand.

The impact of s. 10(b) of the Charter of Rights and Freedoms has been much more significant for a number of reasons. First, the person arrested or detained not only has the right to consult counsel, but the right to be informed of that right, unless the legislation constitutes a reasonable limit within the meaning of s. 1 of the Charter. In addition, the Charter is a constitutional document and contains its own enforcement mechanism in s. 24(2). The cases respecting right to counsel fall into roughly two categories. The first category concerns those cases which attempt to define the circumstances when the s. 10(b) rights attach and the content of those rights. The notes of those cases will, generally speaking, be found under subsec. (2) or (3), as the case may. These cases will, of course, be relevant where an attempt is made to introduce evidence obtained as a result of a demand under these sections. The second category concerns those cases where it is alleged that there has been an infringement of the right in the context of a refusal to comply with a demand under subsec. (2) or (3). Those cases, generally speaking, are noted under subsec. (5). There will obviously be some overlap between the two categories and, therefore, readers should review the cases under any of the right to counsel headings when concerned about a right to counsel issue.

**Subsec. (1) / Validity of designation of technician** – Designation as a qualified technician by the Deputy Attorney-General is valid: *R. v. Bourassa* (1972), 6 C.C.C. (2d) 414, 21 C.R.N.S.355 (B.C.S.C.).

The designation in Ontario of a person as a qualified technician by the provincial Solicitor-General is valid by virtue of the combined operation of this subsection and s. 2 which defines "Attorney General" in part as the Attorney General or Solicitor General of the province: *R. v. Wilkes*; *R. v. Foshay* (1979), 48 C.C.C. (2d) 362, 2 M.V.R. 289 (Ont. C.A.), leave to appeal to S.C.C. refused March 17, 1980.

A police officer designated as a qualified technician under the former s. 237 but who was not redesignated under this section, when many other technicians were, was not a qualified technician within the meaning of this section. Section 44(a) of the Interpretation Act, R.S.C. 1985, c. I-21, providing that a person acting under a former enactment shall continue to act, as if appointed under the new enactment, until another is appointed in his stead, could not apply in view of the designation under this section of other technicians: *R. v. Schemenauer* (1987), 34 C.C.C. (3d) 573, 58 Sask. R. 244, 49 M.V.R. 205 (C.A.).

In *R. v. Novis* (1987), 36 C.C.C. (3d) 275, 50 M.V.R. 1 (Ont. C.A.), s. 44 of the Interpretation Act was applied to find that the officer's original designation under former s. 237 was valid until his new designation became effective. There was, however, no evidence that another officer had been appointed in his stead.

By virtue of s. 7 of the Interpretation Act, R.S.C. 1985, c. I-21 a designation is valid although made prior to proclamation of this section. The effect of s. 7 is that the designation takes effect when the new provision is proclaimed in force: *R. v. Janes* (1987), 40 C.C.C. (3d) 209, 7 M.V.R. (2d) 41, 81 N.S.R. (2d) 388 (C.A.).

The flaw in the designation of an officer which referred to him as a "qualified techni-



cian" when in fact he was qualified to take only breath samples and not blood samples did not affect the admissibility of his certificate in relation to analysis of breath samples: *R. v. MacDonald* (1986), 65 Nfld. & P.E.I.R. 72, 46 M.V.R. 76 (P.E.I.S.C.), affd 39 C.C.C. (3d) 189, 7 M.V.R. (2d) 128, 67 Nfld. & P.E.I.R. 1 (C.A.). Similarly: *R. v. Janes* (1987), 40 C.C.C. (3d) 209, 7 M.V.R. (2d) 41, 81 N.S.R. (2d) 388 (C.A.).

**Proof of designation of technician** – If the designation by the Attorney-General of a breathalyzer officer as a "qualified technician" is sought to be proved by Gazette the publication must be before the Court; otherwise the officer's own evidence of his appointment being made and gazetted is, in the absence of evidence to the contrary, sufficient: *R. v. Leavitt* (1971), 5 C.C.C. (2d) 141, 16 C.R.N.S. 304 (Alta. S.C.).

Judicial notice must be taken of a designation made by the Attorney General and duly gazetted: *R. v. Betts* (1977), 34 C.C.C. (2d) 562, 16 N.B.R. (2d) 317 (S.C.).

The qualified technician's *viva voce* evidence that he had been so qualified by the Attorney-General and his appointment had been gazetted establishes a rebuttable presumption of his position. In addition judicial notice may be taken that the Borkenstein breathalyzer is an approved instrument: *R. v. Leblanc* (1972), 7 C.C.C. (2d) 525, 4 N.S.R. (2d) 29 (N.S.C.A.).

Production of an original letter of appointment purportedly signed by the Attorney-General is proof in the absence of any evidence to the contrary that the breathalyzer operator was a qualified technician: *R. v. Baskier* (1971), 4 C.C.C. (2d) 552, 17 C.R.N.S.26 (Sask. C.A.).

Testimony by the breathalyzer operator that he was a qualified technician and production by him of a letter from the Attorney-General to that effect is sufficient proof in the absence of evidence to the contrary that he is a qualified technician. The designation need not be proved by production of the provincial Gazette containing the designation: *R. v. Gettle* (1977), 34 C.C.C. (2d) 569 (B.C.C.A.).

The accused does not satisfy the evidential burden upon him to adduce evidence tending to negative the presumption of due appointment of the technician, which is raised by the Crown showing that the officer had acted in the requisite capacity, merely by cross-examination of the officer directed to show that the officer was unsure who had signed the letter notifying him of his appointment: *R. v. Adams* (1986), 30 C.C.C. (3d) 469, 51 Sask. R. 161 (C.A.).

The statement in the technician's signed certificate as to his designation as a qualified technician by the Attorney-General is evidence of his official character: *R. v. Evanson* (1973), 11 C.C.C. (2d) 275, [1973] 4 W.W.R. 137 (Man.C.A.); *R. v. Novis* (1987), 36 C.C.C. (3d) 275, 50 M.V.R. 1 (Ont. C.A.).

**Approved container** – A vacutainer XF947 was an approved container within the meaning of para. (a), notwithstanding it was used approximately one year after the expiry date printed on the container by the manufacturer. Expert evidence established that the passing of the expiry date did not adversely affect the result of the blood tests: *R. v. Roberts* (1990), 25 M.V.R. (2d) 156 (Ont. Ct. (Prov. Div.)).

**Approved instrument** – It was held considering a technician's certificate issued pursuant to the former s. 237 that a statement in the technician's certificate that the breath sample was received into a "Borkenstein Breathalyzer, an approved instrument pursuant to section 237(6)" is sufficient proof that the instrument was approved even though the particular model number of the Borkenstein Breathalyzer was not specified in the certificate: *R. v. Gorman* (1976), 32 C.C.C. (2d) 222, 15 N.B.R. (2d) 289 (S.C. App. Div.); *R. v. Gilbert* (1976), 31 C.C.C. (2d) 251 (Ont. C.A.); *R. v. Pedrotti* (1976), 30 C.C.C. (2d) 575n (B.C.S.C.); *R. v. Gregorwich* (1975), 27 C.C.C. (2d) 267, [1975] W.W.D. 170 (Alta. S.C. App. Div.). *Contra*: *R. v. Foley* (1975), 25 C.C.C. (2d) 514 (Sask. Q.B.).

A breathalyzer Model 900A is an approved instrument notwithstanding that the instrument has been modified to eliminate the instrument's susceptibility to radio frequency interference. Minor alterations to improve an instrument's efficiency do not alter

the kind of instrument approved. It is only evidence of a modification to the instrument which goes to the issue of the kind, nature or character of the breathalyzer that should create a reasonable doubt as to whether the particular breathalyzer remains in a class of approved instruments: *R. v. Bebbington* (1988), 43 C.C.C. (3d) 456, 8 M.V.R. (2d) 151 (Ont. C.A.).

**Subsec. (2) [Approved screening device demand] / Proof of reasonable suspicion –**

The element of reasonable suspicion applies only to whether there is alcohol in the accused's body and not to operation or control. The latter element must be proved to exist in fact and not merely as a matter of reasonable suspicion on the part of the officer: *R. v. Swietorzecki* (1995), 97 C.C.C. (3d) 285, 80 O.A.C. 149, 11 M.V.R. (3d) 30 (C.A.).

There is no requirement that the officer apprehending the motorist administer the test. A second officer attending the scene subsequently, who forms the requisite belief, may make the demand and administer the test: *R. v. Telford* (1979), 50 C.C.C. (2d) 322 (Alta. C.A.).

However, the officer who makes the demand must also formulate the opinion as to the adequacy of the sample provided by the motorist: *R. v. Shea* (1979), 49 C.C.C. (2d) 497, 3 M.V.R. 134 (P.E.I.S.C.).

The test for making the demand is consumption of alcohol alone, and not its amount or behavioural consequence: *R. v. Gilroy* (1987), 3 M.V.R. (2d) 123, 79 A.R. 318 (C.A.) leave to appeal to S.C.C. refused 87 N.R. 236n, 85 A.R. 160n.

**Breath sample to be provided “forthwith”** – The term “forthwith” suggests that the breath sample is to be provided immediately. Thus, a demand made by a police officer, who is without the device and requires half an hour for the device to arrive, does not satisfy the conditions of this subsection. Since the demand was invalid, the accused was under no obligation to comply with it and his failure to comply could not constitute an offence: *R. v. Grant* (1991), 67 C.C.C. (3d) 268, 7 C.R. (4th) 388, 5 C.R.R. (2d) 193 (S.C.C.).

The demand did not comply with this subsection where the officer did not have the screening device with him and had to take the accused to the detachment. A total of 14 minutes elapsed between the making of the demand and the time when the device was ready. For the sample to be provided “forthwith” it must be provided immediately, meaning very shortly after the accused has been requested to accompany the officer for the purpose of providing the sample, usually at the side of the road or in the immediate vicinity: *R. v. Cote* (1992), 70 C.C.C. (3d) 280, 6 O.R. (3d) 667 (C.A.).

Where there is evidence that the officer knew that the suspect had recently consumed alcohol and expert evidence shows that the subsequent screening test would be unreliable due to the presence of alcohol in the mouth, and the officer knows that the resultant test will provide inaccurate results, then the fact that the suspect failed the test could not itself provide the requisite reasonable and probable grounds to make a demand under subsec. (3). However, the officer is not required to wait 15 minutes on each occasion that the officer makes the demand. It is only where the officer had reason to believe that, without waiting, the test may be inaccurate, that the officer needs to delay the administration of the test. Where the particular screening device used has been approved under the statutory scheme, the officer is entitled to rely on its accuracy unless there is credible evidence to the contrary: *R. v. Bernshaw*, [1995] 1 S.C.R. 254, 95 C.C.C. (3d) 193, 35 C.R. (4th) 201.

The officer is entitled to delay taking the sample where there are grounds to believe that the delay is necessary to obtain accurate results, as where the suspect has recently consumed alcohol: *R. v. Dewald*; *R. v. Pierman* (1994), 92 C.C.C. (3d) 160, 19 O.R. (3d) 704, 73 O.A.C. 287 (C.A.), affd (*R. v. Dewald*) (1996), 103 C.C.C. (3d) 382, 26 O.R. (3d) 480n, 192 N.R. 237 (S.C.C.).

Although the officer did not have the device when he stopped the accused, it was brought to him in less than five minutes at which time the demand was made. This was a

valid demand and therefore there was no need to inform the accused of his rights under s. 10(b) of the Charter: *R. v. Misasi* (1993), 79 C.C.C. (3d) 339, 12 O.R. (3d) 232, 42 M.V.R. (2d) 12 (C.A.). Similarly: *R. v. Higgins* (1994), 88 C.C.C. (3d) 232, [1994] 3 W.W.R. 305, 50 M.V.R. (2d) 24 (Man. C.A.).

The fact that the device was not on the person of the police officer or in his police vehicle when the demand was made or that he did not know the time frame for the arrival of the device does not necessarily take the demand outside subsec. (2). The determination of whether the test has been administered forthwith is not a question of the number of seconds which have elapsed from the time the demand was made to the time the test was administered but rather is a question of the circumstances of the case. It would seem that if the time between the demand and the administering of the test is more than 30 minutes then in most situations the demand would be invalid, but if there are no more than 30 minutes between the demand and administering of the test the court must examine the circumstances: *R. v. Payne* (1994), 91 C.C.C. (3d) 144, 121 Nfld. & P.E.I.R. 137, 5 M.V.R. (3d) 189 (Nfld. C.A.).

**Proof of contemporaneity of operation or care or control** – The demand may be made under this subsection although the officer forms the requisite suspicion only after the motorist has left the vehicle. The phrase “who is driving a motor vehicle” includes a person who “has been” driving and thus the demand may be made if the person was known to have been recently driving a vehicle: *Letkeman v. The Queen* (1983), 28 Sask. R. 307, 24 M.V.R. 273 (Q.B.); *R. v. Cassidy* (1987), 2 M.V.R. (2d) 136, 80 N.B.R. (2d) 85 (Q.B.). *Contra: MacLellan v. The Queen* (1984), 26 M.V.R. 234 (N.B.Q.B.).

Similarly, it was held that where there was only a momentary separation in time between the driving and contact with the police, the demand was properly made: *R. v. Burkart* (1985), 24 C.C.C. (3d) 32, [1986] 1 W.W.R. 706 (Man. C.A.).

And where the accused was standing near his vehicle after having called a tow-truck and identified himself as the driver he was in immediate care and effective control so as to give the officer power to make a demand under this subsection: *R. v. Drapeau* (1985), 48 C.R. (3d) 185, 36 M.V.R. 58 (N.S.S.C. App. Div.).

The demand under this subsection was still valid where although the accused had stopped driving 15 minutes earlier he remained in the vehicle throughout that time: *R. v. Johnson*, [1987] 3 W.W.R. 765 (Man. C.A.).

While the words “is” and “has” must have some degree of past significance, the justifiable time lapse after the actual care and control has ended, and before the demand is made, should be no longer than is reasonably necessary to enable the police officer to carry out his duties under the provision. The demand should be made as soon as is reasonably possible in the circumstances; *R. v. Campbell* (1988), 44 C.C.C. (3d) 502, 66 C.R. (3d) 150, 9 M.V.R. (2d) 1 (Ont. C.A.). However, a demand was properly made under this subsection where although it was made 25 minutes after the actual operation of the vehicle the accused had not relinquished care and control of the motor vehicle: *R. v. Lackovic* (1988), 45 C.C.C. (3d) 80, 9 M.V.R. (2d) 229 (Ont. C.A.).

**Validity of stop / random stops, R.I.D.E., etc.** – The random stopping of a motor vehicle as part of a well-publicized programme to reduce impaired driving such as the R.I.D.E. programme is authorized at common law and therefore does not affect the validity of a demand made under this subsection once the officer forms the requisite suspicions: *R. v. Dedman* (1985), 20 C.C.C. (3d) 97, 46 C.R. (3d) 193, [1985] 2 S.C.R. 2 (4:3).

The random stopping of a motorist for the purposes of a spot check procedure, even if of relatively brief duration, results in a detention within the meaning of s. 9 of the Charter of Rights and Freedoms and such detention is arbitrary in violation of s. 9 where, although the stop is done pursuant to statutory [provincial] authority and for lawful purposes there are no criteria for the selection of the drivers to be stopped and subjected to the spot check procedure. However, the authorization of such stops by the provincial



legislation is a reasonable limit within the meaning of s. 1 of the Charter of Rights, having regard to the importance of highway safety and the role to be played in relation to it by a random stop authority for the purpose of increasing both the detection and the perceived risk of detection of motor vehicle offences, many of which cannot be detected by mere observation of driving. Finally, the demand by the police officer that the motorist surrender his driver's licence and proof of insurance for inspection as required by the provincial legislation does not infringe the motorist's right to be secure against unreasonable search and seizure as guaranteed by s. 8 of the Charter: *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398, 63 C.R. (3d) 14, [1988] 1 S.C.R. 621 (7:0).

It was held that although there was no comparable legislation in Saskatchewan to the Ontario legislation considered in *R. v. Hufsky*, *supra*, the common law power to stop vehicles in the course of a checkpoint programme also constituted a reasonable limit on the right guaranteed by s. 9 of the Charter. Thus, evidence obtained as to the accused's blood-alcohol level following such a stop is admissible: *R. v. Burke* (1988), 45 C.C.C. (3d) 434, 68 C.R. (3d) 73, 10 M.V.R. (2d) 44 (C.A.).

Further, even purely random stops, not part of an organized programme such as the R.I.D.E. programme, but permitted by provincial legislation and *semble* common law, are a reasonable limit on the s. 9 Charter rights where the stop is for a legal reason, such as to check the driver's licence and insurance, the driver's sobriety or the mechanical fitness of the vehicle: *R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22, [1990] 1 S.C.R. 1257, 21 M.V.R. (2d) 165, 77 C.R. (3d) 110, 108 N.R. 171; *R. v. Wilson* (1990), 56 C.C.C. (3d) 142, [1990] 1 S.C.R. 1291, [1990] 5 W.W.R. 188, 77 C.R. (3d) 137, 108 N.R. 207.

**Right to counsel under s. 10(b) of Charter** – It was held that a motorist required to supply a breath sample under the predecessor to this subsection is detained within the meaning of s. 10 (b) of the Charter, but it is a reasonable limitation on the right to retain and instruct counsel as guaranteed by that provision that the motorist supply the breath sample without being entitled to consult counsel: *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411, 63 C.R. (3d) 1, [1988] 1 S.C.R. 640, 4 M.V.R. (2d) 185.

Although there is no obligation on the police to inform the motorist of his right to retain and instruct counsel under s. 10(b) of the Charter of Rights and Freedoms, having done so, the police must then give the accused a reasonable opportunity to speak to counsel before requiring him to comply with the demand under this subsection: *R. v. Belecque* (1989), 13 M.V.R. (2d) 78 (Ont. Dist. Ct.).

The term “forthwith” does not mean “immediately”. While the test should be administered as soon as possible, a delay of perhaps 15 minutes to ensure that the officer can obtain a proper sample, as where the officer knows that the suspect has just recently consumed alcohol, is permissible. The suspect is not entitled to his or her rights under s. 10(b) of the Charter during this type of delay: *R. v. Bernshaw* (1995), 95 C.C.C. (3d) 193, [1995] 3 W.W.R. 457, 176 N.R. 81 (S.C.C.).

Where the demand is invalid as here because it was not that the accused provide the sample forthwith, it could not constitute a reasonable limit and the accused being detained should have been informed of his rights under s. 10(b): *R. v. Grant*, [1991] 3 S.C.R. 139, 67 C.C.C. (3d) 268, 7 C.R. (4th) 388.

**Right to counsel – sobriety tests other than screening device demand** – A motorist who is stopped and required to perform certain sobriety tests is detained within the meaning of s. 10(b) of the Charter of Rights and Freedoms. However, it was held in *R. v. Saunders* (1988), 41 C.C.C. (3d) 532, 63 C.R. (3d) 37, 4 M.V.R. (2d) 199 (Ont. C.A.), that provincial legislation, which by necessary inference permitted a police officer to request performance of these tests to determine whether or not there were grounds for making a demand under this subsection, constituted a reasonable limit on the right of the accused to retain and instruct counsel and to be informed of that right prior to complying with the request to perform the sobriety tests. Like the test with the screening device, the coordination or sobriety tests must be performed quickly if the potential danger of

impaired drivers is to be eliminated from the highways. A similar result was reached by the British Columbia Court of Appeal in *R. v. Bonin* (1989), 42 C.C.C. (3d) 230, 11 M.V.R. (2d) 31 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi, 102 N.R. 400n, considering slightly different provincial legislation. It was there held that the operating requirements of the provincial legislation, in particular a provision permitting a 24-hour roadside suspension, constituted a reasonable limit on the rights in s. 10(b) of the Charter. It should be noted that the British Columbia Court of Appeal had earlier held in *R. v. Bonogofski* (1987), 39 C.C.C. (3d) 457, 4 M.V.R. (2d) 215, that an accused did have the right to be informed of his right to counsel under s. 10(b) before complying with a request to perform sobriety tests. However, as the court noted in *R. v. Bonin* it was not there asked to consider the effect of the provincial legislation and whether such legislation might constitute a reasonable limit on the s. 10(b) rights. Finally, in *R. v. Gallant* (1989), 48 C.C.C. (3d) 329, 70 C.R. (3d) 139, 66 Alta. L.R. (2d) 165 (C.A.), leave to appeal to S.C.C. refused February 22, 1990, the court noted that in Alberta there was no legislation comparable to that considered by the courts in Ontario and British Columbia and thus no limit prescribed by law within the meaning of s. 1 of the Charter to justify the failure to inform the motorist of his right to retain and instruct counsel prior to complying with sobriety tests. The court also considered whether the common law could constitute such a limit but concluded that while the common law permitted the officer to request the sobriety test, the motorist was not bound to comply and no limit on the right to counsel necessarily flowed from the common law duty imposed on the police constable. There was no urgency and nothing to suggest that the sobriety test had to be performed at the scene or forthwith. However, in the particular case, the court held that the evidence obtained could be admitted since, *inter alia*, there was no evidence that the officer realized that he should advise the accused of his rights.

An accused required to participate in certain sobriety tests is detained within the meaning of s. 10(b) of the Charter of Rights and there being no common law, nor, in Nova Scotia, any statutory authority which could constitute a reasonable limit on the accused's rights as guaranteed by s. 10(b), the accused must be informed of his right to counsel before being required to do the tests: *R. v. Baroni* (1989), 49 C.C.C. (3d) 553, 91 N.S.R. (2d) 295, 14 M.V.R. (2d) 186 (C.A.). A similar result was reached with respect to Prince Edward Island where, as well, it appears that there is no applicable legislation: *R. v. Hill* (1990), 25 M.V.R. (2d) 27, 86 Nfld. & P.E.I.R. (P.E.I.C.A.). However, the contrary result was reached in *R. v. Sullivan* (1989), 22 M.V.R. (2d) 261 (C.M.A.C.) where it was held that the common law power to investigate offences can, like the statutes in Ontario and British Columbia, constitute a reasonable limit prescribed by law within the meaning of s. 1 of the Charter and thus permit delay in informing the motorist of his right to counsel.

**Effect of other Charter of Rights guarantees** – Failure to show the accused the results of the test with the roadside screening device does not constitute a violation of the Canadian Charter of Rights and Freedoms: *R. v. Tanner* (1986), 41 M.V.R. 92 (N.S.C.A.).

This subsection does not violate the guarantee to fundamental justice under s. 7 of the Canadian Charter of Rights and Freedoms despite the lack of criteria in the legislation for determining when the peace officer might reasonably suspect there is alcohol in the person's body. Nor does it authorize an unreasonable search and seizure in violation of s. 8 of the Charter: *R. v. Broadhurst* (1985), 24 C.C.C. (3d) 27, 38 M.V.R. 35 (Ont. H.C.J.); *R. v. Dawson* (1986), 28 C.C.C. (3d) 46 (Alta. Q.B.). *Contra*: *R. v. Ward* (1989), 50 C.C.C. (3d) 376, 18 M.V.R. (2d) 110 (P.E.I.S.C.).

**Subsec. (3)(a) [Breath demand.] / Grounds for demand** – The presumption of care or control under s. 258(1)(a) does not apply to this offence. The test to be applied as to whether the officer had a belief based on reasonable and probable grounds that the accused was in care or control and had committed an offence under s. 253 is an objective

one. The officer may be justified because of the accused's position in the vehicle in believing that he was the driver. Such belief does not have to be established as correct provided it was reasonable: *R. v. Trask* (1987), 3 M.V.R. (2d) 6, 81 N.S.R. (2d) 376 (C.A.).

The reasonable and probable grounds do not have to be based upon the actual operation of a vehicle as the officer's observations of the motorist's condition may disclose the grounds to give him the necessary belief: *R. v. Conway* (1974), 16 C.C.C. (2d) 233, 25 C.R.N.S.69 (P.E.I.S.C.). Further, such grounds may be based on information supplied by third parties, not necessarily fellow police officers, and the officer may testify as to the contents of the conversations which caused him to make the demand: *R. v. Strongquill* (1978), 43 C.C.C. (2d) 232, 4 C.R. (3d) 182 (Sask. C.A.).

The motorist's failure to pass the test with the roadside screening device pursuant to subsec (2), itself constitutes grounds for the demand under this section. There is no requirement that the device be proved to have been operating properly: *R. v. Arthurs* (1981), 63 C.C.C. (2d) 573, 25 C.R. (3d) 83 (Sask. C.A.); *R. v. Beaudette* (1981), 61 C.C.C. (2d) 61, 8 Man. R. (2d) 433 (Co. Ct.); *R. v. Hurley* (1980), 29 Nfld. & P.E.I.R. 263, 9 M.V.R. 46 (Nfld. C.A.); *R. v. Yurechuk*, [1983] 1 W.W.R. 460, 42 A.R. 176 (C.A.); *R. v. Denney* (1985), 34 M.V.R. 111 (N.S.S.C. App. Div.); or even that it is an approved instrument: *R. v. Seymour* (1986), 75 N.S.R. (2d) 174, 45 M.V.R. 132 (S.C. App. Div.).

Where the officer must have known that the screening device test results may be unreliable because he neither waited for 15 minutes nor determined when the accused had his last drink, then he could not have the requisite reasonable and probable grounds to make the breathalyzer demand: *R. v. Bernshaw* (1993), 85 C.C.C. (3d) 404, 48 M.V.R. (2d) 246, 47 W.A.C. 247 (B.C.C.A.), revd [1995] 1 S.C.R. 254, 95 C.C.C. (3d) 193, 35 C.R. (4th) 201.

Assuming that the taking of breath samples was a violation of s. 8 of the Charter because, at the time the demand was made, the officer did not have the requisite grounds to believe that the accused had committed an offence within the preceding two hours. Nevertheless, the evidence of analysis of the breath samples will be admitted where it is not shown that to admit the evidence would bring the administration of justice into disrepute. In this respect, a relevant consideration was that much of the delay was due to the accused having left the scene of the accident, rather than remaining and giving assistance as required by the Criminal Code and provincial legislation. The accused should not be allowed to profit from his own wrongdoing: *R. v. Musurichan* (1990), 56 C.C.C. (3d) 570, 107 A.R. 102 (C.A.). [Also see notes under s. 258: **Effect of absence of grounds for making demand.**]

**Validity of demand** – A peace officer is only vested with the authority to make a demand in the territorial jurisdiction in which his appointment is effective: *R. v. Soucy* (1975), 23 C.C.C. (2d) 561, 11 N.B.R. (2d) 75 (S.C.App.Div.); *R. v. Arsenault* (1980), 55 C.C.C. (2d) 38, 31 N.B.R. (2d) 365 (C.A.).

Even though a demand for blood samples has been made and complied with, if thereafter it became practicable to make a demand under this paragraph for breath samples, then such demand may properly be made and the results of analysis of the breath samples is admissible: *R. v. Hiltz* (1988), 4 M.V.R. (2d) 84, 82 N.S.R. (2d) 387 (C.A.).

**Form of demand** – It is unnecessary that the demand be in any particular form provided it is made clear to the accused that he has to give a sample of his breath: *R. v. Nicholson* (1970), 8 C.C.C. (2d) 170, 27 C.R.N.S. 346 (N.S.S.C. App. Div.); *R. v. Flegel* (1972), 7 C.C.C. (2d) 55 (Sask. C.A.).

The demand under this subsection must be unequivocal and should not leave the accused with any doubt that he must comply, and that it is not a mere request or invitation: *R. v. Boucher* (1986), 73 N.B.R. (2d) 113, 47 M.V.R. 173 (Q.B.).

A demand that the accused supply "a sample" of his breath is a sufficient demand



under this subsection despite the fact that the subsection refers to "such samples": *R. v. Rentoul* (1977), 37 C.C.C. (2d) 78 (Alta. S.C.T.D.).

**Offence committed within preceding two hours** – For a demand to be valid, the officer making the demand must form a belief within two hours of the time that he believes that an offence under s. 253 was committed. It is not necessary, however, that the demand be made within the two hour period or that the tests be performed within two hours: *R. v. Pavel* (1989), 53 C.C.C. (3d) 296, 74 C.R. (3d) 195 (Ont. C.A.); *R. v. Huchner* (1989), 92 A.R. 395, 13 M.V.R. (2d) 37 (C.A.). *Contra*: *R. v. Goodyear* (1988), 70 Nfld. & P.E.I.R. 256 (Nfld. S.C.).

This subsection requires that the judge make two findings, the first being whether the police officer believed the accused had committed an offence within the past two hours and secondly whether he had reasonable and probable grounds to so believe: *R. v. Rowland* (1989), 14 M.V.R. (2d) 261 (Alta. C.A.).

**Demand to be made "forthwith"** – This subsection contemplates that the officer must be given a reasonable time to consider whether or not he will make a demand and accordingly imposes a duty on the motorist to remain in the presence of the officer until he has completed the duties imposed on him. Should the motorist flee before the officer has had an opportunity to make the demand, the motorist may be convicted of the offence contrary to s. 129: *R. v. Quist* (1981), 61 C.C.C. (2d) 207, 11 Sask. R. 28 (C.A.).

Although the word "forthwith" means "within a reasonable time", the ensuing phrase "or as soon as practicable" should not be construed so as to cut down or restrict that word: *R. v. MacGillivray* (1971), 4 C.C.C. (2d) 244, [1971] 3 O.R.452 (Ont. C.A.).

**Failure of police to conduct test** – An officer's demand does not oblige the police to conduct a test and the failure to do so does not vitiate other evidence to prove a driving ability offence: *R. v. Angelantoni* (1975), 28 C.C.C. (2d) 179, 31 C.R.N.S. 342 (Ont. C.A.).

**Constitutionality of provision** – In a lengthy judgment which considered many of the provisions of the Canadian Bill of Rights it was held that the compulsory breath test did not offend the Bill and in particular did not offend the provisions with respect to self-crimination, due process and protection of the law: *Curr v. The Queen* (1972), 7 C.C.C. (2d) 181, [1972] S.C.R. 889 (9:0).

Similarly, these provisions do not offend the Charter of Rights and Freedoms: *R. v. Altseimer* (1982), 1 C.C.C. (3d) 7, 29 C.R. (3d) 276 (Ont. C.A.); *R. v. Gaff* (1984), 15 C.C.C. (3d) 126, 36 Sask. R. 1 (C.A.) leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

Although this section gives the officer the right to detain the motorist for the purpose of complying with the demand, it is open to the officer to arrest the motorist pursuant to s. 495 and such arrest will not violate the accused's rights against arbitrary detention or imprisonment under s. 9 of the Charter of Rights and Freedoms where it was not unreasonable to prevent a repetition or continuation of the offence: *R. v. Cayer* (1988), 6 M.V.R. (2d) 1, 66 C.R. (3d) 30 (Ont. C.A.), or for the accused's own safety: *R. v. Faulkner* (1988), 9 M.V.R. (2d) 137 (B.C.C.A.). Similarly: *R. v. Baker* (1988), 9 M.V.R. (2d) 165 (N.S.C.A.).

As to other cases respecting the effect of a police officer or police department policy to arrest all impaired drivers prior to having them comply with the demand under this subsection and whether an arrest in such circumstances violates s. 9 of the Charter of Rights and Freedoms, see notes under s. 495, *infra*.

**Right to counsel under s. 10(b) of Charter / generally** – In *R. v. Therens* (1985), 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, [1985] 1 S.C.R. 613 (6:2) the court considered whether a motorist to whom a demand under this subsection is made is under detention within the meaning of s. 10(b) of the Canadian Charter of Rights and Freedoms. Estey, J. (Beetz, Chouinard and Wilson JJ. concurring) held that when the police officers administered the breathalyzer test the motorist, who was not under arrest, was detained

and accordingly prior to his complying with the demand, the police were required to inform him of his right to counsel. *Le Dain J.* (Dickson C.J.C., McIntyre and Lamer JJ. concurring on this issue) held that the motorist was under detention when the demand was made under this section to accompany the police officer and submit to a breathalyzer test. He was, accordingly, entitled at the time of his detention to be informed of his right to instruct counsel without delay. As the officers did not inform the accused of his rights under s. 10(b) and he did not consult counsel prior to providing breath samples the majority of the court held that the evidence subsequently obtained from the breathalyzer analysis was inadmissible at the accused's trial for the offence under s. 253(b).

Although breathalyzer evidence is statutorily compellable, its admission can affect the fairness of the trial. The scope of available legal advice in this context is necessarily limited, but it is improper to speculate about the nature of the advice that a detainee would have received and whether the evidence would have been obtained had the right not been infringed. The burden is on the Crown to show that the accused would not have acted any differently had his s. 10(b) rights been fully respected and that, accordingly, the evidence would have been obtained irrespective of the breach. There is sufficient scope for legal advice to a detainee who has received a breathalyzer demand to say that the courts must not speculate about the nature of that advice and whether it would have made any difference to the outcome of the case. One of the purposes of s. 10(b) is to provide detainees with an opportunity to make informed choices about their legal rights and obligations. This opportunity is no less significant when breathalyzer charges are involved: *R. v. Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, 33 C.R. (4th) 1; *R. v. Pozniak*, [1994] 3 S.C.R. 310, 92 C.C.C. (3d) 472, 33 C.R. (4th) 49.

It is not the case that every breach of the right to counsel will result in the exclusion of evidence obtained as a result of a breathalyzer demand. Where the words used by the officer, which were found to be a breach of s. 10(b), were uttered in an effort, in good faith, albeit misguided, to assist the accused in the exercise of his right before it was too late, then it was not shown that to admit the breathalyzer results would bring the administration of justice into disrepute: *R. v. Marshall* (1989), 52 C.C.C. (3d) 130 (Ont. C.A.).

Once it was proved that the accused had been informed of his right to counsel and indicated he understood his rights, there was no obligation on the Crown to establish that he waived the right to consult counsel merely because he had not sought legal advice: *R. v. Shannon* (1987), 34 C.C.C. (3d) 525, 58 C.R. (3d) 117, [1987] N.W.T.R. 214 (C.A.). Also see: *R. v. Elgie* (1987), 35 C.C.C. (3d) 332, 48 M.V.R. 103 (B.C.C.A.), leave to appeal to S.C.C. refused September 17, 1987. Similarly, see *R. v. Baig* (1987), 37 C.C.C. (3d) 181, [1987] 2 S.C.R. 537 (7:0).

In *R. v. Stein* (1989), 14 M.V.R. (2d) 229 (B.C.C.A.), the court adopted the test approved by the Supreme Court of Canada in *R. v. Baig* (1987), 37 C.C.C. (3d) 181, [1987] 2 S.C.R. 537, that absent proof of circumstances indicating that the accused did not understand his right to counsel when he was informed of it, the onus was on the accused to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it.

There is no burden on the Crown to establish that the accused was advised of his rights under s. 10 of the Charter, rather it is for the accused to put any alleged infringement in issue: *R. v. Roach* (1985), 23 C.C.C. (3d) 262, 49 C.R. (3d) 237, 42 M.V.R. 231 (Alta. C.A.).

**Right to counsel / duty to inform** – The duty imposed upon the police under s. 10(b) of the Charter of Rights and Freedoms is to inform the accused of his rights at a time when he was capable of understanding them and not to require the accused to provide potentially incriminating evidence prior to affording the accused a reasonable opportunity to make a reasoned choice to retain legal counsel. Thus the accused's rights under s. 10(b) were infringed where the police proceeded with the test under this paragraph at a time that the accused was so drunk that he could not understand what had been said to him: *R. v. Mohl* (1987), 34 C.C.C. (3d) 435, 56 C.R. (3d) 318, [1987] 4 W.W.R. 31 (Sask.

C.A.), reversed on other grounds [see note below]; *R. v. D. (P.A.)*, [1987] 6 W.W.R. 175, 58 Sask. R. 48 (C.A.), or where as a result of a concussion he was incapable of understanding his right to counsel: *R. v. McAvena* (1987), 34 C.C.C. (3d) 461, 56 C.R. (3d) 303, [1987] 4 W.W.R. 15 (Sask. C.A.).

**Note:** an appeal by the Crown was allowed in the case of *R. v. Mohl* (1989), 47 C.C.C. (3d) 575, [1989] 1 S.C.R. 1389, 69 C.R. (3d) 399 (9:0), the court holding that, assuming there had been a violation of s. 10(b), to admit the evidence of the results of the breathalyzer test would not bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter. The court adopted the reasons of Sirois J. in the summary conviction appeal court. Sirois J. had held that it was not appropriate to grant a remedy to an accused who by his own actions has placed himself in a position of being unable to understand his rights under the Charter.

The delay in informing the accused of his rights under s. 10(b) of the Charter from the time the demand under this section was made until his arrival at the station was so inconsequential as to not warrant exclusion of the results of the breathalyzer test: *R. v. Baccarday* (1986), 44 M.V.R. 178 (N.S.C.A.).

The accused's right to be informed of his right to counsel under s. 10(b) was infringed where the information was given in English but the accused, to the knowledge of the officer, was French-speaking. The accused testified that he did not understand his right to counsel. Special circumstances existed requiring the officer to reasonably ascertain that the accused's rights were understood by him: *R. v. Vanstaceghem* (1987), 36 C.C.C. (3d) 142, 58 C.R. (3d) 121, 48 M.V.R. 311 (Ont. C.A.).

The accused's right to counsel is infringed where police inform him that he has the right to retain and instruct counsel without delay and then instruct him that he has the right to make only one telephone call, a statement with the detainee believes to be correct, and he thereupon makes one call which proves to be abortive and which he believes exhausts his right to further endeavour to contact counsel: *R. v. Pavel, supra*.

The accused, having been informed of his right to counsel in relation to the offence of dangerous driving for which he was arrested, need not again be informed of his rights under s. 10(b) of the Charter of Rights and Freedoms 10 minutes later, prior to the making of a breathalyzer demand under this paragraph: *R. v. MacDonald* (1986), 25 C.C.C. (3d) 572, 40 M.V.R. 46 (N.S.C.A.).

The officer, having advised the accused of his rights under s. 10(b) of the Canadian Charter of Rights and Freedoms before requiring that he comply with the demand to provide samples for analysis in the screening device, need not repeat the rights prior to requiring compliance with the breathalyzer demand: *R. v. Scheuchel* (1985), 32 M.V.R. 316 (Sask. Q.B.).

The two preceding cases should now be read in light of the decision of the Supreme Court of Canada in *R. v. Black* (1989), 50 C.C.C. (3d) 1, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97 (5:0), where the court held that s. 10(b) of the Charter of Rights and Freedoms must be considered in light of s. 10(a) which requires the police to inform the detainee of the reason for the detention. A detainee can exercise her s. 10(b) rights in a meaningful way only if she knows the extent of her jeopardy and thus, the accused's rights under s. 10(b) were violated where she was initially arrested on a charge of attempted murder and not re-informed of her rights when the victim died and she was charged with first degree murder. The two charges were "significantly different".

However, in *R. v. Schmautz* (1990), 53 C.C.C. (3d) 556, [1990] 1 S.C.R. 398, 75 C.R. (3d) 129, [1990] 3 W.W.R. 193, it was held that the accused's rights under s. 10(b) were not infringed in the following circumstances. The police informed the accused of his right to retain and instruct counsel and gave him the usual police caution after informing him that they were investigating an accident. The accused was not detained at that time. After several questions, the officers made a breathalyzer demand and the accused refused. While the accused was detained when the demand was made there was no requirement that he again be informed of his rights under s. 10(b). While there must be



a close factual connection or linkage relating the warning to the detention and the reason therefor, here, by giving the accused both the police and Charter warnings at the outset of the short interview, the police alerted the accused that he was suspected and was being investigated in relation to a serious offence. The situation that arose with the breathalyzer demand was directly connected to the investigation. This was not a case where another more serious offence was suddenly being investigated because of changed circumstances external to the encounter. In this case, the demand arose directly and immediately out of the inquiry; it was part of a single incident at which the accused was fully made aware of his rights.

The accused having been informed of his rights under s. 10(b) of the Charter at the scene of an accident, following the making of a blood demand, he need not again be informed of his rights at the hospital, although the demand itself was repeated at that time: *R. v. Scott* (1991), 30 M.V.R. (2d) 42, 104 N.S.R. (2d) 112 (C.A.).

In *R. v. Brydges* (1990), 53 C.C.C. (3d) 330, [1990] 1 S.C.R. 190, 74 C.R. (3d) 129, [1990] 2 W.W.R. 220, 103 N.R. 282 (7:0), a majority of the court, for the first time, laid down the rule that the police, as a matter of routine, must, as part of the duty to inform the accused of his right to counsel under s. 10(b), inform him of the availability of legal aid and duty counsel. Since this resulted in the imposition of a new duty on the police, a transition period of 30 days from the date of release of the judgment [February 1, 1990] was appropriate. The court left open the further question as to the effect this new caution will have on what constitutes due diligence, on the part of the accused, in the exercise of the right to counsel. The court noted, however, that the right to consult counsel of choice upon arrest or detention may now have to be considered, having regard to the immediate availability of duty counsel in most jurisdictions.

The detainee is entitled under the information component of s. 10(b) of the Charter to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and how such advice can be accessed: *R. v. Pozniak*, [1994] 3 S.C.R. 310, 92 C.C.C. (3d) 472, 33 C.R. (4th) 49.

**Right to consult counsel in private** – The right to privacy is inherent in the right to counsel as guaranteed by s. 10(b). The accused does not waive that right merely by acquiescing to conditions imposed by the police officer: *R. v. Lepage* (1986), 32 C.C.C. (3d) 171, 54 C.R. (3d) 371, 44 M.V.R. 167 (N.S.C.A.); *R. v. Rudolph* (1986), 32 C.C.C. (3d) 179, 73 A.R. 281, 44 M.V.R. 14 (Q.B.); *R. v. Young* (1987), 81 N.B.R. (2d) 233 (C.A.); *R. v. McKane* (1987), 35 C.C.C. (3d) 481, 58 C.R. (3d) 130, 49 M.V.R. 1 (Ont. C.A.).

Violation of the accused's right to consult counsel in private will not in every case require that evidence thereafter obtained must be excluded. Here, the accused followed the advice of his lawyer and complied with the demand. There was no reason to hold that anything had occurred which might result in an unfair trial: *R. v. Olak* (1990), 55 C.C.C. (3d) 257, 23 M.V.R. (2d) 1, 37 O.A.C. 304 (C.A.).

The right to privacy inherent in s. 10(b) of the Charter of Rights is the right to consult counsel and does not necessarily start with the attempt to reach a lawyer: *R. v. Standish* (1988), 41 C.C.C. (3d) 340, 5 M.V.R. (2d) 239, 24 B.C.L.R. (2d) 323 (C.A.).

The private communication to which the detainee is entitled is not restricted to a communication with his lawyer and includes communication with any person to whom the detainee wishes to speak in the process of exercising his rights under s. 10(b) of the Charter of Rights and Freedoms: *R. v. McNeilly* (1988), 10 M.V.R. (2d) 142 (Y.T.S.C.).

Where the circumstances surrounding the giving of information to an accused with respect to his rights under s. 10(b) of the Charter are such as to lead the accused to reasonably believe that he does not have the right to retain and instruct counsel in private or will not be given such right, and where such circumstances are known or ought to be known to the officer and the officer knows or ought to know the effect that such circumstances may reasonably have on the accused, there is a duty on the officer to explain to the accused that he has such right to privacy and that it will be given to him. Again, the

failure to give such explanation constitutes a violation of s. 10(b): *R. v. Jackson* (1993), 86 C.C.C. (3d) 233, 25 C.R. (4th) 265, 48 M.V.R. (2d) 277 (Ont. C.A.).

**Opportunity to consult counsel** – Section 10(b) does not create a constitutional obligation on governments to ensure that free and immediate, preliminary legal advice is available to all detainees: *R. v. Matheson*, [1994] 3 S.C.R. 328, 92 C.C.C. (3d) 434, 33 C.R. (4th) 136. Nevertheless, where a detainee has indicated a desire to exercise his right to counsel, the state is required to provide him with a reasonable opportunity to do so. During this period, state agents must refrain from eliciting incriminating evidence from the detainee until he has had a reasonable opportunity to reach counsel. The police are obliged to “hold off” from attempting to elicit criminatory evidence from the detainee until he has had a reasonable opportunity to reach counsel. While there may be compelling and urgent circumstances in which despite a detainee’s being unable to contact a lawyer due to the unavailability of duty counsel, police will not be required to hold off in requiring the detainee to comply with a breathalyzer demand, as the existence of the two-hour evidentiary presumption available to the Crown under s. 258(1)(c)(ii) does not by itself constitute such a compelling or urgent circumstance. Urgency is not created by a mere investigatory and evidentiary expediency in circumstances where duty counsel is unavailable to detainees who have asserted their desire to contact a lawyer and have been duly diligent in exercising their rights: *R. v. Prosper*, [1994] 3 S.C.R. 236, 92 C.C.C. (3d) 353, 33 C.R. (4th) 85.

Police officers making an arrest in a potentially volatile situation may be justified in denying the detainee the right then and there to call counsel in order to prevent any new factors from entering the situation. Once the police are clearly in control of the situation, however, they must afford the accused an opportunity to contact counsel in private: *R. v. Taylor* (1990), 54 C.C.C. (3d) 152, 95 N.S.R. (2d) 282 (N.S.C.A.).

For a comprehensive review of the case law respecting the duty to inform the accused of his rights without delay and the circumstances where the evidence will be excluded pursuant to s. 24(2) of the Charter, see: *R. v. Dubois* (1990), 54 C.C.C. (3d) 166, 74 C.R. (3d) 216, 22 M.V.R. (2d) 154 (Que. C.A.).

The refusal of the police to permit the accused’s lawyer into the breathalyzer room to observe the administering of the test does not constitute a denial of the right to counsel as guaranteed by s. 10(b) of the Charter: *R. v. Atchison* (1991), 68 C.C.C. (3d) 241 (B.C.S.C.).

**Subsec. (3)(b) [blood demand]** – For a demand to be valid under this paragraph, the officer making the demand must have formed a belief within two hours of the time that he believes that an offence under s. 253 was committed. It is not necessary, however, that the demand be made within the two hour period or that the tests be performed within two hours: *R. v. Deruelle* (1992), 75 C.C.C. (3d) 118, [1992] 2 S.C.R. 663, 15 C.R. (4th) 215. Nor is it necessary that the officer have formed a belief before the expiration of the two hour period that one of the preconditions within subpara. (1) or (ii) existed. Thus, a demand will be valid under this paragraph where, having formed the belief that the accused committed an offence under s. 253 within the preceding two hours, the officer first makes a demand for breath samples but later finds it to be impossible or impracticable to obtain a breath sample and therefore then makes a demand for blood samples, even if this latter demand is made after expiration of the two hour period: *R. v. Pavel*, *supra*; *R. v. Gale* (1991), 13 W.C.B. (2d) 408 (Nfld. C.A.).

It is the officer making the demand who must have formed the belief as to the commission of the offence within the two hour period. Where, initially, a breath demand was made which could not be complied with, a subsequent blood demand by another officer was invalid where this latter officer had no belief that the offence under s. 253 had been committed within the preceding two hours: *R. v. Pavel*, *supra*.

A demand for a blood sample was properly made where the motorist, although willing to take a breathalyzer test, had sustained a head injury, was receiving treatment in a hos-

pital and the officer was concerned that the two hour limit would expire before the treatment was completed. The words “any physical condition of the person” give the officer a wide discretion to determine the practicability or capability of the motorist to provide a breath sample: *R. v. Wytliuk* (1989), 17 M.V.R. (2d) 18 (Man. Q.B.).

A demand made under this paragraph must make reference to the conditions set out in subsec. (4), namely that the samples of blood may only be taken by demand if the samples are taken by or under the direction of a qualified medical practitioner and the practitioner is satisfied that the taking of those samples will not endanger the life or health of the person: *R. v. Green* (1992), 70 C.C.C. (3d) 285, 11 C.R. (4th) 196, [1992] 1 S.C.R. 614. On the other hand, the officer need not obtain the prior approval of the medical practitioner before making the demand: *R. v. Green* (1990), 60 C.C.C. (3d) 362, 25 M.V.R. (2d) 281 (N.S.C.A.).

The failure of the officer to make reference to the conditions set out in subsec. (4) did not however effect the admissibility of the results of the blood sample which were taken pursuant to the demand: *R. v. Langdon* (1992), 74 C.C.C. (3d) 570, 40 M.V.R. (2d) 1 (Nfld. C.A.). Similarly: *R. v. Brown* (1991), 69 C.C.C. (3d) 139, 107 N.S.R. (2d) 349, 35 M.V.R. (2d) 1 (N.S.C.A.).

An accused, who has been involved in a motor vehicle accident and taken to the hospital because of his serious injuries, is detained within the meaning of s. 10(b) of the Charter when a demand is made by a police officer under this paragraph that he consent to the taking of blood samples. While any actual physical restraint arose from his injuries, there was a detention from the psychological compulsion of the demand: *R. v. Harder* (1989), 49 C.C.C. (3d) 565, 14 M.V.R. (2d) 205 (B.C.C.A.).

A motorist, confined to hospital as a result of injuries received in the motor vehicle accident under investigation, is not detained when the officer merely asks some questions at the beginning of the investigation. He is only detained when the demand for a blood sample was made and it was only then that he was entitled to be informed of his rights under s. 10(b) of the Charter: *R. v. Kay* (1990), 53 C.C.C. (3d) 500 (B.C.C.A.).

The demand under this paragraph need not be made in the presence of the qualified medical practitioner. Further, the word “impracticable” in subpara. (ii) does not mean impossible and connotes a degree of reason and involves some regard for practice: *R. v. Pearce* (1988), 56 Man. R. (2d) 77, 13 M.V.R. (2d) 116 (Q.B.).

Where a proper demand for a blood sample has been made and the accused has complied, there is no further requirement of proof that the accused “consented” to the taking of the sample: *R. v. Knox* (1995), 39 C.R. (4th) 362, 13 M.V.R. (3d) 291 (Que. C.A.).

**Subsec. (5) [Failure to comply with A.L.E.R.T. demand under subsec. (2).]** – The Crown is not required to prove that the device which would have been used, had there been no refusal, was an approved device: *R. v. Reimer* (1980), 54 C.C.C. (2d) 127, 4 M.V.R. 270 (Sask. Q.B.). *R. v. Lemieux* (1990), 24 M.V.R. (2d) 157, 41 O.A.C. 326 (C.A.).

The criminalization of the refusal to comply with the demand under subsec. (2) is a reasonable limit on the rights guaranteed by the Canadian Charter of Rights and Freedoms: *R. v. Foster* (1989), 8 W.C.B. (2d) 144 (Ont. C.A.), leave to appeal to S.C.C. refused January 18, 1990.

**Subsec. (5) [Failure to comply with breath demand.] / Elements of offence** – This subsection creates the single offence of non-compliance which may be committed either by failure or refusal, and it is immaterial whether or not a breathalyzer machine was available at the time of the demand: *R. v. Kitchemonia* (1973), 12 C.C.C. (2d) 225, [1973] 5 W.W.R. 669 (Sask. C.A.).

This subsection creates only one offence, the gravamen of which is non-compliance with a demand, not two offences of “fails” or “refuses” and the word “refuses” is fully



comprised in the word "fails": *R. v. Gesner* (1979), 46 C.C.C. (2d) 252, 24 N.B.R. (2d) 468 (C.A.).

Similarly, the offence may be committed by either refusing to accompany the officer or refusing to supply breath samples and the Crown need only show the offence of refusing to comply with the demand was committed in either one of these modes even though both modes are set out in the information. The additional averment in the information is mere surplusage: *R. v. MacNeil* (1978), 41 C.C.C. (2d) 46 (Ont. C.A.); *B.C. (Attorney General) (Re)*, [1980] 3 W.W.R. 193 (B.C.S.C.).

The word "refuses" is fully comprised within the word "fails" and thus a verbal refusal to take the test will support a conviction on an information charging that the accused failed to comply: *R. v. Gesner* (1979), 46 C.C.C. (2d) 252 (N.B. C.A.).

As the combined effect of this section and subsec. 258(1) has been held to require that at least two samples be taken, an accused who refuses to give more than one sample may be convicted of the offence under this subsection and it is no defence to such a charge that the technician considered the first sample satisfactory: *R. v. Faulkner* (No. 2) (1977), 37 C.C.C. (2d) 217 (N.S. Co. Ct.); *R. v. Hatt* (1978), 41 C.C.C. (2d) 442 (N.B. C.A.); *R. v. Quiring* (1979), 46 C.C.C. (2d) 51, 7 C.R. (3d) 180, [1979] 2 W.W.R. 381 (B.C.C.A.); *R. v. Boswell* (1978), 44 C.C.C. (2d) 356 (P.E.I.S.C.); *R. v. Hazzard* (1978), 51 C.C.C. (2d) 344 (N.W.T.C.A.); *R. v. Giroux, supra*.

**Charging offence** – An information which, although it omits the words "without reasonable excuse", is otherwise in the words of the section and sets out the proper section number of the offence, is not defective: *R. v. Cote* (1977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752 (8:0) (S.C.C.).

**Change of mind** – An offer by an accused to provide a breath sample after consulting his counsel is not a defence to this charge where the accused made two clear and unconditional refusals without giving any reason for refusing: *R. v. McGauley* (1974), 16 C.C.C. (2d) 419, [1974] 5 W.W.R. 577 (B.C.C.A.). But compare *Jumaga v. The Queen, supra*, where it was held on the facts that a first refusal really constituted a request to consult counsel and it was so treated by the police and was therefore itself not sufficient to sustain the charge.

In determining whether an accused, who initially refused and later changed his mind, is guilty of this offence, the court ought not to minutely dissect a single conversation or take a single sentence out of context. It would seem that whether there has been a refusal depends on consideration of all the circumstances of each individual case, including the time elapsed and whether it can be said that the deceased's offer to take the test was severable from his earlier words to the contrary: *R. v. Cunningham* (1989), 49 C.C.C. (3d) 521, 97 A.R. 81, 16 M.V.R. (2d) 181 (C.A.).

The requirement that the accused "comply" with the demand must be read as requiring compliance within a reasonable time, not necessarily forthwith. Where the accused initially refused to accompany the technician but later, within the two-hour period, offered to comply after consultation with a lawyer, the charge was not made out: *R. v. Brotton* (1983), 24 M.V.R. 76, 28 Sask. R. 78 (C.A.).

**Proof of refusal** – Since the section simply speaks of a refusal, and not a final or complete refusal the offence is established once the motorist refuses to provide his breath sample regardless of whether or not he changes his mind within the two-hour period: *R. v. Rowe* (1974), 12 C.C.C. (2d) 24, [1973] 3 W.W.R. 400 (B.C.C.A.).

Where the original refusal was not unequivocal and was closely followed by an offer to provide a sample then the offence is not made out: *R. v. Sagh* (1981), 62 C.C.C. (2d) 299, [1981] 6 W.W.R. 370 (Alta. Q.B.).

Where, however, the accused unequivocally refuses and only changes his mind 15 minutes later, at which time the technician advised him that it was too late, the charge was made out. The two events were sufficiently separate as to constitute different transactions: *R. v. Butt* (1983), 23 M.V.R. 273, 44 Nfld. & P.E.I.R. 297 (Nfld. C.A.).

The accused was properly convicted of this offence where, prior to speaking to his lawyer, he told the officer he would not comply with the demand. After speaking to his lawyer, the accused did nothing to disabuse the officer of the view that he was refusing and in those circumstances his conditional refusal became unconditional by his own silence: *R. v. Sullivan* (1991), 65 C.C.C. (3d) 541, 32 M.V.R. (2d) 92, 1 W.A.C. 312 (B.C.C.A.).

The words of refusal need not be proved voluntary and therefore there is no necessity to hold a *voir dire* to determine the voluntariness of such utterance: *R. v. Gallaher* (1977), 37 C.C.C. (2d) 191 (B.C. Co. Ct.); *R. v. Stapleton* (1982), 66 C.C.C. (2d) 231, 26 C.R. (3d) 361, 134 D.L.R. (3d) 239 (Ont. C.A.); *R. v. Zerebeski* (1982), 66 C.C.C. (2d) 284, 26 C.R. (3d) 365, 14 M.V.R. 282 (Sask. Q.B.).

Once the accused supplies breath samples, expert evidence is required to establish that the samples were not sufficient to enable a proper analysis to be made. The evidence of the arresting officer, who was not a technician, that in her opinion the accused was “pretending to blow” and was “not blowing hard enough” is not sufficient to prove the offence: *R. v. Schimpf* (1980), 7 M.V.R. 161 (Alta. C.A.).

It is a question of fact whether or not the accused blew adequately or whether there is some other explanation for the accused’s failure to provide adequate sample, namely, that the breathalyzer was not operating properly. The Crown is not as a matter of law required to prove that the breathalyzer was in working order: *R. v. Leveque* (1985), 22 C.C.C. (3d) 559, 37 M.V.R. 166 (B.C.C.A.).

**Violation of right to counsel generally** – Where the accused immediately refuses after the demand was made and before he was given his rights under s. 10(b) of the Charter, then he should be informed of his right to counsel, that he was not bound by his earlier answers and that it was open to the accused to change his mind and consult counsel if he so wished: *R. v. MacIsaac* (1988), 9 M.V.R. (2d) 239, 72 Nfld. & P.E.I.R. 220 (P.E.I.S.C.).

However, compare *R. v. Cote* (1988), 8 M.V.R. (2d) 256, 87 N.B.R. (2d) 190 (C.A.), where it was held that while the accused’s refusal was not irrevocable in such circumstances, evidence of the refusal was properly admitted where the accused was advised of her right to counsel, subsequently was given an opportunity to speak to a lawyer and never made a request to take the test. The court was divided on whether, since the original refusal is not irrevocable, the accused should be given another demand.

Also see *R. v. Shaw* (1988), 4 M.V.R. (2d) 292, 82 N.S.R. (2d) 407 (C.A.), admitting evidence of a refusal notwithstanding breach of the accused’s rights under s. 10(b) because he was not read his rights to counsel until after the refusal. The court described the breach as inadvertent and noted that the accused did not at that time purport to exercise his right to counsel.

Where the act of refusal occurred after the time when the accused should have been informed of his right to counsel under s. 10(b) of the Canadian Charter of Rights and Freedoms, that is, immediately upon the making of the demand, then the accused’s rights under s. 10(b) have been infringed and the evidence of the refusal must be excluded under s. 24(2). It must be assumed that had the accused consulted counsel he would have complied with the demand: *R. v. Phillips*; *R. v. Reid* (1986), 26 C.C.C. (3d) 60, 50 C.R. (3d) 315, 42 M.V.R. 186 (Alta. C.A.).

*Brownridge v. The Queen* (1972), 7 C.C.C. (2d) 417, 18 C.R.N.S.308 (6:3) (S.C.C.), decided the issue whether or not the fact that the police would not allow a suspected impaired motorist to contact his lawyer for advice after their demand for his breath sample was a “reasonable excuse” for his refusal to comply. In the first majority judgment, *per Ritchie, J.* (Fauteux, C.J.C., Martland and Spence, JJ., concurring), it was held that as there was a genuine reason for the motorist to seek legal advice it would run contrary to s. 2(c)(ii) (the right of a detained person to instruct counsel without delay) of the Bill of Rights to hold that the withholding of that right from him was incapable of constituting a reasonable excuse for him to provide a breath sample. In the second majority judg-

ment Laskin, J. (Hall, J., concurring), held that s. 2 of the Bill of Rights enjoins a construction upon former s. 235 that would infringe any right recognized under the Bill of Rights and if efforts to reach counsel expend the time beyond the two-hour-limitation period primacy must be given the protection accorded by the Bill of Rights over the statutory rule of evidence under s. 258(1)(c)(ii). Moreover, denial of right to counsel does not constitute a "reasonable excuse" rather this right exists independently of those words and its denial vitiates a conviction for this offence. Pigeon, J. (Abbott and Judson, JJ., concurring) dissenting, was of the opinion that regardless of whether or not the suspected motorist was under arrest the denial of his request for counsel was not to be a reasonable excuse for him to refuse to provide his breath sample.

Where a demand is made under subsec. (3) and the accused is not advised of his rights under s. 10(b) of the Canadian Charter of Rights and Freedoms then he has a reasonable excuse for refusing to comply with the demand: *R. v. Mackinnon* (1985), 21 C.C.C. (3d) 264, 47 C.R. (3d) 1, 34 M.V.R. 45 (P.E.I. C.A.).

Denial of the right to counsel is not a reasonable excuse for refusing to comply with the demand. Where, however, the accused proves that his right to counsel was violated then he would be entitled to an exclusion of evidence of the refusal if the accused can prove that to admit evidence would bring the administration of justice into disrepute within the meaning of s. 24(2) of the Charter. Since the onus is on the accused to establish the violation on a balance of probabilities, merely raising a reasonable doubt as to whether his right to counsel had been violated would not be sufficient: *R. v. Williams* (1992), 78 C.C.C. (3d) 72, 17 C.R. (4th) 277, 42 M.V.R. (2d) 212 (Ont. C.A.).

Where an accused, who has been given an opportunity to contact a lawyer but is unable to do so after repeated attempts through no fault of the police, refuses to provide a breath sample he does not have a reasonable excuse for his refusal. The accused in such circumstances has not been deprived of his right to obtain counsel and there is no positive obligation on the police to secure counsel on his behalf: *R. v. MacDonald* (1974), 22 C.C.C. (2d) 351 (N.S.C.A.); *R. v. Drouin* (1972), 10 C.C.C. (2d) 18, 7 Nfld. & P.E.I.R. 107 (P.E.I.S.C.).

The accused's rights were violated when he was charged with refusal despite repeated unsuccessful attempts to reach a lawyer. The accused refused to comply with the demand until he spoke to a lawyer. He had been diligent in asserting his right and there was no urgency, the demand having been made only 45 minutes after he was arrested: *R. v. Dunnett* (1990), 62 C.C.C. (3d) 14, 26 M.V.R. (2d) 194, 111 N.B.R. (2d) 67 (C.A.), leave to appeal to S.C.C. refused 62 C.C.C. (3d) vi, 29 M.V.R. (2d) 87n, 116 N.B.R. (2d) 450n.

Where the accused, a visitor from out of the province, was unable to contact her lawyer because it was not possible to make long-distance telephone calls on the only telephone available, she had a reasonable excuse for refusing the demand: *R. v. Hogan* (1979), 48 C.C.C. (2d) 149, 11 C.R. (3d) 328 (N.S.C.A.).

The refusal of the police to first await the motorist's lawyer's attendance before administering the breathalyzer test following a consultation on the telephone is not a reasonable excuse for the motorist to refuse to take the test: *R. v. Bond* (1973), 14 C.C.C. (2d) (497), 24 C.R.N.S.273 (N.S.C.A.); *R. v. Kavanagh* (1981), 62 C.C.C. (2d) 518, 25 C.R. (3d) 171 (B.C.S.C.); *R. v. Giroux* (1981), 63 C.C.C. (2d) 555, 24 C.R. (3d) 101 (Que. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

The accused's right to counsel was infringed where he was not given an opportunity to speak to a lawyer after the first lawyer he called, whose name was drawn from a list of lawyers supplied by the police showed no interest in his "plight": *R. v. Goodine* (1989), 97 A.R. 102, 13 M.V.R. (2d) 330 (C.A.).

Where the accused was informed of his right to counsel and given a reasonable opportunity to counsel, his inability to speak to his lawyer, which he did not communicate to the police, did not constitute a reasonable excuse for refusing to comply with the



demand. Without any request on the part of the accused for more time to consult counsel, the police were entitled to conclude that the accused had refused without reasonable excuse: *R. v. Ferron* (1989), 49 C.C.C. (3d) 432, 16 M.V.R. (2d) 15 (B.C.C.A.).

**Inability to consult in private** – Prior to complying with the demand made under subsec. (3) the motorist has the right to consult counsel in private. Failure to permit private consultation is a breach of s. 10(b) of the Canadian Charter of Rights and Freedoms and may require a remedy such as a stay of proceedings of a charge of refusing to comply with the demand: *R. v. Porter* (1985), 46 C.R. (3d) 232, 34 M.V.R. 239 (Sask. Q.B.).

As indicated in the cases noted under s. 254(3), *supra*, it has been held that under s. 10(b) of the Charter of Rights, the right to consult with counsel in private is inherent in the right and there need not be any request for privacy. Nevertheless, it was held in *R. v. Young* (1987), 38 C.C.C. (3d) 452, 6 M.V.R. (2d) 295, 81 N.B.R. (2d) 233 (C.A.), that having regard to all the circumstances the trial judge did not err in refusing to exclude under s. 24(2) of the Charter the evidence of the accused's refusal notwithstanding the violation of s. 10(b) by reason of the failure of the police officer to move out of earshot. The court did not consider whether the breach of s. 10(b) provided the accused with a reasonable excuse. Also see: *R. v. Dempsey* (1987), 77 N.S.R. (2d) 284, 46 M.V.R. 179 (C.A.).

The right to consult with counsel includes the right to do so in privacy. The failure of the police to comply with a request for privacy constitutes a denial of the right to counsel and therefore a reasonable excuse to refuse to comply with the demand: *R. v. Penner* (1973), 12 C.C.C. (2d) 468, 22 C.R.N.S. 35 (Man. C.A.).

But the right to consult in privacy, while requiring that the consultation be out of hearing of other persons, need not be out of sight of other persons: *R. v. Walkington* (1974), 17 C.C.C. (2d) 553, [1974] 6 W.W.R. 117 (Sask. C.A.); *R. v. Doherty* (1974), 16 C.C.C. (2d) 494, 25 C.R.N.S. 289 (N.S. C.A.); *R. v. Holmes* (1982), 2 C.C.C. (3d) 471, 40 O.R. (2d) 707, 18 M.V.R. 92 (C.A.).

That an enclosed glass booth in the police station may not be absolutely soundproof does not establish that a conversation carried on within it between the accused and his lawyer can be overheard. The test to be applied in determining whether the accused's right to consult in private has been complied with is whether the accused was afforded such privacy as would permit a discussion without fear of being overheard: *R. v. Miller* (1990), 1 C.R. (4th) 57, 25 M.V.R. (2d) 170, 87 Nfld. & P.E.I.R. 55 (Nfld. C.A.).

**Reasonable excuse / legal advice** – An accused's statement that "My lawyer advised me not to take the test" in response to the making of a breathalyzer demand was a refusal within this subsection: *R. v. Hurley* (1980), 29 Nfld. & P.E.I.R. 263, 9 M.V.R. 46 (Nfld. C.A.).

The police officer's refusal to permit the accused's lawyer to verify the results of the first breathalyzer test does not constitute a reasonable excuse, nor does the accused's mistaken belief, based on the advice of the lawyer, that it would constitute a reasonable excuse: *R. v. Giroux* (1981), 63 C.C.C. (2d) 555, 24 C.R. (3d) 101 (Que. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 40 N.R. 142n.

A motorist's mistaken belief, based on an erroneous judgment of a Provincial Court Judge, that a police officer had no right to make the demand is not a reasonable excuse: *R. v. MacIntyre* (1983), 24 M.V.R. 67 (Ont. C.A.).

**Reasonable excuse / grounds for demand** – It is not a "reasonable excuse" for refusing to provide a breath sample that the accused is subsequently acquitted of the charge under former s. 234 [now s. 253], where the demand for the breath sample was lawfully made and the offence under this subsection is otherwise established. "Reasonable excuse" refers to matters which stand outside of the requirements which must be met (*i.e.*, those under subsec. (3)(a)) before a charge can be supported under this subsection: *R. v. Taraschuk* (1975), 25 C.C.C. (2d) 108, 30 C.R.N.S. 321 (9:0) (S.C.C.). Note, this case overrules: *R. v. Canstone* (1971), 3 C.C.C. (2d) 539, 15 C.R.N.S. 125, [1971] 5

W.W.R. 191 (B.C.S.C.) and *R. v. Mitchell* (1973), 11 C.C.C. (2d) 12, [1973] 3 W.W.R. 644 (B.C.S.C.).

While it is a defence to a charge under this subsection that the officer did not have reasonable and probable grounds to believe that the accused had committed an offence under former s. 234 [now s. 253]: *R. v. MacDonald* (1974), 22 C.C.C. (2d) 350 (N.S. C.A.), to sustain the charge there need not be direct evidence from the officer that he had such a belief. Rather, the existence of the necessary belief can be inferred by the Court: *R. v. Fraelic* (1977), 36 C.C.C. (2d) 473 (N.S. Co. Ct.); *R. v. Blanchette* (1978), 41 C.C.C. (2d) 205 (Alta. Dist. Ct.).

It does not constitute a reasonable excuse to refuse to comply with the demand that the officer had no grounds for initially stopping the accused and only formed the requisite belief that the accused had committed an offence under former s. 234 [now s. 253] after the accused had been stopped for a routine check: *R. v. Warford* (1981), 61 C.C.C. (2d) 489, 11 M.V.R. 198 (Nfld. C.A.).

**Reasonable excuse / offer of blood sample** – An offer to provide a blood sample in lieu of a breath sample is not a reasonable excuse for refusing to comply with the demand under subsec. (3)(a): *R. v. Wall* (1974), 19 C.C.C. (2d) 146, [1974] 5 W.W.R. 634 (Sask. C.A.); *R. v. Weir* (1993), 79 C.C.C. (3d) 538, 120 N.S.R. (2d) 256, 42 M.V.R. (2d) 1 (C.A.); *R. v. Richardson* (1993), 80 C.C.C. (3d) 287, 42 M.V.R. (2d) 261, 62 O.A.C. 393 (C.A.); *R. v. Taylor* (1993), 43 M.V.R. (2d) 240, 39 W.A.C. 201 (B.C.C.A.).

Where, however, the accused's offer to supply a blood sample is taken up and it is not made clear to him that this is not a suitable alternative to complying with the demand the accused had a reasonable excuse to refuse: *Sask. (Attorney General) v. Chrun*, [1973] 5 W.W.R. 611 (Sask. Dist. Ct.); *R. v. Larkin* (1979), 27 Nfld. & P.E.I.R. 284, 4 M.V.R. 149 (P.E.I.S.C.).

**Reasonable excuse / impairment** – Establishment that the defendant's mind was so affected by alcohol or a drug that he could not grasp the demand at all would constitute a reasonable excuse for non-compliance: *R. v. Laybolt* (1974), 17 C.C.C. (2d) 16, 6 Nfld. & P.E.I.R. 85 (P.E.I.S.C.). *Contra*: *R. v. Warnica* (1980), 56 C.C.C. (2d) 100, 42 N.S.R. (2d) 108 (C.A.), where it was held that once it was shown that the accused appeared to understand the demand a rebuttable presumption arose that he intended the natural consequences of his own conduct which however may *not* be rebutted by testimony from the accused that he was too drunk to understand the demand. Further, lack of understanding is not a reasonable excuse.

**Reasonable excuse / physical disability** – In *R. v. Nadeau* (1974), 19 C.C.C. (2d) 199, 8 N.B.R. (2d) 703 (N.B.C.A.), Hughes, C.J.N.B., expressed the view that "the 'reasonable excuse' envisaged must be some circumstance which renders compliance with the demand either extremely difficult or likely to involve a substantial risk to the health of the person on whom the demand has been made".

The physical inability of the accused to take the test is a reasonable excuse within this subsection notwithstanding the inability is the result of the voluntary consumption of alcohol: *R. v. Henderson* (1976), 34 C.C.C. (2d) 40 (Ont. Co. Ct.).

The defence of reasonable excuse should not be confined to matters in the mind of the accused, to the exclusion of dangerous conditions not fully known or recognized by the accused. The defence should include rare situations where there is a reason at the time not to make the demand or to require compliance under threat of prosecution, but that reason is not fully known, either to the investigating officer or to the suspect. There is a reasonable excuse where both police and the accused have been seriously misled by mistaken medical diagnosis on a matter so fundamental to the interests of both. In this case, even though the accused was unaware of the exact nature of his injury, he did know that he was injured, perhaps seriously, and consequently, on the advice of counsel, he refused to comply with the police request until he was examined by a physician whom he

knew and trusted. The accused had been examined briefly by a physician who advised the police that the accused was fit to comply with the demand. In fact, the accused had a very serious spinal injury and had he complied with the demand, he might well have become paralyzed. The fact that the accused was unaware of the specific danger to which he was exposed was no basis for a conclusion that he was not fearful for his safety and not justified in accepting the advice of his lawyer: *R. v. Moser* (1992), 71 C.C.C. (3d) 165, 13 C.R. (4th) 96, 7 O.R. (3d) 737 (C.A.).

**Reasonable excuse / generally** – The accused's belief that the results of the breathalyzer test would be inaccurate is not a reasonable excuse to refuse to comply with the demand. The accused must rely on the safeguard in s. 258(1) (c) which permits "evidence to the contrary" to rebut the presumption, which arises from the results of the breathalyzer test, taken pursuant to a demand under subsec. (3) that the blood alcohol reading from the breathalyzer is the same as at the time of the offence: *R. v. Campbell* (1978), 40 C.C.C. (2d) 570, [1978] 4 W.W.R. 507 (Alta. C.A.) (2:1).

The accused's sincere belief that the results would be inaccurate, because he had consumed alcohol after driving is not a reasonable excuse: *R. v. Roy* (1979), 11 C.R. (3d) 178, 2 M.V.R. 293 (Que. C.A.); *R. v. Dunn* (1980), 8 M.V.R. 198 (B.C.C.A.).

Anxiety caused by accurate information supplied at the accused's request by the police officer as to the penalty for a second conviction for a drinking and driving offence (including information that a jail term would also result for a conviction under this subsection) is not a reasonable excuse: *R. v. Broda* (1983), 21 M.V.R. 85, 22 Sask. R. 239 (C.A.).

An extremely helpful review of the various factors which could constitute a "reasonable excuse" is found in the decision of the Court in *R. v. Phinney* (1979), 49 C.C.C. (2d) 81 (N.S.C.A.) where the majority of the Court concluded that the accused's honest belief based on reasonable grounds that the particular breathalyzer machine might not be functioning properly was a reasonable excuse to refuse to comply with the demand. The Court emphasized, however, that this fear must be based on objective evidence.

Thus the accused's fear that, because he was on medication, the results would be inaccurate is not a reasonable excuse for refusing to comply with the demand: *R. v. Frohwerk* (1979), 48 C.C.C. (2d) 214 (Man. C.A.).

Where the accused was to be taken 100 miles away for the breathalyzer test where he would be effectively stranded with no way to get home and no place to stay it was held that he had a reasonable excuse as contemplated by this subsection: *R. v. Iron* (1977), 35 C.C.C. (2d) 279 (Sask. Q.B.).

A possible financial loss for the accused if he were required to leave his vehicle and accompany the officer is not a reasonable excuse. In this case the accused claimed that he needed to remain with his truck to clean up the spilled cargo of fish otherwise there was risk that the cargo would be condemned resulting in a substantial financial loss: *R. v. Gidney* (1987), 7 M.V.R. (2d) 90, 81 N.S.R. (2d) 404 (C.A.).

Grounds of compassion, in this case the accused's desire to go to the hospital when he learned that his nephew who was at the hospital was in serious condition, do not constitute grounds for refusing to comply with the demand: *R. v. Heim* (1989), 98 N.S.R. (2d) 447, 13 M.V.R. (2d) 301 (C.A.).

A genuine religious belief is not an excuse for refusal to provide a breath sample: *R. v. Chomokowski* (1973), 11 C.C.C. (2d) 562, [1973] 5 W.W.R. 184 (Man. C.A.).

The accused had a reasonable excuse for refusing to comply with the demand because of her concern about sanitation when the officer gave her an unwrapped mouthpiece: *R. v. Pittendreigh* (1994), 83 W.A.C. 169, 162 A.R. 169, 9 M.V.R. (3d) 236 (C.A.).

**Right to production** – Failure to provide the accused with the mouthpiece he used in his attempt to blow into the breathalyzer did not violate the accused's rights under s. 7. It was highly improbable that a broken mouthpiece would not have been detected by even a brief inspection: *R. v. Mayer* (1989), 16 M.V.R. (2d) 174 (B.C. Co. Ct.).



**Multiple convictions** – The offences under this section and under s. 253(a) constitute separate and distinct acts or delicts and therefore the accused may be convicted of both offences though they arise out of one incident: *R. v. Schilbe* (1976), 30 C.C.C. (2d) 113 (Ont. C.A.).

**PUNISHMENT / Impaired driving causing bodily harm / Impaired driving causing death / Previous convictions / Conditional discharge.**

255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,

- (a) whether the offence is prosecuted by indictment or punishable on summary conviction, to the following minimum punishment, namely,
  - (i) for a first offence, to a fine of not less than three hundred dollars,
  - (ii) for a second offence, to imprisonment for not less than fourteen days, and
  - (iii) for each subsequent offence, to imprisonment for not less than ninety days;
- (b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years; and
- (c) where the offence is punishable on summary conviction, to imprisonment for a term not exceeding six months.

(2) Every one who commits an offence under paragraph 253(a) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(3) Every one who commits an offence under paragraph 253(a) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(4) Where a person is convicted of an offence committed under paragraph 253(a) or (b) or subsection 254(5), that person shall, for the purposes of this Act, be deemed to be convicted for a second or subsequent offence, as the case may be, if the person has previously been convicted of

- (a) an offence committed under any of those provisions;
- (b) an offence under subsection (2) or (3); or
- (c) an offence under section 250, 251, 252, 253, 259 or 260 or subsection 258(4) of this Act as this Act read immediately before the coming into force of this subsection.

(5) Notwithstanding subsection 736(1), a court may, instead of convicting a person of an offence committed under section 253, after hearing medical or other evidence, if it considers that the person is in need of curative treatment in relation to his consumption of alcohol or drugs and that it would not be contrary to the public interest, by order direct that the person be discharged under section 736 on the conditions prescribed in a probation order, including a condition respecting the person's attendance for curative treatment in relation to that consumption of alcohol or drugs. R.S.C. 1985, c. 27 (1st Supp.), s. 36.

**Note:** Subsection (5) has been proclaimed in force December 4, 1985 in New Brunswick, Manitoba, Prince Edward Island, Alberta, Saskatchewan, Yukon Territory, and Northwest Territories, proclaimed in force January 1, 1988 in Nova Scotia; and is to come into force on proclamation in the remaining provinces.

#### CROSS-REFERENCES

**Mode of trial** – Where the prosecution elects to proceed by indictment on the offences in subsec. (1) then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of the offence is conducted by a summary conviction court pursuant to Part XXVII. In either case, release pending trial is determined by

s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Where the accused is charged with an offence under subsec. (2) or (3) then he has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined by s. 515.

**Causation** – With respect to the offence in subsec. (3) and the issue of causation, see ss. 224 to 227. As to case law, in addition to the notes under this section, see the notes under s. 249. The term “bodily harm” is defined s. 2.

**Punishment** – The maximum fine for the offences in subsec. (1), where the prosecution proceeds by way of summary conviction, is \$2000.00 as set out in s. 787 and the limitation period is set out in s. 786(2). There is no limit on the fine where the prosecution proceeds by way of indictment. Where the prosecution seeks the higher penalty prescribed by para. (a)(ii) or (iii), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. No reference to the prior conviction may be made in the information by virtue of s. 664. Note the extended definition of the meaning of previous convictions in subsec. (4). The wording of para. (4)(c) is somewhat confusing because the numbers refer to the section numbers of R.S.C. 1985 immediately prior to the Criminal Law Amendment Act, 1985, c. 19, proclaimed in force on December 4, 1985. For convenience, following are set out a description of the offence referred to and in square brackets the R.S.C. 1985 number as used in this subsection followed by the R.S.C. 1970 section number with which readers may be more familiar. Impaired driving and care or control of motor vehicle [250/234]; refusing to comply with roadside screening device demand [251/234.1]; refusing to comply with breathalyzer demand [252/235]; “over 80” re motor vehicles [253/236]; refusal to comply with breath demand re operation of vessel [259/240.1]; “over 80” re vessels [260/240.2]; and impaired operation of vessel [258(4)/240(4)]. By reason of the change in the minimum term from 3 months to 90 days, a person sentenced to the minimum term of 90 days under para. (a)(iii) may be ordered to serve the sentence on an intermittent basis pursuant to s. 737(1)(c). By reason of s. 736, since subsec. (1) prescribes a minimum punishment, a discharge is not available in relation to the offence under s. 254 nor for the offence under s. 253 in provinces where subsec. (5) has not been proclaimed in force.

An accused convicted of the offence under subsec. (2) or (3) may, pursuant to s. 259, be ordered prohibited from operating a motor vehicle, vessel, aircraft or railway equipment, as the case may be, during any period not exceeding 10 years. The prohibition order for the offence under subsec. (1) is mandatory by virtue of s. 259(1). The length of the order is as follows: for a first offence, during a period of not more than three years and not less than three months; for a second offence, during a period of not more than three years and not less than six months; for each subsequent offence, during a period of not more than three years and not less than one year. The procedure respecting the making of that order of prohibition is found in s. 260.

## ANNOTATIONS

**Sentencing under subsec. (1) generally** – It was open to the trial court to adopt a series of detailed guidelines for the imposition of penalties in drinking and driving offences, provided that the guidelines are used in conjunction with the appropriate principles and factors as they apply to the situation before the judge in the particular case: *R. v. Stephens* (1989), 51 C.C.C. (3d) 557, 21 M.V.R. (2d) 153 (P.E.I.C.A.).

In *R. v. Bradshaw* (1975), 21 C.C.C. (2d) 69, [1976] 1 S.C.R. 162 (8:0), decided prior to the enactment of subsec. (5), it was held that a minimum fine is a minimum punishment within the meaning of s. 662.1 [now s. 736] and therefore a discharge is not available.

**Second or subsequent offence [para. (1)(a)(ii) and (iii)]** – The increased penalty for a “second” or “subsequent” offence does not apply where the offence is committed prior to the conviction for the offence relied upon as a prior offence even if committed after this prior offence: *R. v. Negridge* (1980), 54 C.C.C. (2d) 304, 17 C.R. (3d) 14 (Ont. C.A.); *R. v. Rahko* (1983), 29 M.V.R. 37 (B.C.C.A.). Similarly where the accused is convicted on the same day of impaired driving and refusing to comply with a breathalyzer demand arising out of the same transaction he has only one prior conviction for the

purposes of penalty and is to be sentenced on the basis of para. (a)(ii) rather than para. (a)(iii): *R. v. Skolnick* (1981), 59 C.C.C. (2d) 286 (Ont. C.A.), affd 68 C.C.C. (2d) 385, 29 C.R. (3d) 143, 138 D.L.R. (3d) 193, [1982] 2 S.C.R. 47 (9:0).

**Constitutionality of minimum punishment** – The mandatory jail term prescribed by para. (a) does not offend the fundamental justice guarantee in s. 7 of the Charter of Rights and Freedoms: *R. v. Tardif* (1983), 9 C.C.C. (3d) 223, 37 C.R. (3d) 95 (Sask. C.A.), nor s. 15 of the Charter of Rights: *R. v. Aucoin* (1987), 79 N.S.R. (2d) 32, 48 M.V.R. 154 (S.C. App. Div.).

The minimum punishment of 90 days prescribed by subpara. (1)(a)(iii) does not violate the guarantee to protection against imposition of cruel and unusual punishment under s. 12 of the Charter: *R. v. Parsons* (1988), 40 C.C.C. (3d) 128, 68 Nfld. & P.E.I.R. 206 (Nfld. S.C.T.D.).

The mandatory minimum jail sentence for repeat offenders will not ordinarily violate ss. 7 and 12 of the Charter and thus subsec. (1)(a)(ii) is not unconstitutional. However, in a particular case, as where there is a very significant time gap between the first and second offences, the minimum punishment may be grossly disproportionate in which case the accused may be entitled to a constitutional exemption under s. 24(1) of the Charter: *R. v. Kumar* (1993), 85 C.C.C. (3d) 417, 49 M.V.R. (2d) 20, 58 W.A.C. 81 (B.C.C.A.).

**Causation [subsecs. (2), (3)]** – On the question of causation, see notes by R. Libman, “The Requirement of Causation in the New Offences of Impaired Driving Causing Bodily Harm or Death and Dangerous Driving Causing Bodily Harm or Death” (1987), 48 M.V.R. 211 and 17 M.V.R. (2d) 227.

The accused is properly convicted of the offence under subsec. (2) where it is shown that the drinking was a cause, at least beyond *de minimis*, of the faulty driving and the injury to the victim: *R. v. Larocque* (1988), 5 M.V.R. (2d) 221 (Ont. C.A.).

In *R. v. Colby* (1989), 52 C.C.C. (3d) 321, 18 M.V.R. (2d) 73, 100 A.R. 142 (C.A.) and *R. v. Ewart* (1989), 53 C.C.C. (3d) 153, 18 M.V.R. (2d) 55, 100 A.R. 118 (C.A.), the court held that the test to be applied in determining whether or not the necessary causal link between the impairment and the death or injury has been made out was the test in *Smithers v. The Queen* (1977), 34 C.C.C. (2d) 427, [1978] 1 S.C.R. 506 (a manslaughter case noted under s. 222(1)) that the unlawful act must be “at least a contributing cause of death, outside the *de minimus range*”. The Court of Appeal interpreted this test as requiring proof that the accused’s substantial impairment was a “real factor” in the chain of events leading to the death of the victim. To a similar effect see: *R. v. Halkett* (1988), 73 Sask. R. 241, 11 M.V.R. (2d) 109 (C.A.), where the court as well held that the test enunciated in *Smithers* should be applied to the offences under this section.

Evidence of impairment *per se* is not sufficient to satisfy the test of causation even when coupled with expert opinion evidence as to the physiology of alcohol, an opinion, however, which was expressed in terms of averages and statistical probabilities and couched in qualifying language: *R. v. Fisher* (1992), 13 C.R. (4th) 222, 36 M.V.R. (2d) 6 (B.C.C.A.).

**Editor’s Note:** Also see cases noted under s. 249(3) and (4).

**Rule precluding multiple convictions [Kienapple rule]** – Where the act of the accused, which amounts to dangerous driving, is operating her motor vehicle while her ability to do so was substantially impaired by alcohol, the rule precluding multiple convictions enunciated in *Kienapple v. The Queen*, [1975] 1 S.C.R. 725 applies and the accused cannot be convicted of this offence and the offence under s. 249(4). Since a conviction for the offence under this subsection more accurately describes the *delict*, the conviction should be entered on that charge and the charge under s. 249(4) stayed: *R. v. Colby* (1989), 52 C.C.C. (3d) 321, 18 M.V.R. (2d) 73, 100 A.R. 142 (C.A.).

The rule precluding multiple convictions does not prevent the conviction of the



accused for the offence under subsec. (2) and the offence of criminal negligence causing bodily harm, although the injuries underlying both offences were to the same victim. The evidence disclosed facts concerning both the accused's manner of driving and, as well, her capacity to drive. The act of impaired operation did not encompass the manner of driving which, in this case, formed a part of the sequence of actions which constituted criminal negligence: *R. v. Andrew* (1990), 57 C.C.C. (3d) 301, 78 C.R. (3d) 239, 46 B.C.L.R. (2d) 325, 24 M.V.R. (2d) 85 (C.A.).

**Discharge for curative treatment [subsec. (5)] / Constitutional considerations** – While the validity of the selective proclamation of this subsection has been attacked as a violation of the equality rights in s. 15 of the Canadian Charter of Rights and Freedoms, most courts have held either that there is no violation or that the courts have no power to, in effect, proclaim this provision in force: *R. v. Killen* (1985), 24 C.C.C. (3d) 40, 49 C.R. (3d) 242, 37 M.V.R. 180 (N.S.C.A.); *R. v. Ellsworth* (1988), 46 C.C.C. (3d) 442, 11 M.V.R. (2d) 129 (Que. C.A.); *R. v. Van Vliet* (1988), 45 C.C.C. (3d) 481, 38 C.R.R. 133, 10 M.V.R. (2d) 190 (B.C.C.A.). Moreover, in *R. v. Turpin* (1989), 48 C.C.C. (3d) 8, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97 (6:0), the court doubted the correctness of the decision of the Ontario Court of Appeal in *R. v. Hamilton*; *R. v. Asselin*; *R. v. McCullagh* (1986), 30 C.C.C. (3d) 257, 54 C.R. (3d) 193, 44 M.V.R. 72 where that court had found a violation of s. 15 and in effect proclaimed this subsection to be in effect. Thus in *R. v. Alton* (1989), 53 C.C.C. (3d) 252, 74 C.C.C. (3d) 124, 18 M.V.R. (2d) 186 (Ont. C.A.), the court reversed the decision in *R. v. Hamilton, supra*, and held that this subsection is not available to an accused in Ontario.

**Circumstances where discharge should be granted** – Where this subsection has been proclaimed in force, the Court is entitled to assume that adequate facilities will be provided for curative treatment. Before invoking this subsection the Court must be satisfied on a balance of probabilities that the accused is in need of curative treatment and that a discharge would not be contrary to the public interest. However, notwithstanding the accused has a lengthy record for Criminal Code driving offences this subsection may be resorted to where evidence adduced shows that the appropriate treatment for the accused's addiction is available and that the accused is now well-motivated and has a good chance of overcoming his alcoholism: *R. v. Beaulieu* (1980), 53 C.C.C. 342, 7 M.V.R. 9 (N.W.T.S.C.).

In considering whether a curative discharge would be contrary to the public interest, the court should consider, among other things, the circumstances of the offence and whether the accused was involved in an accident causing death, bodily harm or significant property damage; the *bona fides* of the accused; the accused's criminal record as it relates to alcohol-related driving offences; whether the accused was subject to a driving prohibition at the time of the offence; whether the accused had received the benefit of a prior curative discharge and what, if anything, the accused had done to facilitate his rehabilitation under the prior discharge: *R. v. Storr* (1995), 102 W.A.C. 65, 33 Alta. L.R. (3d) 163, 174 A.R. 65 (C.A.).

It will not always be contrary to the public interest to grant a discharge under this subsection to a recidivist. In some cases public protection may well be best served by effective measures to reduce the risk of repetition of the offence through rehabilitation of the offender. On the other hand it would be contrary to the public interest to grant a discharge if there was a real risk of repetition of the offence: *R. v. Wallner* (1988), 44 C.C.C. (3d) 358, 66 C.R. (3d) 79, 9 M.V.R. (2d) 7 (Alta. C.A.).

It was improper for the trial judge to adjourn the sentencing of the accused for a lengthy period of time presumably to determine whether he was an appropriate candidate for a discharge for curative treatment by seeing whether he would stop drinking. If the evidence was not sufficient at the time of the application for the discharge, then the judge should have invited the accused to call medical or other evidence: *R. v. Kidder* (1992), 38 M.V.R. (2d) 98, 127 A.R. 136 (C.A.).

**Note:** The following case was decided prior to the decision of the Ontario Court of Appeal in *R. v. Alton*, *supra*, where that court reversed its earlier decision in *R. v. Hamilton*, *supra*, and held that this subsection is not available to an accused in Ontario. The note of this case is included, however, since it sets out guidelines for granting of the discharge for curative treatment which may be of value in those provinces and territories where this subsection has been proclaimed in force.

In those narrow circumstances where the evidence demonstrates that the accused is in need of curative treatment and that his rehabilitation is probable, then it would not be contrary to the public interest to grant a discharge subject to stringent terms of probation, notwithstanding the accused has a prior record. Among the considerations relevant to the question of whether a given case is sufficiently exceptional to warrant recourse to the curative treatment/conditional discharge are:

1. The circumstances of the offence and whether offender was involved in an accident which caused death or serious bodily injury. The need to express social repudiation of an offence where the victim was killed or suffered serious bodily injury will generally militate against the discharge of the offender.
2. The motivation of the offender as an indication of probable benefit from treatment. The important question is the *bona fides* of the offender in giving an undertaking to take treatment. The efforts of the offender to obtain treatment before conviction is of some importance. If the accused has a history of alcohol-related driving offences and has never before sought treatment, then the court may regard with some suspicion efforts to obtain treatment at this stage.
3. The availability and calibre of the proposed facilities for treatment and the ability of the accused to complete the programme.
4. The probability that the course of treatment will be successful and that the accused will never again drive a motor vehicle while under the influence of alcohol.
5. The criminal record and, in particular, the alcohol-related driving record of the offender. Normally, where the offender has a previous record of alcohol-related driving offences there is a high risk of the offence being repeated and a greater need for a sentence emphasizing specific and general deterrence.

However, the repeat offender may well be a more suitable candidate for curative treatment because of his chronic alcoholism or drug addiction. The fact that he has on a number of prior occasions received fines or sentences of imprisonment may lead the court to conclude that these penalties have had no deterrent effect and that the public interest would best be served by directing curative treatment under a formal supervised programme. If a discharge is considered appropriate it should be accompanied by a lengthy term of probation with stringent terms requiring, *inter alia*, the accused to abstain from consumption of alcohol: *R. v. Ashberry* (1989), 47 C.C.C. (3d) 138, 68 C.R. (3d) 341, 30 O.A.C. 376 (C.A.).

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#### WARRANTS TO OBTAIN BLOOD SAMPLES / Form / Information on oath / Duration of warrant / Facsimile to person.

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256. (1) Subject to subsection (2), where a justice is satisfied, on an information on oath in Form 1 or on an information on oath submitted to the justice pursuant to section 487.1 by telephone or other means of telecommunication, that there are reasonable grounds to believe that

- (a) a person has, within the preceding four hours, committed, as a result of the consumption of alcohol, an offence under section 253 and the person was involved in an accident resulting in the death of another person or in bodily harm to himself or herself or to any other person, and
- (b) a qualified medical practitioner is of the opinion that
  - (i) by reason of any physical or mental condition of the person that resulted from the consumption of alcohol, the accident or any other occurrence

related to or resulting from the accident, the person is unable to consent to the taking of samples of his blood, and

- (ii) the taking of samples of blood from the person would not endanger the life or health of the person,

the justice may issue a warrant authorizing a peace officer to require a qualified medical practitioner to take, or to cause to be taken by a qualified technician under the direction of the qualified medical practitioner, such samples of the blood of the person as in the opinion of the person taking the samples are necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood.

(2) A warrant issued pursuant to subsection (1) may be in Form 5 or 5.1 varied to suit the case.

(3) Notwithstanding paragraphs 487.1(4)(b) and (c), an information on oath submitted by telephone or other means of telecommunication for the purposes of this section shall include, instead of the statements referred to in those paragraphs, a statement setting out the offence alleged to have been committed and identifying the person from whom blood samples are to be taken.

(4) Samples of blood may be taken from a person pursuant to a warrant issued pursuant to subsection (1) only during such time as a qualified medical practitioner is satisfied that the conditions referred to in subparagraphs (1)(b)(i) and (ii) continue to exist in respect of that person.

(5) Where a warrant issued pursuant to subsection (1) is executed, the peace officer shall, as soon as practicable thereafter, give a copy or, in the case of a warrant issued by telephone or other means of telecommunication, a facsimile of the warrant to the person from whom the blood samples were taken. R.S.C. 1985, c. 27 (1st Supp.), s. 36; 1992, c. 1, s. 58; 1994, c. 44, s. 13.

#### CROSS-REFERENCES

The terms “peace officer” and “justice” are defined in s. 2 and the terms “qualified medical practitioner” and “qualified technician” in s. 254. The reference to s. 487.1 is to the telewarrant procedure set out in that section. The term “bodily harm” is defined in s. 2.

The normal procedure for obtaining blood samples by demand is set out in s. 254. Section 257 protects the medical practitioner and qualified technician from criminal and civil liability when proceeding under this section.

The presumption respecting the accused’s blood alcohol level arising from analysis of a blood sample is found in s. 258(1)(d). Procedure for admission of certificates of an analyst, qualified technician and medical practitioner is set out in s. 258(1)(e) to (i) and (6) and (7). Note s. 258(4) which provides for summary application to a judge, within 3 months of the date the blood sample was taken, for an order releasing one of the samples for the purpose of testing by the defence.

Section 489.1 [which incorrectly refers to s. 258 rather than this section] requires that the peace officer make a report to a justice as soon as practicable following execution of the warrant.

#### SYNOPSIS

This section authorizes a justice who has reasonable grounds to believe: (a) that a person has committed an offence under s. 253 within the preceding four hours; (b) that the person has been involved in an accident resulting in bodily harm to himself or anyone else or death to another person; (c) that a physician is of the opinion that the person is physically or mentally unable to consent to the taking of blood samples; and (d) that the physician is also of the opinion that the taking of the blood samples would not endanger the life or health of the person, to issue a warrant authorizing a peace officer to require a physician to take or to supervise the taking of sufficient blood from the person to allow analysis for the concentration of alcohol. The information to obtain the warrant must be



in Form 1 or, if obtained by telephone or other means of telecommunication, pursuant to s. 487.1, modified to contain a statement setting out the alleged offence and the identity of the person from whom blood samples are to be taken. The warrant may be in Form 5 or 5.1, varied to suit the case. The warrant may only be executed if the physician continues to be satisfied that the condition of the person precludes consent and that the person's health will not be endangered. If blood is taken pursuant to the warrant, the peace officer must give a copy or a facsimile of the warrant (as soon as practicable) to the person from whom the samples are obtained.

## ANNOTATIONS

**Constitutional considerations** – The non-consensual taking of a blood sample from an unconscious motorist without a warrant and without any statutory authority is a serious intrusion into the person's privacy and this violation of s. 8 of the Charter of Rights warrants exclusion of the evidence obtained: *Pohoretsky v. The Queen* (1987), 33 C.C.C. (3d) 398, 58 C.R. (3d) 113, [1987] 1 S.C.R. 945 (7:0). [Note: This case arose prior to the statutory amendments providing for the taking of blood samples in certain cases.] Similarly: *R. v. Tomaso* (1989), 70 C.R. (3d) 152, 14 M.V.R. (2d) 10, 33 O.A.C. 106 (Ont. C.A.).

To a similar effect, see *R. v. Dyment* (1988), 45 C.C.C. (3d) 244, 66 C.R. (3d) 348, [1988] 2 S.C.R. 417 (5:0), where a blood sample originally taken from the accused for medical reasons was turned over to a police officer. The physician held the blood sample subject to a duty to respect the patient's privacy and this was sufficient to qualify the police officer's taking of the sample as a seizure. The officer had no warrant to seize the sample and the Crown adduced no evidence to justify a warrantless seizure. The seizure was unlawful and unreasonable under s. 8 of the Charter and the results of the analysis of the sample were inadmissible pursuant to s. 24(2) of the Charter of Rights.

Similarly, *R. v. Dersch*, [1993] 3 S.C.R. 768, 85 C.C.C. (3d) 1, 25 C.R. (4th) 88 where it was held that the accused's rights were violated when the police, without consent or a warrant, obtained confidential information from the physician as to the results of a blood alcohol test. The accused had repeatedly refused to provide a blood sample and the sample was only obtained, for medical purposes, when the accused was unconscious. Also, *R. v. Colarusso*, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193, 26 C.R. (4th) 289 where it was held that the accused's rights under s. 8 of the Charter were violated when the results of analysis of blood samples originally obtained by the coroner for his purposes were appropriated for use in a criminal prosecution.

There was no violation of the Charter where the officer merely asked hospital personnel to not destroy a blood sample taken for medical purposes until the officer could obtain a warrant. The hospital staff were not agents of the state and the subsequent seizure pursuant to the warrant was valid: *R. v. Lunn* (1990), 61 C.C.C. (3d) 193, 26 M.V.R. (2d) 209 (B.C.C.A.).

It was proper for the police officer to take control of one of several blood samples taken by hospital personnel for medical purposes to preserve its continuity until a search warrant could be obtained. Such action did not violate s. 8 of the Charter of Rights where the officer had reasonable and probable grounds to protect the blood sample: *R. v. Katsigiorgis* (1987), 39 C.C.C. (3d) 256, 4 M.V.R. (2d) 102, 62 O.R. (2d) 441 (C.A.).

**Procedural requirements** – The failure of the officer to file the written report as required by s. 487.1(9) did not invalidate the warrant nor render inadmissible the results of analysis of a blood sample taken pursuant to the warrant: *R. v. Skin* (1988), 13 M.V.R. (2d) 130 (B.C. Co. Ct.).

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## NO OFFENCE COMMITTED / No criminal or civil liability.

257. (1) No qualified medical practitioner or qualified technician is guilty of an offence only by reason of his refusal to take a sample of blood from a person for the purposes of section 254 or 256 and no qualified medical practitioner is guilty of an

offence only by reason of his refusal to cause to be taken by a qualified technician under his direction a sample of blood from a person for those purposes.

(2) No qualified medical practitioner by whom or under whose direction a sample of blood is taken from a person pursuant to a demand made under subsection 254(3) or a warrant issued under section 256 and no qualified technician acting under the direction of a qualified medical practitioner incurs any criminal or civil liability for anything necessarily done with reasonable care and skill in the taking of such a sample of blood. R.S.C. 1985, c. 27 (1st Supp.), s. 36.

#### CROSS-REFERENCES

The terms “qualified medical practitioner” and “qualified technician” are defined in s. 254. As to protection of persons enforcing the law generally, see s. 25.

#### SYNOPSIS

This section makes it clear that neither a physician nor a qualified technician will be guilty of a criminal offence for refusing to take, or for causing to be taken, a blood sample from a person pursuant to s. 254 or 256. Similarly, no physician or qualified technician, acting under the directions of a physician, will incur criminal or civil liability for anything necessarily done with reasonable care and skill in taking the blood sample.

**PROCEEDINGS UNDER SECTION 255 / No obligation to give sample except as required under section 254 / Evidence of failure to comply with demand / Release of specimen for testing / Testing blood for presence of drugs / Attendance and right to cross-examine / Notice of intention to produce certificate.**

**258. (1) In any proceedings under subsection 255(1) in respect of an offence committed under section 253 or in any proceedings under subsection 255(2) or (3),**

- (a) where it is proved that the accused occupied the seat or position ordinarily occupied by a person who operates a motor vehicle, vessel or aircraft or any railway equipment or who assists in the operation of an aircraft or of railway equipment, the accused shall be deemed to have had the care or control of the vehicle, vessel, aircraft or railway equipment, as the case may be, unless the accused establishes that the accused did not occupy that seat or position for the purpose of setting the vehicle, vessel, aircraft or railway equipment in motion or assisting in the operation of the aircraft or railway equipment, as the case may be;**
- (b) the result of an analysis of a sample of the breath or blood of the accused (other than a sample taken pursuant to a demand made under subsection 254(3)) or of the urine or other bodily substance of the accused may be admitted in evidence notwithstanding that, before the accused gave the sample, he was not warned that he need not give the sample or that the result of the analysis of the sample might be used in evidence;**
- (c) where samples of the breath of the accused have been taken pursuant to a demand made under subsection 254(3), if**

**Note:** Subparagraph (i), enacted by 1968-69, c. 38, s. 16; re-enacted by 1974-75-76, c. 93, s. 18(1); re-enacted by R.S.C. 1985, c. 27 (1st Supp.), s. 36 is to come into force on proclamation. The unproclaimed text reads as follows:

- (i) at the time each sample was taken, the person taking the sample offered to provide to the accused a specimen of the breath of the accused in an approved container for his own use, and, at the request of the accused made at that time, such a specimen was thereupon provided to the accused,*
- (ii) each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and, in the case of the first**

- sample, not later than two hours after that time, with an interval of at least fifteen minutes between the times when the samples were taken,
- (iii) each sample was received from the accused directly into an approved container or into an approved instrument operated by a qualified technician, and
  - (iv) an analysis of each sample was made by means of an approved instrument operated by a qualified technician,
- evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;
- (d) where a sample of the blood of the accused has been taken pursuant to a demand made under subsection 254(3) or otherwise with the consent of the accused or pursuant to a warrant issued under section 256, if
    - (i) at the time the sample was taken, the person taking the sample took an additional sample of the blood of the accused and one of the samples was retained, to permit an analysis thereof to be made by or on behalf of the accused and, at the request of the accused made within three months from the taking of the samples, one of the samples was ordered to be released pursuant to subsection (4),
    - (ii) both samples referred to in subparagraph (i) were taken as soon as practicable after the time when the offence was alleged to have been committed and in any event not later than two hours after that time,
    - (iii) both samples referred to in subparagraph (i) were taken by a qualified medical practitioner or a qualified technician under the direction of a qualified medical practitioner,
    - (iv) both samples referred to in subparagraph (i) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed, and
    - (v) an analysis was made by an analyst of at least one of the samples that was contained in a sealed approved container,
 evidence of the result of the analysis is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence was alleged to have been committed was the concentration determined by the analysis or, where more than one sample was analyzed and the results of the analyses are the same, the concentration determined by the analyses and, where the results of the analyses are different, the lowest of the concentrations determined by the analyses;
  - (e) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood, urine, breath or other bodily substance of the accused and stating the result of that analysis is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;
  - (f) a certificate of an analyst stating that the analyst has made an analysis of a sample of an alcohol standard that is identified in the certificate and intended for use with an approved instrument and that the sample of the standard analyzed by the analyst was found to be suitable for use with an approved instrument, is evidence that the alcohol standard so identified is suitable for use with an approved instrument without proof of the signature or the official character of the person appearing to have signed the certificate;
  - (g) where samples of the breath of the accused have been taken pursuant to a



demand made under subsection 254(3), a certificate of a qualified technician stating

- (i) that the analysis of each of the samples has been made by means of an approved instrument operated by the technician and ascertained by the technician to be in proper working order by means of an alcohol standard, identified in the certificate, that is suitable for use with an approved instrument,
- (ii) the results of the analyses so made, and
- (iii) if the samples were taken by the technician,

**Note:** Clause (A), enacted by 1968-69, c. 38, s. 16; re-enacted by 1974-75-76, c. 93, s. 18(2); re-enacted by R.S.C. 1985, c. 27 (1st Supp.), s. 36 is to come into force on proclamation. The unproclaimed text reads as follows:

- (A) *that at the time each sample was taken the technician offered to provide the accused with a specimen of the breath of the accused in an approved container for his own use and, at the request of the accused made at that time, the accused was thereupon provided with such a specimen,*
  - (B) the time when and place where each sample and any specimen described in clause (A) was taken, and
  - (C) that each sample was received from the accused directly into an approved container or into an approved instrument operated by the technician,
- is evidence of the facts alleged in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate;
- (h) where a sample of the blood of the accused has been taken pursuant to a demand made under subsection 254(3) or otherwise with the consent of the accused or pursuant to a warrant issued under section 256,
    - (i) a certificate of a qualified medical practitioner stating that
      - (A) the medical practitioner took the sample and that before the sample was taken he was of the opinion that the taking of blood samples from the accused would not endanger the life or health of the accused and, in the case of a demand made pursuant to a warrant issued pursuant to section 256, that by reason of any physical or mental condition of the accused that resulted from the consumption of alcohol, the accident or any other occurrence related to or resulting from the accident, the accused was unable to consent to the taking of his blood,
      - (B) at the time the sample was taken, an additional sample of the blood of the accused was taken to permit analysis of one of the samples to be made by or on behalf of the accused,
      - (C) the time when and place where both samples referred to in clause (B) were taken, and
      - (D) both samples referred to in clause (B) were received from the accused directly into, or placed directly into, approved containers that were subsequently sealed and that are identified in the certificate,
    - (ii) a certificate of a qualified medical practitioner stating that the medical practitioner caused the sample to be taken by a qualified technician under his direction and that before the sample was taken the qualified medical practitioner was of the opinion referred to in clause (i)(A), or
    - (iii) a certificate of a qualified technician stating that the technician took the sample and the facts referred to in clauses (i)(B) to (D)
- is evidence of the facts alleged in the certificate without proof of the signature or official character of the person appearing to have signed the certificate; and
- (i) a certificate of an analyst stating that the analyst has made an analysis of a sample of the blood of the accused that was contained in a sealed approved container identified in the certificate, the date on which and place where the sample was analyzed and the result of that analysis is evidence of the facts alleged

in the certificate without proof of the signature or official character of the person appearing to have signed it.

### *Transitional provision*

**Note:** R.S.C. 1985, c. 27 (1st Supp.), s. 204, proclaimed in force December 4, 1985, provides as follows:

204. Paragraphs 258(1)(f) and (g) of the *Criminal Code*, as they read immediately before the coming into force of the amendments to those paragraphs, as enacted by section 36 of this Act, continue to apply to any proceedings in respect of which a certificate referred to in those paragraphs was issued prior to the coming into force of the amendments to those paragraphs.

(2) No person is required to give a sample of urine or other bodily substance for analysis for the purposes of this section except breath or blood as required under section 254, and evidence that a person failed or refused to give such a sample or that such a sample was not taken is not admissible nor shall such a failure or refusal or the fact that a sample was not taken be the subject of comment by any person in the proceedings.

(3) In any proceedings under subsection 255(1) in respect of an offence committed under paragraph 253(a) or in any proceedings under subsection 255(2) or (3), evidence that the accused, without reasonable excuse, failed or refused to comply with a demand made to him by a peace officer under section 254 is admissible and the court may draw an inference therefrom adverse to the accused.

(4) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction shall, on the summary application of the accused made within three months from the day on which samples of the blood of the accused were taken, order the release of one of the samples for the purpose of an examination or analysis thereof, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the sample and its preservation for use in any proceedings in respect of which it was retained.

(5) Where a sample of blood of an accused has been taken pursuant to a demand made under subsection 254(3) or otherwise with the consent of the accused or pursuant to a warrant issued under section 256, the sample may be tested for the presence of drugs in the blood of the accused.

(6) A party against whom a certificate described in paragraph (1)(e), (f), (g), (h) or (i) is produced may, with leave of the court, require the attendance of the qualified medical practitioner, analyst or qualified technician, as the case may be, for the purposes of cross-examination.

(7) No certificate shall be received in evidence pursuant to paragraph (1)(e), (f), (g), (h) or (i) unless the party intending to produce it has, before the trial, given to the other party reasonable notice of his intention and a copy of the certificate. R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 61; 1994, c. 44, s. 14.

### CROSS-REFERENCES

The terms "peace officer", "motor vehicle", "railway equipment", "superior court of criminal jurisdiction" and "court of criminal jurisdiction" are defined in s. 2. The terms "aircraft", "vessel" and "operates" are defined in s. 214. The terms "analyst", "approved container", "approved instrument", "qualified medical practitioner" and "qualified technician" are defined in s. 254. The offence of impaired operation is defined in ss. 253 and 255, of "over 80" in s. 253 and refusing to comply with a breath or blood demand in s. 254.

Section 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21 provides that "Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the

document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary.”

As to proof of service by affidavit, see s. 4(6).

## SYNOPSIS

This section states that where the prosecution establishes in proceedings under s. 255(1) with respect to an offence under s. 253 or in proceedings under s. 255(2) or (3) that the accused was sitting in the operator's seat of the vehicle, the accused is deemed to have care or control of that vehicle. This presumption can be overturned if the accused is able to establish that the purpose of occupying that seat was not for setting the vehicle in motion.

In addition, the result of an analysis of a breath or blood sample along with samples of urine or other bodily substances, may be admitted in evidence even if there was no warning prior to the taking of the sample that the accused need not consent to the procedure, nor that the result might be used in evidence. No person is required, however, to give a sample of urine or other bodily substance except as required under s. 254 and evidence of a failure or refusal to give such a sample is not admissible at trial nor may it be made the subject of comment. When the technical requirements described in s. 258(1)(c) and (d) are met, the evidence of the results of analysis is, in the absence of evidence to the contrary, proof of the concentration of alcohol in the accused's blood at the time of the offence. If more than one sample is analyzed and the results are different, the evidence of the lowest of the concentrations will be used in the proceedings.

Paragraphs 1(e), (f), (g), (h) and (i) provide that the certificates of analysts, medical practitioners and qualified technicians are themselves evidence of the facts set out therein without the need to prove the signature or the official character of the person signing the certificate. The accused may apply to a judge of a superior court or court of criminal jurisdiction within three months of the date upon which the blood samples were taken for an order for the release of one of the samples for analysis. The party intending to produce the certificate as evidence must, prior to trial, give the other party reasonable notice of his intention along with a copy of the certificate. An accused person may, with leave of the court, require the attendance for cross-examination of the medical practitioner, analyst or technician who signed the certificate. In proceedings under s. 255(1) in respect of an offence committed under s. 253(a) or in proceedings under s. 255(2) or (3), evidence of failure by the accused to comply with a demand made under s. 254 is admissible. The court may draw an inference adverse to the accused from such evidence.

## ANNOTATIONS

**Presumption of care or control [subsec. (1)(a)]** – Proof of indecision on the part of the accused is not sufficient to rebut the presumption in subsec. (1)(a). While it may be that the accused need not establish on a balance of probabilities that he had a settled purpose at the time of initially occupying the driver's seat other than that of setting the vehicle in motion, he must nevertheless prove on a balance of probabilities that he did not occupy that seat for the purpose of putting the vehicle in motion: *R. v. George* (1994), 90 C.C.C. (3d) 502, 120 Nfld. & P.E.I.R. 237, 5 M.V.R. (2d) 1 (Nfld. C.A.).

The fact that the accused is able to rebut the presumption in this paragraph does not entitle him to an acquittal where the Crown is able to establish that he had care or control without reliance on the presumption. This paragraph does not import into the care or control offence an intent to drive and the accused may be convicted of that offence where although he does not have an intent to drive he performs some act or series of acts involving the use of a car, its fittings or equipment, whereby the vehicle may unintentionally be set in motion: *Ford v. The Queen* (1982), 65 C.C.C. (2d) 392, 13 M.V.R. 237 (S.C.C.) (7:2).

The Crown does not have to make a formal election before it can rely on the presumption in this paragraph: *R. v. Journeaux* (1992), 38 M.V.R. (2d) 323 (Ont. C.A.).



The Crown was not entitled to rely on the presumption in this paragraph where the accused was lying across the seat with his head on the passenger side and his legs were encased in a sleeping-bag under the steering wheel. It could not be said that he was occupying the seat ordinarily occupied by the driver. It was further held that the Crown had not otherwise made out care or control. Acts of care or control, short of driving, are acts which involve some use of the vehicle or its fittings, or some course of conduct associated with the vehicle which would involve the risk of putting the vehicle in motion so that it could become dangerous, and in this case the accused was asleep in the sleeping-bag: *R. v. Toews* (1985), 21 C.C.C. (3d) 24, 47 C.R. (3d) 213, [1985] 2 S.C.R. 119 (7:0).

**Constitutionality of care or control presumption** – It has been held that the predecessor to this paragraph, although it required the accused to prove on a balance of probabilities that he did not enter the vehicle with the intention of setting it in motion, is a reasonable limit on the guarantee to the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms and is therefore valid: *R. v. Whyte* (1988), 42 C.C.C. (3d) 97, 64 C.R. (3d) 123, [1988] 2 S.C.R. 3 (6:0).

**Right to production of ampoules, etc.** – In *Duke v. The Queen* (1972), 7 C.C.C. (2d) 474, 18 C.R.N.S.302 (S.C.C.), it was held (9:0) that because Parliament specifically proclaimed the predecessor to this section in force, in the manner that it did, the failure of the Crown to provide the suspected driver with a sample of his breath did not deprive him of his right to a fair hearing.

Similarly, the routine non-malicious destruction of the ampoules so that the accused is unable to conduct his own tests of the ampoules does not deprive the accused of a fair hearing or of his rights under the Charter of Rights and Freedoms: *Re Potma and The Queen* (1983), 2 C.C.C. (3d) 383, 31 C.R. (3d) 231, 144 D.L.R. (3d) 620 (Ont. C.A.), leave to appeal to S.C.C. refused D.L.R. *loc. cit.*

Section 7 of the Charter of Rights and Freedoms requires the Crown to make disclosure and discovery of relevant materials and in this case this included providing representative samples of the ampoules from the same lot as those used to test the accused so that independent tests could be conducted to ascertain the reliability and accuracy of the machine when such ampoules are used. In this case the ampoules were not those recommended for use by the machine's manufacturer: *R. v. Bourget* (1987), 35 C.C.C. (3d) 371, 56 C.R. (3d) 97, 46 M.V.R. 246 (Sask. C.A.).

However, it was held in *R. v. Eagles* (1989), 47 C.C.C. (3d) 129, 68 C.R. (3d) 271, 88 N.S.R. (2d) 337 (C.A.), that the accused was not entitled to a sample of the ampoule in the absence of some factual foundation or other basis shown indicating that production and examination of the representative ampoule would advance the defence. And, a similar test was applied in *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 13 M.V.R. (2d) 1 (N.S.C.A.), where an application was made by the accused for an order permitting access by a defence expert to the breathalyzer machine upon which the accused had been tested. It was held that the application should have been dismissed, the first request for inspection not having been made in a timely fashion and it not being shown in what way mere inspection of the machine might assist the accused's case.

Similarly, in *R. v. Lefebvre* (1988), 90 A.R. 334, 9 M.V.R. (2d) 304 (Q.B.), it was held that failure to furnish representative samples of the ampoules was not a violation of s. 7. In this case, the evidence indicated that the warning referred to in *R. v. Bourget*, *supra*, had been withdrawn by the manufacturer. Further, evidence accepted by the trial judge indicated that it was highly unlikely that a random sample of the ampoule would be found to be faulty and even if it were it could not affect the tests administered by the technician. The standard alcohol test would demonstrate the accuracy of the breathalyzer. Finally, the ampoule actually used in the test of the accused is of no value.

It was held in *R. v. Hodgson* (1990), 57 C.C.C. (3d) 278, 78 C.R. (3d) 333, 24 M.V.R. (2d) 42 (B.C.C.A.) that there was no reasonable basis for concluding that the failure to preserve a representative sample of the alcohol standard infringed the accused's rights to

make full answer and defence and to be tried in accordance with the principles of fundamental justice as guaranteed by s. 7 of the Charter. Counsel could only speculate that independent analysis of the sample could have disclosed that it was not suitable for use in the breathalyzer and there were other means to determine the issue, for example, by obtaining the chemical composition from the analyst who prepared it or by resorting to the opinion of an expert. Further, the Crown had acted fairly by informing defence counsel of the name of the analyst and offering to provide a sample if the particular lot had not been exhausted.

Failure of the prosecution to supply the accused with a sample of the alcohol standard does not violate s. 7 of the Charter of Rights: *R. v. Gascon* (1987), 50 M.V.R. 213 (Ont. Prov. Ct.). *Contra: R. v. Kalafut* (1988), 70 Sask. R. 94, 8 M.V.R. (2d) 185 (Q.B.).

Failure of the officer to show the accused the reading on the breathalyzer did not deprive the accused of a fair trial. The officer had been willing to do so but, by the time the request was made, the reading had been erased: *R. v. Cabanela* (1989), 25 M.V.R. (2d) 161 (Ont. C.A.).

The accused's rights under ss. 7 and 11(d) of the Charter were infringed when his polite request to view the breathalyzer gauge at the time the tests were being administered was refused. Viewing the readings would have assisted the accused in making full answer and defence and would not have interfered in the administration of the tests: *R. v. Selig* (1991), 4 C.R. (4th) 20, 27 M.V.R. (2d) 166, 101 N.S.R. (2d) 281 (C.A.). *Contra: R. v. Gillis* (1994), 91 C.C.C. (3d) 575, 63 W.A.C. 395, 149 A.R. 395 (C.A.).

Also see Lucas, D.M. "Production of Breathalyzer Material", (1989), 1 J.M.V.L. 103.

On this issue, also see the note by C. Finley, "Production Requests: The Crown's Duty to Provide", 21 M.V.R. (2d) 65.

**Subsec. (1)(c), (d) [presumption of blood-alcohol level] / Constitutionality of presumption** – The presumption in this paragraph is not an unconstitutional violation of the presumption of innocence as guaranteed by s. 11(d) of the Charter of Rights: *R. v. Phillips* (1988), 42 C.C.C. (3d) 150, 64 C.R. (3d) 154, 4 M.V.R. (2d) 239 (Ont. C.A.); *R. v. Hamilton* (1984), 28 M.V.R. 127 (Alta. Q.B.); *R. v. Sturge* (1987), 2 M.V.R. (2d) 189 (N.B.Q.B.); *R. v. Ballem* (1990), 58 C.C.C. (3d) 46, 22 M.V.R. (2d) 14 (P.E.I. C.A.).

**Applicability of presumption** – The Crown may rely on the presumption in this subsection not only where it proceeds by way of certificate under subsec. (1)(g) but where the technician gives *viva voce* evidence: *R. v. Lightfoot* (1981), 59 C.C.C. (2d) 414, 24 C.R. (3d) 323, [1981] 1 S.C.R. 566 (9:0).

When the Crown proceeds by way of *viva voce* evidence of the qualified technician and seeks to rely on the presumption in this subsection it need only meet the requirements of this subsection and therefore, *inter alia*, the provisions of subsec. (1)(f) have no application: *R. v. Walters* (1975), 26 C.C.C. (2d) 56, 11 N.S.R. (2d) 443 (App. Div.).

Where the Crown is unable to rely on the presumption in this subsection it may still prove the offence by adducing expert evidence as to the progressive absorption of alcohol into the bloodstream in order to relate the readings in the certificate back to the time of the offence: *R. v. Bozek* (1977), 34 C.C.C. (2d) 457 (Sask. Dist. Ct.); *R. v. Burnison* (1979), 70 C.C.C. (2d) 38 (Ont. C.A.).

When proceeding by way of *viva voce* evidence from the breathalyzer technician rather than by certificate there is no requirement of proof as to the suitability of the substance or solution before the Crown may rely on the presumption in this subsection: *Lightfoot v. The Queen* (1981), 59 C.C.C. (2d) 414, 24 C.R. (3d) 323, [1981] 1 S.C.R. 566 (9:0).

The presumption in this paragraph applies to the trial of an offence laid prior to the proclamation of this section: *R. v. Copley* (1988), 43 C.C.C. (3d) 396, 6 M.V.R. (2d) 40 (Ont. C.A.).

The burden imposed on the accused by subsec. (1)(c) is merely to adduce evidence to

the contrary which raises a reasonable doubt, that might reasonably be true or that suggests a reasonable possibility of innocence. There is no persuasive burden placed on the accused: *R. v. Dubois* (1990), 62 C.C.C. (3d) 90, 25 M.V.R. (2d) 21 (Que. C.A.).

**Requirement of two samples** – The words “each sample” must be interpreted in conjunction with s. 254(3) meaning each sample which in the opinion of the qualified technician is necessary to enable a proper analysis to be made. It would not include for example, a breath sample a portion of which escapes due to a malfunction in the machine and which in the opinion of the technician will not give a proper analysis: *R. v. Perrier* (1984), 15 C.C.C. (3d) 506, 29 M.V.R. 92 (Ont. C.A.).

Despite the use of the superlative “lowest” the Crown may still rely on the presumption where only two samples were taken. It is not necessary that three or more samples be taken: *R. v. Schultz* (1977), 38 C.C.C. (2d) 39 (Ont. H.C.J.).

It was held in *R. v. Norman* (1978), 40 C.C.C. (2d) 27, [1978] 3 W.W.R. 542 (Alta. S.C. App. Div.) that considering the certificate as a whole the fact that the certificate referred to the results of analysis of “one of the said samples” and “another of the said samples” did not leave open as a reasonable conclusion that a third sample was taken the results of which were not given in the certificate. In the absence of anything to suggest to the contrary “another” is to be read in the sense of “the other”. Folld: *R. v. Grace* (1979), 47 C.C.C. (2d) 301 (N.S.S.C. App. Div.).

Similarly, the fact that the printed form of the certificate has spaces for the results of three breath tests, only two of which were filled out does not give rise to an inference that a third sample was taken but that the results were not recorded: *R. v. Dempsey* (1979), 45 C.C.C. (2d) 267 (N.B.S.C. App. Div.).

Similarly, the mere fact that the accused blew into the breathalyzer three times is not evidence that more than two “samples” were taken: *R. v. Mangialaio* (1984), 15 C.C.C. (3d) 331, 29 M.V.R. 244 (B.C.C.A.).

Where only one breath sample was obtained, although the Crown may not rely on the technician's certificate or the presumption in this section, it may still secure a conviction under s. 253(b) by proceeding by *viva voce* expert evidence where the technician is able to testify that the one sample was suitable: *R. v. Jones* (1976), 33 C.C.C. (2d) 50, 16 N.B.R. (2d) 32 (S.C. App. Div.).

**Requirement samples received directly into approved instrument [para. (c)(iii)]** – Evidence from the technician, merely that samples were received into a “breathalyzer instrument” is not proof that the samples were received directly into an approved instrument as required by subpara. (iii): *R. v. Alatyppo* (1983), 4 C.C.C. (3d) 514, 20 M.V.R. 39 (Ont. C.A.).

The court may take judicial notice of the workings of the Borkenstein Breathalyzer, or at least refer to standard textbooks on the subject, and so take note of the fact that the only way to introduce the breath sample is by blowing directly into a tube attached to the machine. Thus, evidence that the breath sample was “introduced” is proof that it was received “directly” into the breathalyzer: *R. v. Walters* (1975), 26 C.C.C. (2d) 56, 11 N.S.R. (2d) 443 (App. Div.).

**Time element / interval of 15 minutes between samples** – It was held by Seaton, J.A., in *R. v. Perry* (1978), 41 C.C.C. (2d) 182, 33 N.R. at p. 108 (C.A.), that there was no basis for extending the provisions of s. 25(2) of the Interpretation Act, R.S.C. 1970, c. 1-23 to minutes and thus breath tests taken at 3:00 a.m. and 3:15 a.m. complied with the requirement that the breath samples be taken “at least 15 minutes” apart. This holding, which was contrary to the conclusion reached by several other provincial appellate courts, was apparently upheld by the Supreme Court of Canada which dismissed the appeal by the accused on June 11, 1980, 51 C.C.C. (2d) 576n, [1980] 1 S.C.R. 1104, N.R. *loc. cit.* p. 106, in brief reasons to the effect that the Court was in agreement with the reasons of Taggart, J.A. Taggart, J.A., concurred in the reasons of Seaton, J.A., but



in addition relied on a finding of fact by the trial Judge that the actual time between the tests was 15 complete minutes.

In *R. v. Taylor* (1983), 7 C.C.C. (3d) 293, 22 M.V.R. 295 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, the court considered the judgments in *R. v. Perry*, *supra*, and the majority of the Court concluded that while a bare 15 minutes is sufficient for compliance, that interval is the interval of time from the point when everything necessary to complete the taking of the first sample has been done and the point when the first act is done to commence the taking of the second sample. The requirement will not be met by a certificate which merely states that the samples were taken at, for example, 3:00 a.m. and 3:17 a.m. since such a certificate is open to the conclusion that the taking of the samples commenced at those two times and without additional information as to the length of time needed to finish taking the first sample, the trial Judge would not be able to determine the interval between them. *Folld: R. v. Dawson* (1984), 12 C.C.C. (3d) 152, 27 M.V.R. 252, 47 Nfld. & P.E.I.R. 295 (P.E.I.S.C. *in banco*); not followed: *R. v. Kornak* (1984), 12 C.C.C. (3d) 182, 27 M.V.R. 152, 30 Alta. L.R. (2d) 193 (C.A.); *R. v. Moore* (1984), 13 C.C.C. (3d) 281, 28 M.V.R. 23 (B.C.C.A.); *R. v. Scott* (1984), 36 Sask. R. 216 (C.A.); *R. v. DeCoste* (1984), 15 C.C.C. (3d) 289, 65 N.S.R. (2d) 61 (S.C. App. Div.); *R. v. Hepdich* (1989), 47 C.C.C. (3d) 286, 13 M.V.R. (2d) 101, 75 Nfld. & P.E.I.R. 201 (Nfld. C.A.).

In a subsequent case, *R. v. Hayes* (1985), 19 C.C.C. (3d) 569, 32 M.V.R. 126 (Ont. C.A.), the court held that for the purpose of this paragraph the sample is taken once the accused's breath sample is inside the breathalyzer and in computing the time interval it is not necessary to take into account the period of time for the machine to analyze and indicate the results of each sample. Similarly, *R. v. Daly* (1985), 32 M.V.R. 213 (Ont. C.A.); *R. v. Atkinson* (1986), 42 M.V.R. 78 (N.S.C.A.); *R. v. Arsenaault* (1986), 43 M.V.R. 287 (P.E.I.S.C.).

The requirement that the samples were taken at least 15 minutes apart applies to samples of which in the opinion of the technician a proper analysis can be made. Thus, where a "sample" is taken but not analyzed because the machine was not properly hooked up, the technician need not wait 15 minutes to take a proper sample: *R. v. Weselowski* (1984), 11 C.C.C. (3d) 574 (B.C.C.A.); *Denton v. The Queen* (1985), 32 M.V.R. 250 (Sask. Q.B.).

**Time element / as soon as practicable and within two hours** – A breath sample was taken "as soon as practicable" where it was taken one hour after the accused's arrival at the police station where the delay was due to the necessity of repairing the breathalyzer: *R. v. Finlayson* (1974), 21 C.C.C. (2d) 511, [1975] W.W.D. 57 (Sask. C.A.).

The test for determining whether or not breath samples were taken as soon as practicable is whether they were taken within a reasonably prompt time under the circumstances. The court must take into account both subjective and objective factors, including whether the police officer involved acted reasonably: *R. v. Van Der Veen* (1988), 44 C.C.C. (3d) 38, 11 M.V.R. (2d) 251, 89 A.R. 4 (C.A.).

The phrase "as soon as practicable" does not require that the tests be taken at the very earliest moment. In the circumstances a 20-minute delay while the accused was kept under observation was permissible: *R. v. Mudry*; *R. v. Coverly* (1979), 50 C.C.C. (2d) 518 (Alta. C.A.). *Folld: R. v. Carter* (1980), 55 C.C.C. (2d) 405, 8 M.V.R. 108 (B.C.C.A.); *R. v. Ashby* (1980), 57 C.C.C. (2d) 348 (Ont. C.A.); *R. v. Cander* (1981), 59 C.C.C. (2d) 490, 28 B.C.L.R. 376 (C.A.), leave to appeal to S.C.C. refused 38 N.R. 450n. Similarly: *R. v. Phillips* (1988), 42 C.C.C. (3d) 150, 64 C.R. (3d) 154 (Ont. C.A.).

Similarly, a 21-minute delay between the time of the arrival at the police station and the time of the first test is not evidence that the tests were not taken as soon as practicable. The requirement that the tests be taken as soon as practicable must be applied with reason. There is no need to explain every incident which occurred from the time of the offence to the time the samples were taken unless the trial Judge is not satisfied on the evidence before him that the samples were taken as soon as practicable: *R. v. Carter*

(1981), 59 C.C.C. (2d) 450, 10 M.V.R. 187 (Sask. C.A.). Folld: *R. v. Cambrin* (1982), 1 C.C.C. (3d) 59, [1983] 2 W.W.R. 250, 18 M.V.R. 160 (B.C.C.A.).

The critical issue in each case, where it is alleged that the tests were not taken as soon as practicable, is whether the conduct of the police was reasonable, having regard to all the circumstances. The act of the arresting officer in commencing the preparation of the alcohol influence report for a period of nine minutes before turning the accused over to the breathalyzer technician, was not an unreasonable procedure: *R. v. Payne* (1990), 56 C.C.C. (3d) 548, 23 M.V.R. (2d) 37, 38 O.A.C. 161 (C.A.).

Similarly, the conduct of the arresting officer, who was also a qualified technician, in waiting for another technician to conduct the test to ensure objectivity was reasonable. Accordingly, the test was taken as soon as practicable: *R. v. Clarke* (1991), 27 M.V.R. (2d) 1 (Ont. C.A.).

Although the officer has grounds to make an immediate demand under s. 254(3), the fact that he first makes a demand under s. 254(2) does not prevent the samples subsequently obtained pursuant to the s. 254(3) demand from being obtained as soon as practicable: *R. v. Jensen* (1982), 2 C.C.C. (3d) 11, 18 M.V.R. 52 (N.S.S.C. App. Div.).

**Judicial notice** – It was held in *R. v. Dickson* (1973), 5 N.S.R. (2d) 240 (S.C. App. Div.) that the trial Judge erred in taking judicial notice of the tolerance for error in the Borkenstein Breathalyzer.

And, it was held to be an error for the Judge to base his decision in part on a breathalyzer manual which he obtained from the police and which was not properly introduced into evidence: *R. v. Robertson* (1979), 47 C.C.C. (2d) 159 (B.C.C.A.).

A judge cannot take judicial notice of the amount by which the subsequent consumption would affect the breathalyzer reading and the Crown would still be entitled to rely on the presumption in this paragraph in the absence of further evidence raising a reasonable doubt as to whether the results of the breathalyzer accurately depict the blood alcohol level at the time of the offence as being above the permissible limit: *R. v. Batley* (1985), 19 C.C.C. (3d) 382, 32 M.V.R. 257 (Sask. C.A.). Similarly: *R. v. White* (1986), 41 M.V.R. 82 (Nfld. C.A.).

To a similar effect is *R. v. Kays* (1987), 62 C.R. (3d) 193, 82 N.S.R. (2d) 18 (C.A.), leave to appeal to S.C.C. refused 88 N.R. 400n, holding that while the court may take judicial notice of the fact that consumption of alcohol increases the blood-alcohol level, it cannot take notice as to the extent to which the consumption will affect the breathalyzer reading.

**Evidence to the contrary / generally** – As to the meaning generally of the words “any evidence to the contrary” see *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, 91 D.L.R. (3d) 449 (S.C.C.) noted under s. 348, *infra*.

“Evidence to the contrary” must be evidence which tends to establish that the proportion of alcohol in the accused’s blood at the time of the offence was not the same as indicated by the approved instrument. No evidence is “evidence to the contrary” when its only effect is to demonstrate in general terms the possible uncertainty of the elements of the legislative scheme established by these provisions or the inherent fallibility of the instruments which are approved under statutory authority. Thus, for example, evidence that the particular type of Borkenstein Breathalyzer is subject to a possible margin of error is not evidence to the contrary: *R. v. Moreau* (1978), 42 C.C.C. (2d) 525, 89 D.L.R. (3d) 449, [1979] 1 S.C.R. 261 (5:4).

Similarly, evidence merely showing that the accused’s blood-to-breath alcohol partition ratio was different from the average upon which the breathalyzer is based so that the machine would over-estimate the accused’s actual blood-alcohol level is not of itself evidence sufficient to rebut the presumption in this paragraph. The evidence must go further and raise a reasonable doubt as to whether the accused’s blood-alcohol level exceeded the permissible limit. This could take the form of expert evidence as to the blood-alcohol level based on the amount of alcohol consumed by the accused on the day

in question: *R. v. Star* (1983), 10 C.C.C. (3d) 363, 26 M.V.R. 95, 61 N.S.R. (2d) 132 (S.C. App. Div.).

Evidence to the contrary means simply evidence that the blood-alcohol level at the time of the test was different from the level at the time of the offence. There is no requirement that the evidence additionally shows that the accused's blood-alcohol level was below .08. However, the mere fact that the presumption is rebutted does not render the breathalyzer certificate inadmissible. It is still open to the trial judge to convict if, on the basis of all the evidence, the judge is satisfied beyond a reasonable doubt that the accused was over the limit at the time of driving. On the other hand, the effect of normal biological processes of absorption and elimination of alcohol cannot of and by itself constitute evidence to the contrary, because Parliament can be assumed to have known that blood-alcohol levels constantly change, yet saw fit to implement the presumption: *R. v. St. Pierre*, [1995] 1 S.C.R. 791, 96 C.C.C. (3d) 385, 36 C.R. (4th) 273.

**Evidence to the contrary / expert evidence** – It is not the mere adducing of evidence capable of being “evidence to the contrary” which rebuts the presumption in this paragraph. Rather, it is only if the evidence is not rejected and raises a doubt as to guilt that the presumption no longer applies. Evidence of a simulation test which attempted to duplicate the conditions on the day of the offence and which resulted in a blood alcohol level less than .08 at the time of the offence is capable of being evidence to the contrary: *R. v. Hughes* (1982), 70 C.C.C. (2d) 42, 30 C.R. (3d) 2 (Alta. C.A.); *R. v. St. Pierre* (1982), 70 C.C.C. (2d) 453, 23 M.V.R. 316 (Alta. C.A.).

Expert evidence based on the accused's testimony as to the amount of alcohol consumed that his blood-alcohol level would not have exceeded the prescribed limit at the time of the offence constitutes “evidence to the contrary” notwithstanding such evidence by implication casts doubt on the accuracy of the particular breathalyzer: *R. v. Kucher* (1979), 48 C.C.C. (2d) 115 (Alta. S.C. App. Div.); *R. v. Andrews* (1983), 8 C.C.C. (3d) 519, 22 M.V.R. 213 (N.S.S.C. App. Div.).

Expert evidence based on testimony from the accused which is accepted by the trial judge that the accused's blood alcohol level would not have exceeded .08 at the time of the offence is evidence to the contrary, notwithstanding this evidence also means that the analysis of the blood sample must be wrong. The accused is not required to speculate where the error may have occurred: *R. v. Carter* (1985), 19 C.C.C. (3d) 174, 31 M.V.R. 1 (Ont. C.A.).

Evidence to the contrary includes evidence as to the amount of alcohol consumed, coupled with expert opinion evidence which tends to show that, at the time of the offence, the proportion was within the permitted limit. The fact that the same evidence tended to show that the blood alcohol level could be over the permitted limit does not mean that the evidence is not capable of being evidence to the contrary. Thus, expert evidence that, based on the amount of alcohol consumed by the accused, his blood alcohol reading at the time of the offence, which was approximately 50 minutes prior to the breathalyzer test, would have been in a range of .058 at the low end to .107 at the high end, was capable of being evidence to the contrary. The expert testified that the range was intended to take into account the uncertainty that exists as to whether the accused was a slow absorber and fast eliminator of alcohol, which would place him at the low end of the scale, or a fast absorber and a slow eliminator, which would put him at the high end of the scale. The expert could not say which of these characteristics the accused possessed and further testing of the accused would not have assisted, since an individual can vary from day to day or even during an evening: *R. v. Gibson* (1992), 72 C.C.C. (3d) 28, 13 C.R. (4th) 165 (Sask. C.A.).

Subsection (1)(c) does not impose any persuasive burden upon the accused, it being sufficient if the evidence adduced raises a reasonable doubt, might reasonably be true, or suggests a reasonable possibility of innocence. It was an error for the trial judge to resolve the conflict between the breathalyzer evidence and the credible evidence to the contrary by simply assuming that the breathalyzer result reflected accurately the quan-



tity of alcohol consumed and concluding for that reason that the accused's witnesses must be mistaken as to the amount of alcohol consumed by the accused, although they had testified honestly and to the best of their recollection. The defence evidence, while not absolutely precise, provided a sufficient basis for the expert opinion that the accused's blood-alcohol level would have been within the permitted level at the time of the driving and it was not for the accused to speculate as to where the error occurred which resulted in the breathalyzer readings: *R. v. Dubois* (1990), 62 C.C.C. (3d) 90, 25 M.V.R. (2d) 21 (Que. C.A.).

**Evidence to the contrary / alcohol consumption after operation of vehicle** – Evidence that the accused took a drink of alcohol between the time of the offence and the time of administering the breathalyzer may constitute evidence to the contrary as the effect of such drinking would be to increase the blood-alcohol level and would tend to show that the blood-alcohol level at the time of the offence was different than at the time of the tests: *R. v. St. Pierre*, [1995] 1 S.C.R. 791, 96 C.C.C. (3d) 385, 36 C.R. (4th) 273.

**Evidence to the contrary / proper functioning of approved instrument** – While proof that the breathalyzer was operating properly is not a condition precedent to the admissibility of the certificate under subsec. (1)(g), evidence that the particular instrument was not functioning properly would constitute “evidence to the contrary”. However such evidence must tend to show an inaccuracy in the breathalyzer or in the manner of its operation on the occasion in question of such a degree and nature that it could affect the results of the analysis to the extent that it would leave a doubt as to the accused's blood-alcohol being over the prescribed limit. The fact that the technician did not ensure that the temperature of the standard alcohol solution was within 1°C of the room air temperature, as recommended in the breathalyzer manual, even when coupled with expert evidence that the two temperatures could differ is not evidence to the contrary, particularly where the expert is unable to say what effect, if any, this would have on the tests: *R. v. Crosthwait* (1980), 52 C.C.C. (2d) 129, [1980] 1 S.C.R. 1089, 111 D.L.R. (3d) 431 (7:0).

The possibility that there may have been a mistake in the concentration of the standard alcohol solution does not constitute “evidence to the contrary”: *R. v. Rahkola* (1979), 48 C.C.C. (2d) 196, 11 C.R. (3d) 138 (B.C.C.A.).

**Evidence to the contrary / other notes** – In *R. v. Kozun* (1981), 64 C.C.C. (2d) 62, 12 M.V.R. 285 (Sask. C.A.) it was held that the fact that a third test was taken, the results of which were not disclosed in the certificate did not constitute evidence to the contrary.

A second reading at variance with the first reading is not in itself evidence to the contrary: *R. v. Westman* (1973), 11 C.C.C. (2d) 355, [1973] 5 W.W.R. 580 (Sask. C.A.); *R. v. Underwood* (1982), 3 C.C.C. (3d) 94, 18 M.V.R. 226 (B.C.C.A.).

The fact that the accused passed the test with the A.L.E.R.T. device is not in itself evidence to the contrary: *R. v. Fraser* (1983), 6 C.C.C. (3d) 273, 20 M.V.R. 241 (N.S.S.C. App. Div.).

Rounding down or truncating the breathalyzer reading to the second digit does not produce a false result nor constitute evidence to the contrary: *R. v. Hanson* (1989), 75 C.R. (3d) 110, 18 M.V.R. (2d) 172 (Ont. C.A.); *R. v. Goosen* (1985), 34 Man. R. (2d) 242, 35 M.V.R. 145 (Q.B.).

**Subsec. (1)(d) [Special considerations re blood samples]** Sub-paragraph (i) requires that the accused have notice within the three-month period that he is charged with an impaired driving offence, that the Crown has had a sample of the accused's blood analysed and that a second sample was taken and is available to permit an analysis of it by him or on his behalf. If the accused is given notice within this three-month period and then does not exercise his right to request production then, absent special circumstances, this would foreclose any complaints that the prosecution was later unable to produce the sample by reason of its destruction following the expiry of the three-month period. The most appropriate and convenient way to notify the accused of the existence of the second

sample is by service of the certificate of the qualified technician or certificate of the qualified medical practitioner as the case may be. This does not mean that notice by other means cannot be given so long as it is to the same effect and it is proved in accordance with the criminal standard that the accused was made aware in a timely fashion. The accused must receive the information with enough time to apply for an order releasing the sample for analysis under subsec. (4). However, where the accused has been given proper notice of the availability of the second sample then the fact that he did not apply for its release for testing would not effect the availability of the presumption: *R. v. Egger*, [1993] 2 S.C.R. 451, 82 C.C.C. (3d) 193, 21 C.R. (4th) 186.

Where no application is made for a blood sample prior to trial and no application is made for adjournment of the trial to bring such an application the accused's right to obtain a blood sample for independent analysis is not violated because the trial takes place less than three months after the offence: *R. v. Corning* (1987), 5 M.V.R. (2d) 207, 81 N.S.R. (2d) 53 (C.A.).

The "offence" referred to in para. (d)(ii) means not only the offence specified in the information but also any other offence properly included therein: *R. v. Cyr* (1983), 25 M.V.R. 62, 60 N.S.R. (2d) 159 (S.C. App. Div.).

Where the Crown does not rely on the provisions of the Criminal Code respecting the obtaining of blood samples and proof of the blood alcohol level pursuant to this section, but rather relies on an analysis made at the hospital, the evidence of the hospital technologists as to the results of the analysis performed by the hospital equipment is admissible, notwithstanding that the technologists were unable to give evidence as to the capability or reliability of the equipment nor as to the accuracy of the results of the analyses. It is not necessary for evidence to be given to explain precisely how the machine operates, it being sufficient that the expert operating the machine establishes that the machine is capable of making the required measurements or producing the required data, that the machine was in good working order at the relevant times, and that it was properly used: *R. v. Redmond* (1990), 54 C.C.C. (3d) 273, 21 M.V.R. (2d) 1, 37 O.A.C. 133 (C.A.). *Contra: R. v. Bird* (1989), 71 C.R. (3d) 52, 76 Sask. R. 275, 16 M.V.R. (2d) 46 (C.A.).

The fact that the blood samples, taken from the accused for hospital purposes, were destroyed before the accused could apply for release of a sample for independent testing did not result in violation of the accused's rights under s. 7, although the Crown relied upon the analysis performed at the hospital to prove the accused's blood alcohol level. The Crown was not seeking to rely on the presumption in this paragraph and thus there was no reason for requiring that a blood sample should have been preserved for analysis: *R. v. Redmond*, *supra*.

**Subsec. (1)(e) [certificate of analyst]** – It is not necessary for the certificate to name the defendant but it must identify the bodily substance in such a way so that that substance may be linked to the defendant by other evidence: *R. v. Larson* (1971), 3 C.C.C. (2d) 537, 15 C.R.N.S.398 (Alta. S.C. App. Div.).

**Subsec. (1)(f) [certificate of analyst re alcohol standard]** – A rubber stamp facsimile of the analyst's signature is not the equivalent of his signature: *R. v. Faber* (1972), 9 C.C.C. (2d) 353, [1972] 6 W.W.R.629 (B.C.S.C.).

This subsection is merely evidentiary providing the Crown with the means by which to rebut any evidence that the substance or solution was unsuitable: *R. v. Ware* (1975), 30 C.R.N.S. 308 (Ont. C.A.).

**Subsec. (1)(g) [qualified technician's certificate] / Identification of suitable alcohol standard** – **Note:** Several cases below were decided under a former provision which required identification of a suitable solution.

The suitable solution is sufficiently identified for the purposes of subpara. (i) where it is referred to by lot number. There is no requirement that the technician's certificate set out the chemical composition of the solution: *R. v. Genero* (1979), 50 C.C.C. (2d) 312,

[1980] 2 W.W.R. 182 (B.C.S.C.), affd 53 C.C.C. (2d) 159, [1980] 4 W.W.R. 237 (B.C.C.A.).

The identification of the suitable solution required by this paragraph must be such that it is meaningful when read with a certificate pursuant to para. (1)(e). If the solution is simply referred to by lot number it is not identified by a distinctive number. The suitable solution should be identified as a manufacturer might on its label, for example BDH Potassium Dichromate Breath Test Solution Lot No. "X": *R. v. Pearce* (1982), 3 C.C.C. (3d) 434, 19 M.V.R. 3 (Ont. C.A.).

An identification of the solution by manufacturer, type and lot or batch number is sufficient. The chemical elements or components of the solution need not be included in the description: *R. v. Janzen* (1986), 41 M.V.R. 1 (Sask. C.A.); *R. v. McEwan* (1988), 39 C.C.C. (3d) 572, 62 C.R. (3d) 222, 3 M.V.R. (2d) 153 (Ont. C.A.).

The qualified technician's certificate is itself sufficient to prove the suitability of the solution and it is not necessary to prove the suitability of the solution by resort to a certificate of an analyst or testimony from an analyst: *R. v. Lightfoot* (1981), 59 C.C.C. (2d) 414, 24 C.R. (3d) 323, [1981] 1 S.C.R. 566 (9:0).

There is no requirement of proof by means of a separate certificate from an analyst under subsec. (1)(f) that the testing standard was suitable. Absent evidence to the contrary, the technician is the judge of the suitability of the standard and the technician's statement as to the suitability of the alcohol standard is sufficient. Further, unless there is some evidence that the certificate under s. 258(1)(g) is not reliable, there is no duty on the Crown to produce at or before trial a certificate under subsec. (1)(f) or to disclose that the standard used was suitable: *R. v. Squires* (1994), 87 C.C.C. (3d) 430, 114 Nfld. & P.E.I.R. 157, 2 M.V.R. (3d) 295 (Nfld. C.A.). Similarly, the technician's testimony that he had ascertained that the breathalyzer was in proper working order by means of alcohol standard was sufficient even though the operator testified that he did not personally examine the analyst's certificate accompanying ampoules of the standard alcohol solution: *R. v. Harding* (1994), 88 C.C.C. (3d) 97, 17 O.R. (3d) 462, 50 M.V.R. (2d) 1 (C.A.).

An analyst's certificate stating that the solution was suitable for use in a Borkenstein Breathalyzer "an approved instrument" without specifying the model number is sufficient evidence of the suitability of the solution in the particular model number of Borkenstein Breathalyzer referred to in the technician's certificate: *R. v. Frankland* (1978), 43 C.C.C. (2d) 365, [1978] 6 W.W.R. 268 (B.C.C.A.).

Further, a concession by the technician that his statement as to the suitability of the solution was based on the certificate accompanying the solution and that he had no personal knowledge as to its suitability does not render his certificate inadmissible nor does such testimony constitute "evidence to the contrary" within the meaning of para. (1)(c): *R. v. Moore* (1981), 63 C.C.C. (2d) 135, 12 M.V.R. 40 (B.C.C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 31 NR. 104n; *R. v. Simpson* (1982), 3 C.C.C. (3d) 371, 18 M.V.R. 40 (P.E.I. C.A.); *R. v. Paulson* (1983), 5 C.C.C. (3d) 336, 21 M.V.R. 57 (Sask. C.A.).

**Other prerequisites to admissibility** – The "place" is adequately identified for the purposes of subpara. (iii) (B) where the municipality in which the tests were administered is set out in the certificate: *R. v. Padula* (1981), 59 C.C.C. (2d) 572, 10 M.V.R. 201 (Ont. C.A.).

The certificate is inadmissible when only one breath sample was taken nor *semble* may the Crown rely on the presumption in subsec. (1)(c) when only one sample was taken: *R. v. Noble* (1977), 37 C.C.C. (2d) 193, 80 D.L.R. (3d) 69, [1978] 1 S.C.R. 632 (9:0).

While proof that samples of the accused's breath were taken and that they were taken pursuant to a demand under s. 254 may be prerequisites to the admissibility of the certificate, these conditions may be established by circumstantial evidence an important element of which is the act of tendering the certificate: *R. v. Walsh* (1980), 53 C.C.C. (2d) 568, 6 M.V.R. 125 (Ont. C.A.).



The necessary nexus between the certificate and the charge may be inferred from circumstantial evidence based on the arresting officer's testimony as to the times of the tests and the identity of the technician and the contents of the notice of intention with the certificate of analysis attached thereto. In any event, it would seem that in determining the evidentiary link and the certificate's admissibility, the judge may refer to the contents of the certificate itself: *R. v. Andraishek* (1988), 9 M.V.R. (2d) 121 (Alta. C.A.).

The only conditions precedent to the admissibility of the technician's certificate are that samples of breath be taken and that they be taken pursuant to a demand under s. 254. There is no further requirement that there be *viva voce* evidence from the technician that suitable samples had been taken by him: *R. v. Hall* (1981), 57 C.C.C. (2d) 305, 26 A.R. 313 (C.A.).

It is not necessary for the Crown to prove by extrinsic evidence that two or more samples were taken. While the Crown, to have the benefit of this paragraph, must establish a link between the breathalyzer demand and the test which resulted in the analysis, that link is established by proof that the test dealt with in the certificate was made pursuant to the demand: *R. v. Schlegel* (1985), 22 C.C.C. (3d) 436 (B.C.C.A.), leave to appeal to S.C.C. refused February 28, 1986.

Subparagraph (iii)(B) does not require that the certificate record the time when the taking of the first sample commenced, where the certificate did set out the time when the taking of the first sample was complete and when the taking of the second sample commenced: *R. v. Eggen* (1988), 42 C.C.C. (3d) 94, 5 M.V.R. (2d) 163, 66 Sask. R. 124 (C.A.); *R. v. Hogg* (1990), 25 M.V.R. (2d) 1 (Ont. C.A.).

**Errors in certificate** – Even though it seems obvious that there is only a minor typographical error an inaccurate certificate must be rejected: *R. v. Gosby* (1974), 26 C.R.N.S.161, 8 N.S.R. (2d) 183 (C.A.).

It was held, however, in *R. v. Bykowski* (1980), 54 C.C.C. (2d) 398, 23 A.R. 426, (C.A.) (2:1) that what was obviously a typographical error in the certificate the dates of the two samples being given as March "1978" and March "1979" could be "corrected" by evidence of a person other than a qualified technician, such as evidence from the arresting officer that all events occurred in March, 1979.

**Effect of absence of grounds for making demand** – While absence of reasonable and probable grounds for belief of impairment [or *seem* as result of the recent amendments, belief that the offence under s. 253(b) was committed] may afford a defence to a charge under s. 254(5) it does not render inadmissible certificate evidence of a qualified technician on a charge under s. 237: *R. v. Rilling* (1975), 24 C.C.C. (2d) 81, 31 C.R.N.S. 142, [1976] 2 S.C.R. 183 (5:3). [However, consider now the impact of ss. 8 and 24(2) of the Charter of Rights and Freedoms.]

The amendment to [now] s. 254 to authorize a demand not only for an alleged breach of the impaired offence but also the "over 80" offence has not changed the effect of *R. v. Rilling*, *supra*, and thus, subject to the possible effect of the Charter of Rights and Freedoms, the law remains that the certificate is admissible although the Crown fails to prove that the officer had the requisite reasonable and probable grounds: *R. v. Lintell* (1991), 64 C.C.C. (3d) 507 (Alta. C.A.).

The question of whether or not the decision in *R. v. Rilling*, *supra*, can still represent the law in light of the Charter of Rights and Freedoms, and especially the guarantee to protection against unreasonable search and seizure in s. 8, has been considered by a number of courts. For example, the following courts have held that *Rilling* is no longer the law: *R. v. Bajkov* (1988), 8 M.V.R. (2d) 213 (B.C.S.C.); *R. v. Wilson* (1985), 42 Sask. R. 181, 22 C.R.R. 32, 37 M.V.R. 203 (Q.B.); *R. v. Dennehy* (1986), 26 C.C.C. (3d) 339 (Y. Terr. Ct.), while the following courts have continued to apply *Rilling*; *R. v. Kiskotagan* (1986), 49 Sask. R. 10, 41 M.V.R. 161 (Q.B.); In *R. v. Marshall* (1989), 91 N.S.R. (2d) 211, 13 M.V.R. (2d) 251 (C.A.), the issue was left open because no application had been made at trial pursuant to s. 24 of the Charter. On the other hand, in *R. v.*

*Wason* (1987), 35 C.R.R. 285, 7 M.V.R. (2d) 88 (Ont. C.A.), the court, without referring to *Rilling*, excluded evidence obtained as a result of a breathalyzer demand because the officer had no reasonable and probable grounds for making the demand which had been based on an improper approved screening device demand under s. 254(2).

It was held in *R. v. Dwernychuk* (1992), 77 C.C.C. (3d) 385, 135 A.R. 31, 42 M.V.R. (2d) 237 (C.A.), leave to appeal to S.C.C. refused 79 C.C.C. (3d) vi, 14 C.R.R. (2d) 192n, 151 N.R. 400n that until the Supreme Court of Canada reconsiders *R. v. Rilling*, *supra*, the lower courts are bound by that decision and thus the lack of reasonable and probable grounds does not affect the admissibility of the certificate.

The absence of reasonable and probable grounds to make the demand will not necessarily result in a violation of the guarantee against arbitrary detention under s. 9 of the Charter of Rights and Freedoms, so as to require a determination whether the evidence of the certificate should be excluded under s. 24(2) of the Charter: *R. v. Moore* (1988), 45 C.C.C. (3d) 410, 9 M.V.R. (2d) 190 (N.S.C.A.).

**Matters not affecting admissibility of certificate** – The fact that the samples were not taken at least 15 minutes apart does not affect the admissibility of the certificate. This only precludes the Crown from relying on the presumption in subsec. (1)(c): *R. v. Andrushko* (1977), 37 C.C.C. (2d) 273 (Man. C.A.). O'Sullivan, J.A., differed from the majority as to the effect of the words "at least" in subsec. (1)(c) and therefore considered a second question, *i.e.*, whether the fact that the sample was taken pursuant to a demand under s. 235(1) could be proved by a statement to that effect in the certificate itself. His Lordship held that as this was a condition precedent to the admissibility of the certificate it could not be proved merely by production of the certificate.

For a certificate of a qualified technician to be admissible it is not necessary to have proof independent of the certificate that the maker was in fact a "qualified technician" as defined in s. 254(1): *R. v. Tolley* (1974), 21 C.C.C. (2d) 380, [1975] 2 W.W.R. 673 (Alta. C.A.).

The certificate is not inadmissible because the demand was not made by a "peace officer" as defined by s. 2: *R. v. Harvey* (1979), 18 A.R. 382, 5 M.V.R. 41 (C.A.), leave to appeal to S.C.C. refused 20 A.R. 266n, *loc. cit.* M.V.R.; *R. v. Wright* (1980), 6 M.V.R. 80 (P.E.I.S.C. *in banco*).

**Evidentiary effect of certificate** – It is not necessary, before the certificate is admissible, to prove by extrinsic evidence the matters set out in subsec. (1)(c) and once the certificate is admitted it is evidence of the statements contained in it, which statements permit the application of the presumption under subsec. (1)(c): *R. v. Pickles* (1973), 11 C.C.C. (2d) 210, 20 C.R.N.S. 301 (Ont. C.A.); *R. v. Teague* (1972), 11 C.C.C. (2d) 191, 20 C.R.N.S. (B.C.C.A.); *R. v. Ferster* (1973), 11 C.C.C. (2d) 368 (Sask. C.A.).

Further, the existence of "evidence to the contrary" within the meaning of subsec. (1)(c) is not grounds for rejection of the certificate under this subsection: *R. v. Robertson* (1979), 47 C.C.C. (2d) 159 (B.C.C.A.).

Section 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21 applies to this paragraph and has the effect that the facts set out in the certificate are deemed to be established "in the absence of any evidence to the contrary". Evidence to the contrary would include evidence raising a reasonable doubt that the results of the analyses set out in the certificate correctly state the blood alcohol level at the time of those analyses: *R. v. Stewart* (1983), 8 C.C.C. (3d) 368, [1984] 1 W.W.R. 385 (B.C.C.A.).

**Subsec. (1)(h) [certificate re blood samples]** – The results of analysis of blood samples, taken for medical purposes and performed on hospital equipment, were inadmissible without some evidence from a qualified person that the machines used were capable of performing the function in question and that, if operated properly, would produce an accurate and reliable result. In the absence of such evidence, the results of the analyses produced by the machines lack any evidentiary value. It was precisely to avoid these

problems of proof that this provision and s. 254 were enacted. Where the Crown is unable to rely on these provisions then it must prove its case in the usual way: *R. v. Bird* (1989), 71 C.R. (3d) 52, 76 Sask. R. 275, 16 M.V.R. (2d) 46 (C.A.).

The certificate of the qualified technician (a registered nurse) was not inadmissible although the technician failed to indicate what class of persons she fell into by marking one of the alternatives on the certificate. The omission was not substantially prejudicial to the accused since the technician signed the certificate and included the initials “R.N.” In addition, the certificate of the qualified medical practitioner referred to the samples having been taken by a “qualified technician”: *R. v. Fedun* (1993), 50 M.V.R. (2d) 286, 114 Sask. R. 127 (Q.B.).

**Subsec. (2) [No legal compulsion to provide samples]** – Since this subsection is for the protection of the defence it is not improper for defence counsel to cross-examine to show that the accused’s refusal to take a breathalyzer test reflected an attitude which would make it unlikely that her inculpatory statement was given voluntarily: *Re R. v. Lapinsky*, [1966] 3 C.C.C. 97, 47 C.R. 346 (B.C.S.C.).

In *R. v. Brager*, [1965] 4 C.C.C. 251, 47 C.R. 264 (B.C.C.A.), the Court held that if defence counsel had elicited the fact that no physical sobriety tests were made then Crown counsel would be entitled to re-examine to disclose the reasons for that omission, not to prove guilt, but to alleviate any inference that such tests were not made because they would not support the charge.

**Subsec. (3) [Adverse inference from refusal to comply with demand]** – Where the accused was acquitted of the charge under s. 254(5) and no appeal was taken the Crown is bound to accept the correctness of the verdict and may not rely on the adverse inference in this subsection on the accused’s appeal from his conviction of the offence under s. 253: *R. v. Zink* (1977), 38 C.C.C. (2d) 97, 2 C.R. (3d) 161 (Alta. S.C. App. Div.).

On the other hand the fact that the Crown by reliance on this subsection secures a conviction for the offence under s. 253(a) is not a bar to a conviction for the offence contrary to s. 254(5): *R. v. Mazurek* (1978), 41 C.C.C. (2d) 353, 6 Alta. L.R. (2d) 273 (Dist. Ct.).

Where the acquittal on the s. 254 charge is not the result of a finding that the accused did not comply with the demand but rather due to the “technicality” that the Crown failed to prove that the demand was made by the officer named in the information then this subsection may be invoked: *R. v. Fredrek* (1979), 17 A.R. 613, 5 M.V.R. 1 (C.A.); *R. v. Ranger* (1983), 26 M.V.R. 83 (B.C.C.A.).

The adverse inference arises merely upon proof that the accused refused without reasonable excuse to comply with the demand. There need not be proof also that the refusal was due to the accused’s fear that the results would show that he was impaired: *R. v. Garneau* (1982), 66 C.C.C. (2d) 90 (Alta. Q.B.).

Although this subsection refers to proceedings under s. 255(1), which is the penalty provision for the impaired operation offence, it applies to the trial of the offence under s. 253 and is not limited in application to sentencing. The word “committed” is not to be equated with the word “convicted”: *R. v. MacDonald* (1989), 51 C.C.C. (3d) 191, 98 A.R. 308, 18 M.V.R. (2d) 275 (C.A.).

The adverse inference provided for by this subsection does not offend the guarantee to the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms: *R. v. Mackenzie* (1983), 6 C.C.C. (3d) 86, 150 D.L.R. (3d) 144 (Alta. Q.B.); *R. v. Van Den Elzen* (1983), 10 C.C.C. (3d) 532, 7 D.L.R. (4th) 163, 26 M.V.R. 292 (B.C.C.A.).

**Subsec. (4) [Application for order releasing sample]** – See notes under heading: “Special considerations re blood samples” under subsec. (1)(c), (d) above.

**Subsec. (6) [Attendance of technician, etc.]** – The analyst or qualified technician testifying under this subsection is a witness for the Crown and his evidence in chief would be the statements in his certificate: *R. v. Latter* (1971) 2 C.C.C. (2d) 453, 14 C.R.N.S. 151 (N.S.S.C. App. Div.).



This subsection is neither pre-emptive nor exclusive and it is open to the accused to apply to a Justice of the Peace for a subpoena pursuant to s. 698 to compel the attendance of the analyst although the analyst would then be the accused's witness. In determining whether or not to issue the subpoena however, the same test should be applied by the Justice of the Peace as must be met under this subsection: *Re R. and Forsythe* (1980), 54 C.C.C. (2d) 44, 23 A.R. 589, (Q.B.).

Leave to call the technician should not be given unless there is an indication in the evidence, or an affidavit or in the submissions or undertakings by counsel, of a material irregularity in the testing procedure followed by the technician which, if substantiated, could provide a legal basis for doubting the accuracy of the certificate. Further, it should be apparent that the evidence sought is within the peculiar knowledge of the technician *qua* technician and not evidence which, for example, could be given by any other officer present at the relevant time: *R. v. Davis* (1983), 4 C.C.C. (3d) 53, 42 A.R. 185 (C.A.).

**Subsec. (7) [Notice of intention to introduce certificate] / Reasonable notice / form and content of notice** – The notice does not have to be in writing, but it must be exact for the specific offence proceeded upon. Accordingly notice given for use of a certificate for a s. 253(a) offence is of no avail upon the withdrawal of that charge and the proceeding upon a s. 253(b) offence: *R. v. Hannan* (1970), 1 C.C.C. (2d) 447, 13 C.R.N.S.223, *sub nom. Hannan v. The Queen* (Sask. Q.B.).

Written notice which is clear and unambiguous is not nullified by the fact that at the time the police officer serves it, he tells the accused the certificate would be used "if necessary": *R. v. Good, Schmidt and Winnipeg*; *R. v. Neubert* (1983), 6 C.C.C. (3d) 105, 44 A.R. 393, 25 M.V.R. 73 (C.A.).

It is not enough for an accused to point to an error in a notice and then allege that, by reason of the error alone, there is ambiguity or confusion which results in the notice not being reasonable. The bald generalization of ambiguity or confusion must be brought down to concrete terms, based on the facts of the case, to show a particular ambiguity or confusion which relates to the reasonableness of the notice. Thus, an accused charged with the offence under s. 253(b) was given reasonable notice, although the notice he was given referred to that charge as well as a charge under s. 253(a). The accused at all times knew he was facing a charge under s. 253(b) and that he had been given a notice which said that the Crown intended to tender the certificate in evidence at the trial on that charge. There was nothing confusing or ambiguous in this information and the superfluous reference to s. 253(a) could in no way have altered the impact of what was undoubtedly a straightforward statement: *R. v. McCullagh* (1990), 53 C.C.C. (3d) 130 (Ont. C.A.).

A printed notice of intention in which, through an apparent typographical error, the wrong section number was checked off, was not invalid and it was open to the trial judge to find that the accused was given reasonable notice: *R. v. Brebner* (1989), 49 C.C.C. (3d) 97, 14 M.V.R. (2d) 161, 34 O.A.C. 278 (C.A.).

This provision has no application where the Crown proceeds by way of *viva voce* evidence of the qualified technician rather than relying on his certificate: *R. v. Walters* (1975), 26 C.C.C. (2d) 56, 11 N.S.R. (2d) 443 (S.C. App. Div.).

**Reasonable notice / time of service** – For the purposes of this subsection the trial commences with the taking of the evidence and accordingly service of a notice after plea was taken about one month earlier was held to be sufficient: *R. v. Vereschagin* (1972), 10 C.C.C. (2d) 529, 21 C.R.N.S.269 (B.C.S.C.).

A certificate of intention to use the resulting certificate of analysis was served upon the defendant a few minutes after he completed his breathalyzer test even though the information against him was not laid until two days later. It was held that since the primary purpose of service was to notify him of the use at trial of the certificate, there would not be any prejudice to him not knowing at the time of service whether he would be charged under the ability impaired or in excess of 80 mg. of alcohol section of the Code: *R. v.*

*Goerz* (1971), 5 C.C.C. (2d) 92, [1972] 1 W.W.R. 696 (Alta. C.A.). *Folld: R. v. MacIsaac* (1972), 9 C.C.C. (2d) 46, 5 N.B.R. (2d) 365 (N.B.C.A.); *R. v. Ratto*; *R. v. Gillis*; *R. v. McMullin* (1972), 9 C.C.C. (2d) 63, 4 N.S.R. (2d) 538 (N.S.C.A.); *R. v. Faber* (1972), 8 C.C.C. (2d) 10, [1972] 5 W.W.R. 413 (B.C.C.A.); *R. v. Ledoux* (1972), 7 C.C.C. (2d) 18, [1972] 4 W.W.R. 624 (Sask. C.A.); and *R. v. Evanson* (1973), 11 C.C.C. (2d) 275, [1973] 4 W.W.R. 137 (Man. C.A.).

The notice of intention and the certificate may be served on the accused prior to the laying of an information and the certificate may be used on the trial of even a third information, where the first and second informations were quashed prior to plea, without service of a new notice, at least where the Crown has proceeded promptly in laying the new information: *R. v. Nykiforuk* (1981), 60 C.C.C. (2d) 128, 22 C.R. (3d) 303 (Alta. C.A.), leave to appeal to S.C.C. refused 33 A.R. 467n, 39 N.R. 540n.

Similarly, *R. v. Koback* (1986), 43 M.V.R. 272 (Sask. C.A.), where the Crown withdrew one information charging the care or control offence and promptly relaid another information charging the driving offence.

Similarly, on a re-trial ordered after a successful appeal, the Crown may rely on the original notice of intention: *R. v. Nickerson* (1984), 27 M.V.R. 124, 64 N.S.R. (2d) 164 (S.C. App. Div.).

In the absence of evidence of the date of service, even though defence counsel did not object, the Court is not entitled to infer that the defendant had been given both reasonable notice of the Crown's intention and a copy of the certificate: *R. v. Tunke* (1975), 25 C.C.C. (2d) 518 (Alta. S.C.).

**Reasonable notice / capacity to understand** – In *R. v. Hamm* (1976), 28 C.C.C. (2d) 257, [1977] 2 S.C.R. 85 (6:3) (S.C.C.), the Court held that the presumption that a person understood what was going on when he was served with the notice under this section was not rebutted merely by the high blood-alcohol reading set out in the certificate of the results of a breathalyzer test performed at the time since the effect of the consumption of alcohol varies among individuals. The trial Judge therefore erred in finding that because of the high reading the accused was so intoxicated at the time of service as to be incapable of being served with reasonable notice. The majority accordingly did not consider the propriety of effecting service on a person in an even more intoxicated state. Spence, J., dissenting, took a different view of the facts and would have upheld the trial Judge's finding of fact of lack of reasonable notice. His Lordship also held that notice under this subsection could not validly be given until an information was laid for it is only then that there is an "accused".

The presumption that the accused understood the notice and certificate which were in English was not rebutted merely by evidence that the demand and other conversation between the accused and the police was in French: *R. v. Saulnier (No. 2)* (1980), 53 C.C.C. (2d) 237, 38 N.S.R. (2d) 538, (S.C. App. Div.).

The rebuttable presumption that the accused understood the notice was applied where the accused was hard of hearing: *R. v. Bender* (1980), 3 Sask. R. 277, 6 M.V.R. 44 (C.A.).

**Service on persons other than accused** – Service of the certificate and the notice of intention on a law student appearing to fix a date is sufficient compliance with this subsection just as service on the accused's counsel would constitute sufficient compliance: *R. v. Meyer* (1973), 29 C.C.C. (2d) 165 (B.C.C.A.).

Similarly, service on a lawyer who acknowledges that he acts for the accused is compliance with this subsection: *R. v. Monty* (1981), 65 C.C.C. (2d) 54, [1982] 1 W.W.R. 283 (Alta. Q.B.).

**Proof of service** – A certificate of an analysis is a document within the meaning of s. 4(6) and therefore proof of service may be by way of affidavit: *R. v. Spreen* (1987), 40 C.C.C. (3d) 190, 8 M.V.R. (2d) 148, 82 A.R. 318 (C.A.).

**Copy of certificate** – The copy of the certificate, served along with the notice of intention to produce the original at trial, does not have to be signed as a duplicate original, but is sufficient if it is a true copy in all essential particulars and conveys to the defendant all of the required information: *R. v. Glass* (1973), 12 C.C.C. (2d) 450, [1973] 5 W.W.R.761 (Sask. C.A.).

Evidence that the copy of the certificate was prepared using a preassembled form containing carbon paper is *prima facie* proof that the copy given to the accused was a copy of the certificate and there is no requirement that the copy and the certificate have been specifically compared: *R. v. Bergstrom* (1982), 65 C.C.C. (2d) 351, [1982] 2 W.W.R. 95 (Man. C.A.). Also see: *R. v. Pederson* (1973), 15 C.C.C. (2d) 323, [1974] 1 W.W.R. 481 (B.C.S.C.).

The service on the accused of the top of three copies of the certificate, the lower two of which are carbon copies, complies with the requirement in this subsection that the accused be served with a “copy” of the certificate: *R. v. Walsh* (1980), 53 C.C.C. (2d) 568, 6 M.V.R. 125 (Ont. C.A.).

Where the copy was made by means of a carbon and the officer testifies he checked the copy for errors and to his recollection it was accurate there is sufficient proof that the copy was accurate. It was not necessary that the officer also check the copy and the original word for word: *R. v. Nawrocki* (1974), 21 C.C.C. (2d) 122 (Alta. S.C.T.D.).

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**MANDATORY ORDER OF PROHIBITION / Discretionary order of prohibition / Saving / Operation while disqualified / Definition of “disqualification”.**

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259. (1) Where an offender is convicted of an offence committed under section 253 or 254 or discharged under section 736 of an offence committed under section 253 and, at the time the offence was committed or, in the case of an offence committed under section 254, within the two hours preceding that time, was operating or had the care or control of a motor vehicle, vessel or aircraft or of railway equipment or was assisting in the operation of an aircraft or of railway equipment, the court that sentences the offender shall, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel or an aircraft or railway equipment, as the case may be.

- (a) for a first offence, during a period of not more than three years and not less than three months;
- (b) for a second offence, during a period of not more than three years and not less than six months; and
- (c) for each subsequent offence, during a period of not more than three years and not less than one year.

**NOTE:** Subsection (1) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

(2) Where an offender is convicted or discharged under section 736 of an offence under section 220, 221, 236, 249, 250, 251 or 252, subsection 255(2) or (3) or this section committed by means of a motor vehicle, vessel or aircraft or of railway equipment, the court that sentences the offender may, in addition to any other punishment that may be imposed for that offence, make an order prohibiting the offender from operating a motor vehicle on any street, road, highway or other public place, or from operating a vessel, an aircraft or railway equipment, as the case may be.

- (a) during any period that the court considers proper, if the offender is liable to imprisonment for life in respect of that offence;
- (b) during any period not exceeding ten years, if the offender is liable to imprisonment for more than five years but less than life in respect of that offence; and
- (c) during any period not exceeding three years, in any other case.



**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

(3) No order made under subsection (1) or (2) shall operate to prevent any person from acting as master, mate or engineer of a vessel that is required to carry officers holding certificates as master, mate or engineer.

(4) Every one who operates a motor vehicle, vessel or aircraft or any railway equipment in Canada while disqualified from doing so

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) is guilty of an offence punishable on summary conviction.

(5) For the purposes of this section, “disqualification” means

- (a) a prohibition from operating a motor vehicle, vessel or aircraft or any railway equipment ordered pursuant to subsection (1) or (2); or
- (b) a disqualification or any other form of legal restriction of the right or privilege to operate a motor vehicle, vessel or aircraft imposed
  - (i) in the case of a motor vehicle, under the law of a province, or
  - (ii) in the case of a vessel or an aircraft, under an Act of Parliament,
 in respect of a conviction or discharge under section 736 of any offence referred to in subsection (1) or (2). R.S.C. 1985, c. 27 (1st Supp.), s. 36; c. 32 (4th Supp.), s. 62.

#### CROSS-REFERENCES

The terms “highway”, “motor vehicle” and “railway equipment” are defined in s. 2. The terms “aircraft”, “vessel” and “operate” are defined in s. 214. Where the prosecution seeks the longer prohibition order prescribed by para. (1)(b) or (c), it probably must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. No reference to the prior conviction may be made in the information by virtue of s. 664. Procedure for making the prohibition order is set out in s. 260(1) to (3). Provision respecting a means of proof of notice of the disqualification and proof of the disqualification is set out in s. 260(4) to (7). Section 261 provides for an order staying the prohibition order pending appeal against a conviction or discharge. An order under this section is within the definition of “sentence” in ss. 673 and 785 for the purposes of appeals in proceedings by indictment and summary conviction respectively.

Where the Crown elects to proceed by indictment on the offence described in subsec. (4) then the intention was that, by virtue of s. 553(c)(vii), the offence be one over which a provincial court judge has absolute jurisdiction which does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). However, there is an error in s. 553(c)(vii) and it incorrectly refers to “subsection 263(4) (driving while disqualified)”. Until the legislation is amended, it may be that the accused should be put to his election under s. 536(2) where the prosecution proceeds by way of indictment. Where the Crown elects to proceed by way of summary conviction for the offence under subsec. (4) then the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the summary conviction offence is as set out in s. 787 and the limitation period is set out in s. 786(2). The accused is also liable to imposition of a prohibition order under this section for a period not exceeding 3 years. For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section describes the circumstances under which a judge is required to impose an order prohibiting an offender from operating a motor vehicle, vessel, aircraft or railway equipment. If an offender is convicted of an offence under s. 253 or s. 254, or discharged of an offence under section 253, and had at the time of the offence, or in the case of an

offence under section 254, two hours preceding that time, care or control of or was operating a motor vehicle, a vessel, an aircraft or railway equipment, the judge must impose a prohibition order. Such an order will last for a period of not more than three years and not less than three months for a first offence, not more than three years and not less than six months for a second offence, and not more than three years and not less than one year for each subsequent offence. If an offender is convicted or discharged of an offence under section 220, 221, 236, 249, 250, 251, 252, 255(2) and (3), and 259, the judge may make an order prohibiting the offender from operating the motor vehicle, vessel, aircraft or railway equipment for any period that the court considers appropriate if the offender is liable to a maximum sentence of life imprisonment. If the offender is liable to a sentence greater than five years but less than life imprisonment, the prohibition order may last for a period of up to ten years. In any other case, the maximum length of the order is three years. This section also holds that no order under subsec. (1) or (2) shall prevent a person from acting as master, mate or engineer or a vessel required to carry such qualified individuals. Any person who is convicted of operating a motor vehicle, vessel, aircraft or railway equipment in Canada while disqualified is guilty of a hybrid offence punishable upon indictment to a maximum term of imprisonment of two years. If is an offence under the Criminal Code to drive while disqualified, even if the disqualification was made pursuant to a provincial statute or federal legislation other than the Criminal Code, provided that the disqualification arose from a conviction for an offence referred to in subsec. (1) or (2).

## ANNOTATIONS

**Principles in making prohibition order** – The order made under subsec. (1) is an aspect of the sentence and the duty on the judge is to determine what is a fit period of prohibition applying proper sentencing principles. It is not proper to simply impose a one-year prohibition because the accused, an out-of-province resident, would not otherwise be suspended from driving for the one year prescribed by provincial legislation: *R. v. Goulding* (1987), 40 C.C.C. (3d) 244, 7 M.V.R. (2d) 188 (N.S.C.A.).

Although there is no minimum period of prohibition set out in subsec. (2)(b) unlike under subsec. (1), Parliament obviously intended that a longer period of prohibition be imposed for an offence under s. 255(2), impaired driving causing bodily harm, and barring very unusual circumstances, the minimum period of prohibition for this offence must be about one year: *R. v. Bohachik* (1988), 9 M.V.R. (2d) 33, 68 Sask. R. 300 (C.A.).

There is no power to provide for exceptions from the prohibition order to, for example, permit the accused to drive for the purposes of employment: *R. v. Girard* (1993), 79 C.C.C. (3d), 132 N.B.R. (2d) 87, 42 M.V.R. (2d) 19 (C.A.).

**Elements of offence** – The offence under former s. 238(3) was held to be a true criminal offence requiring proof of *mens rea*. Further, the existence of a provincial licence suspension was a question of fact and ignorance of that fact is a defence to this charge, notwithstanding the suspension arises automatically by operation of a provincial law as a consequence of a conviction for a Criminal Code motor vehicle offence: *R. v. Prue*; *R. v. Baril* (1979), 46 C.C.C. (2d) 257, 8 C.R. (3d) 68, [1979] 2 S.C.R. 547 (4:3).

An accused whose licence is suspended by virtue of provincial legislation should be convicted of the criminal offence only where he is driving in circumstances in which a licence is required by provincial legislation: *R. v. Mansour* (1979), 47 C.C.C. (3d) 129, [1979] 2 S.C.R. 916 (9:0).

Both under the provincial legislation and the Criminal Code, upon conviction for the offences specified in the Registrar's certificate, the accused is to be informed by the court that he is disqualified from driving and under the provincial legislation where the accused is a resident of the province, the convicting judge is to secure the driver's licence, if any, from the accused. As well, under the provincial legislation, the accused

would not be entitled to reinstatement of his licence so long as he was disqualified from driving. In the circumstances, the doctrine of regularity applies with the result that the only reasonable presumption was that the accused was notified of his disqualification. Accordingly, the Registrar's certificate together with the application of the doctrine of regularity was sufficient to constitute *prima facie* proof of the *mens rea* for the offence of driving while disqualified, that is proof that the accused knew he was disqualified from driving: *R. v. Larsen* (1992), 71 C.C.C. (3d) 335 (Sask. C.A.). [Also see notes under s. 260.]

**Procedure** – In order to obtain the greater driving prohibition mandated by para. (1)(c) the prosecution must give notice as required by s. 665: *R. v. Keldsen* (1987), 1 W.C.B. (2d) 75 (B.C.S.C.).

The period of prohibition takes effect when the sentence is imposed and the judge has no power to provide that it operate following his release from the custodial portion of the sentence: *R. v. Laycock* (1989), 51 C.C.C. (3d) 65, 17 M.V.R. (2d) 1 (Ont. C.A.); *R. v. Gruben* (1989), 21 M.V.R. (2d) 230 (N.W.T.S.C.). *Contra*: *R. v. Atkinson* (1989), 16 M.V.R. (2d) 4 (Alta. C.A.).

It was held in *R. v. Boggs* (1981), 58 C.C.C. (2d) 7, 19 C.R. (3d) 245, [1981] 1 S.C.R. 49 (7:0), that the predecessor to this subsection (s. 238(3)) was unconstitutional because it had the effect of attaching penal consequences to a breach of an order made under a provincial statute although the provincial order of disqualification did not arise out of a conviction for a criminal offence. This particular problem would seem to have been remedied by the limited definition of “disqualification” in subsec. (5).

This section does not violate the equality rights guaranteed by s. 15 of the Charter of Rights and Freedoms even though a person may be disqualified by reason of para. (5)(b) pursuant to a suspension imposed by provincial legislation and the length of suspension varies from province to province: *R. v. Buchanan* (1989), 46 C.C.C. (3d) 468, 88 N.S.R. (2d) 320, 11 M.V.R. (2d) 81 (C.A.).

**PROCEEDINGS ON MAKING OF PROHIBITION ORDER / Endorsement by offender / Validity of order not affected / Onus / Certificate admissible in evidence / Notice to accused / Definition of “registrar of motor vehicles”.**

**260. (1)** Where a court makes a prohibition order under subsection 259(1) or (2) in relation to an offender, it shall cause

- (a) the order to be read by or to the offender;
- (b) a copy of the order to be given to the offender; and
- (c) the offender to be informed of subsection 259(4).

(2) After subsection (1) has been complied with in relation to an offender who is bound by an order referred to in that subsection, the offender shall endorse the order, acknowledging receipt of a copy thereof and that the order has been explained to him.

(3) The failure of an offender to endorse an order pursuant to subsection (2) does not affect the validity of the order.

(4) In the absence of evidence to the contrary, where it is proved that a disqualification referred to in paragraph 259(5)(b) has been imposed on a person and that notice of the disqualification has been mailed by registered or certified mail to that person, that person shall, after five days following the mailing of the notice, be deemed to have received the notice and to have knowledge of the disqualification, of the date of its commencement and of its duration.

(5) In proceedings under section 259, a certificate setting out with reasonable particularity that a person is disqualified from



- (a) driving a motor vehicle in a province, purporting to be signed by the registrar of motor vehicles for that province, or
  - (b) operating a vessel or aircraft, purporting to be signed by the Minister of Transport or any person authorized by the Minister of Transport for that purpose
- is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed.
- (6) Subsection (5) does not apply in any proceedings unless at least seven days notice in writing is given to the accused that it is intended to tender the certificate in evidence.
- (7) In subsection (5), "registrar of motor vehicles" includes the deputy of that registrar and any other person or body, by whatever name or title designated, that from time to time performs the duties of superintending the registration of motor vehicles in the province. R.S.C. 1985, c. 27 (1st Supp.), s. 36.

#### CROSS-REFERENCES

The term "offender" is defined in s. 2. The term "motor vehicle" is defined in s. 2. The terms "aircraft", "vessel" and "operate" are defined in s. 214. Procedure for stay of the prohibition order pending appeal is set out in s. 261.

With respect to the notice prescribed by subsec. (6), note s. 27(1) of the Interpretation Act, R.S.C. 1985, c. I-21 which provides that, where there is reference to "at least" a number of days between two events, in calculating that number of days, the days on which the events happened are excluded.

Section 25(1) of the Interpretation Act provides that "Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary."

#### SYNOPSIS

This section sets out the steps that a court must take in imposing a prohibition order under s. 259(1) and (2). The court must ensure that the order is read by or to the offender, that a copy is given to the offender, and that the offender is informed of the criminal consequences of disobeying the order. After these steps are taken, the offender must endorse the order and acknowledge both receipt of it and the fact that the order has been explained. The order will be valid even if the offender fails to endorse it.

Where it is proved that a notice of disqualification as defined in s. 259 has been mailed by registered or certified mail to an offender, in the absence of evidence to the contrary, after five days of the mailing of the notice, the offender is deemed to have received it and to have knowledge of the disqualification, the date of its commencement and its duration. A certificate describing in reasonably particular terms that a person has been disqualified from driving a motor vehicle or operating a vessel or aircraft is evidence of the facts without further proof. The accused must be given at least seven days' notice in writing that the certificate will be used in evidence.

#### ANNOTATIONS

**Note:** Some of the decisions noted below, although decided under the predecessor legislation, were felt to be relevant to these provisions.

**Procedure in making order [subsec. (1)]** – While the judge may delegate to an appropriate official of the court compliance with this subsection, the duties cannot be delegated to the agent of the accused who appeared on his behalf and entered the plea of guilty: *R. v. Materi* (1987), 35 C.C.C. (3d) 273, 56 Sask. R. 37, 49 M.V.R. 291 (C.A.).

An accused cannot be convicted of the offence contrary to s. 259(4) in the absence of proof of compliance with this subsection, even where there is proof that the accused was

aware of the prohibition order: *R. v. Kean* (1989), 22 M.V.R. (2d) 279, 80 Nfld. & P.E.I.R. 159 (Nfld. Prov. Ct.).

**Proof of knowledge of disqualification [subsec. (4)]** – It was held in relation to former s. 238, which did not contain a provision respecting proof of knowledge, that nevertheless with the establishment of the accused's licence suspension the Crown is entitled to rely on the presumption that a man intends the natural consequences of his act in order to prove the necessary *mens rea* and if, in order to make his suspension order effective, the registrar was required to give notice of his suspension to the accused there is no obligation on the Crown to prove that such notice had been served on the accused prior to his driving as, in the absence of evidence to the contrary, the presumption that all acts required by law have been taken will apply: *R. v. Heisler*, [1967] 1 C.C.C. 97, 49 C.R. 297 (N.S.S.C.).

Similarly, it was held that once the Crown proves that the accused drove while disqualified it makes out a *prima facie* case notwithstanding there is no direct evidence that the accused knew of the suspension. The accused then runs the risk of being convicted unless he discharges the evidential burden of introducing evidence of lack of knowledge although if at the end of the case there is a reasonable doubt with respect to any element of the offence, including such knowledge, he is entitled to be acquitted: *R. v. Lock* (1974), 18 C.C.C. (2d) 477, 4 O.R. (2d) 178 (C.A.).

**Sufficiency of certificate under subsec. (5)** – It was held in relation to former s. 238(4), which was worded similarly to this subsection, that the certificate is not admissible to prove additionally that notice of suspension had been given to the accused: *R. v. Lock* (1974), 18 C.C.C. (2d) 477, 4 O.R. (2d) 178 (C.A.). *Quaere*, whether the same result would be reached now, in light of subsec. (4).

A notice which complied with the provisions of this subsection but went on to name the wrong date of the offence was held to be valid. This latter piece of information was not essential to the giving of notice and did not vitiate the effectiveness of the notice given: *R. v. Spezzano* (1976), 32 C.C.C. (2d) 303 (Ont. C.A.).

A stamped impression of the registrar's signature on the certificate is sufficient: *R. v. Layton* (1978), 40 C.C.C. (2d) 457, [1978] 4 W.W.R. 633 (B.C.S.C.).

However, a form which is pre-printed with the registrar's signature on it and then filled out later and which is never seen by the registrar does not comply: *R. v. Zwicker* (1979), 49 C.C.C. (2d) 340, 37 N.S.R. (2d) 622 (Mag. Ct.), affd (1980), 53 C.C.C. (2d) 239, 38 N.S.R. (2d) 361 (S.C. App. Div.).

A certificate that referred to the former section number, prior to the renumbering as a result of proclamation of the R.S.C. 1985, was valid: *R. v. Lee* (1990), 23 M.V.R. (2d) 114, 85 Sask. R. 32 (Q.B.).

**Sufficiency of notice under subsec. (6)** – Service of the notice of intention in the period between the accused's first appearance and his trial is permissible, provided the notice is given to the accused seven days before the trial date: *R. v. Heisler*, [1967] 1 C.C.C. 97, 49 C.R. 297 (N.S.S.C.).

The Crown may not resort to provincial legislation which permits the admissibility of documents in the possession of the Registrar without notice: *R. v. Delyon* (1979), 47 C.C.C. (2d) 173 (Ont. Prov. Ct.), apv'd *R. v. Morrison* (1980), 53 C.C.C. (2d) 478 (Ont. H.C.J.). See also: *R. v. Albright* (1987), 37 C.C.C. (3d) 105, 60 C.R. (3d) 97, [1987] 2 S.C.R. 383 noted under s. 645.

**Other means of proof of disqualification** – A certified copy of an order of driving prohibition, signed by a justice of the peace for the clerk of the court and bearing the seal of the provincial court, although not admissible under subsec. (5) because the notice required by this subsection was not given, is admissible at common law. At common law, judicial documents could be proved by production of the original record or an

exemplification under the seal of the court, without notice: *R. v. Tatimir* (1989), 51 C.C.C. (3d) 321, [1990] 1 W.W.R. 470, 99 A.R. 188, 17 M.V.R. (2d) 321 (C.A.).

It was held in *R. v. Gramik* (1988), 9 M.V.R. (2d) 141 (Alta. Q.B.), that an order of a driving prohibition made by a court is admissible under the common law public documents exception to the hearsay rule.

However, it was held in *R. v. Kuzma* (1988), 5 M.V.R. (2d) 232, 66 Sask. R. 153 (C.A.), that a certified copy of the order of driving prohibition was not properly tendered under s. 667 since on its face it was a copy of an order by a clerk of the court and not a certified copy of an order made pursuant to s. 259. The court left open whether if there were a certified copy of a court order of prohibition this would be a certificate within the meaning of s. 667.

## STAY OF ORDER PENDING APPEAL.

**261.** Where an appeal is taken against a conviction or discharge under section 736 for an offence committed under any of sections 220, 221, 236, 249 to 255 and 259, a judge of the court being appealed to may direct that any order under subsection 259(1) or (2) arising out of the conviction or discharge shall be stayed, pending the final disposition of the appeal or until otherwise ordered by that court. R.S.C. 1985, c. 27 (1st Supp.), s. 36; 1994, c. 44, s. 15.

**NOTE:** Section 261 re-enacted by 1994, c. 44, s. 103 (to come into force when 1995, c. 22, s. 6 comes into force). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

*261. Where an appeal is taken against a conviction or discharge under section 730 for an offence committed under any of sections 220, 221, 236, 249 to 255 and 259, a judge of the court being appealed to may direct that any order under subsection 259(1) or (2) arising out of the conviction or discharge shall be stayed pending the final disposition of the appeal or until otherwise ordered by that court.*

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

## CROSS-REFERENCES

An order under this section is itself within the definition of "sentence" in ss. 673 and 785 for the purposes of appeals in proceedings by indictment and summary conviction respectively.

## ANNOTATIONS

The burden is on the appellant to show that a stay of the order should be granted. The appellant must show that the appeal is not frivolous, that continuation of the driving prohibition pending appeal is not necessary in the public interest, and that to grant the stay would not detrimentally affect the confidence of the public in the effective enforcement and administration of criminal law: *R. v. Jay and MacLean* (1987), 66 Nfld. & P.E.I.R. 84, 50 M.V.R. 137 (P.E.I.S.C.).

The court has power to stay the prohibition in part to allow the applicant to drive to and from work. Nevertheless, the effect of such an order is a stay of the prohibition and if the conviction should be upheld then the period of the stay will not count against the period of the driving prohibition: *R. v. Smith* (1993), 50 M.V.R. (2d) 307, 58 W.A.C. 202 (B.C.C.A.).

## IMPEDING ATTEMPT TO SAVE LIFE.

### 262. Every one who

- (a) prevents or impedes or attempts to prevent or impede any person who is attempting to save his own life, or



(b) without reasonable cause prevents or impedes or attempts to prevent or impede any person who is attempting to save the life of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 241.

#### CROSS-REFERENCES

The accused has an election as to mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

#### DUTY TO SAFEGUARD OPENING IN ICE / Excavation on land / Offences.

263. (1) Every one who makes or causes to be made an opening in ice that is open to or frequented by the public is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the opening exists.

(2) Every one who leaves an excavation on land that he owns or of which he has charge or supervision is under a legal duty to guard it in a manner that is adequate to prevent persons from falling in by accident and is adequate to warn them that the excavation exists.

(3) Every one who fails to perform a duty imposed by subsection (1) or (2) is guilty of

- (a) manslaughter, if the death of any person results therefrom;
- (b) an offence under section 269, if bodily harm to any person results therefrom; or
- (c) an offence punishable on summary conviction. R.S., c. C-34, s. 242; 1980-81-82-83, c. 125, s. 18.

#### CROSS-REFERENCES

The offence of manslaughter is punishable pursuant to s. 236. An accused charged with manslaughter has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined under s. 515.

The offence under s. 269, referred to in subsec. (3)(b), is the offence of unlawfully causing bodily harm. "Bodily harm" is defined in s. 267(2). An accused, charged with the offence under s. 269, has an election as to mode of trial pursuant to s. 536(2) and release pending trial is determined under s. 515.

For the offence under subsec. (3)(c), the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the summary conviction offence is as set out in s. 787 [although, note that the maximum fine for a corporation is determined by s. 719(b)] and the limitation period is set out in s. 786(2).

Related offences: ss. 219 to 221, criminal negligence; s. 247, setting traps with intent.

#### SYNOPSIS

This section sets out the legal requirements incumbent upon anyone who makes a hole in ice that is, or could be used by the public, or who leaves an excavation on land that he owns or supervises. A person who fails to guard such openings in the land or the ice in such manner as to prevent other persons from falling in, and to adequately warn them of the opening, is guilty of a criminal offence punishable on summary conviction.

If a person dies as a result of the failure to comply with this section, the offender will be guilty, upon conviction, of manslaughter. If a person suffers bodily harm, the offender, upon conviction, will be subject to the terms of s. 269.

#### ANNOTATIONS

This section sets up a statutory duty which if breached will lead to a conviction for manslaughter even in circumstances which would not amount to criminal negligence as defined by s. 219: *R. v. Aldergrove Competition Motorcycle Association and Levy* (1982), 69 C.C.C. (2d) 183 (B.C. Co. Ct.), affd 5 C.C.C. (3d) 114 (C.A.).

264. (old provision) [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 37.*]

### CRIMINAL HARASSMENT / Prohibited conduct / Punishment.

264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.

(3) Every person who contravenes this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction. 1993, c. 45, s. 2.

### CROSS-REFERENCES

Other related offences are: s. 177, trespassing by night; s. 264.1, uttering threats; s. 372, indecent and harassing telephone calls; s. 423, intimidation; s. 430, mischief. In addition, ss. 810 and 810.1 authorize a provincial court judge to require the defendant to enter into a recognizance and comply with conditions.

### SYNOPSIS

This section creates the Crown option offence of criminal harassment. It is an offence to engage in harassing conduct as defined in subsec. (2) knowing that the person is harassed [or being reckless in that respect] that causes the other person to reasonably fear for their safety or the safety of anyone known to them.

### ANNOTATIONS

This section does not violate either s. 2(b) or s. 7 of the Charter: *R. v. Sillipp* (1995), 99 C.C.C. (3d) 394, 42 C.R. (4th) 381, [1995] 9 W.W.R. 552 (Alta. Q.B.).

While there must be proof of a causal connection between the prohibited conduct and the fear which the victim has for his safety or the safety of anyone known to him, it is not necessary that the Crown prove that the accused knew that the other person feared for his safety: *R. v. Sillipp, supra*.

## Assaults

### UTTERING THREATS / Punishment / Idem.

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

- (a) to cause death or bodily harm to any person;
- (b) to burn, destroy or damage real or personal property; or
- (c) to kill, poison or injure an animal or bird that is the property of any person.

(2) Every one who commits an offence under paragraph (1)(a) is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
  - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.
- (3) Every one who commits an offence under paragraph (1)(b) or (c)
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 27 (1st Supp.), s. 38; 1994, c. 44, s. 16.

#### CROSS-REFERENCES

The terms “person” and “property” are defined in s. 264.1. Bodily harm is defined in s. 2.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Where the threat is in relation to the use of nuclear material see s. 7(3.4).

An alternative to this offence is the procedure for requiring the offender to enter into a recognizance to keep the peace, either at common law or pursuant to s. 810. Related offences: s. 346, extortion; s. 243, intimidation; s. 424, threat to commit offence against internationally protected person; ss. 430 to 432, damage to property; ss. 433 to 436, arson and other fires; ss. 444 to 447, offences in relation to animals.

#### ANNOTATIONS

**Meaning of threat** – A “conditional” threat, that if the police officer did not leave he would be shot, comes within the ordinary meaning of “threat” and can constitute an offence under this section. In this case the court adopted a dictionary definition of threat as “a denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course; a menace”: *R. v. Ross* (1986), 26 C.C.C. (3d) 413, 50 C.R. (3d) 391 (Ont. C.A.).

Serious bodily harm in subsec. (1)(a) means any hurt or injury, whether physical or psychological, that interferes in a substantial way with the physical or psychological integrity, health or well-being of the complainant. The issue to be determined is whether looked at objectively in the context of all the words written and having regard to the person to whom they were directed, would the questioned words convey a threat of serious bodily harm to a reasonable person? A threat to rape is capable of constituting a threat to cause serious bodily harm: *R. v. McCraw* (1991), 66 C.C.C. (3d) 517, 128 N.R. 299, 7 C.R. (4th) 314 (S.C.C.) (7:0).

**Elements of offence generally** – Aside from cases where the words might have a secondary, innocent meaning as between the parties it is immaterial whether the “victim” appreciated he was being threatened. The Crown is only required to prove the accused uttered the threat by one of the means specified: *R. v. Carons* (1978), 42 C.C.C. (2d) 19 (Alta. C.A.).

In determining whether or not the accused’s statements were a threat, the words are to be viewed objectively in the context or circumstances in which they were spoken, the issue being whether they would convey a threat of serious bodily harm to a reasonable person. The *mens rea* of the offence is that the words to be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously. Words spoken in jest or in such a manner that they could not be taken seriously could not lead a reasonable person to conclude that the words conveyed a threat. There is no requirement that the intended victim of the threat be aware of the threat: *R. v. Clemente*, [1994] 2 S.C.R. 758, 91 C.C.C. (3d) 1, 31 C.R. (4th) 28.

In *R. v. Leblanc* (1989), 50 C.C.C. (3d) 192n, [1989] 1 S.C.R. 1583, 70 C.R. (3d) 94 (7:0), the court overturned the decision of the New Brunswick Court of Appeal, 44



C.C.C. (3d) 18, 66 C.R. (3d) 134, and restored the accused's conviction for the offence under this section, holding that the jury had been properly directed. The issue in the case was the *mens rea* of the offence and the trial judge, in directing the jury, had distinguished between a threat innocently made which was no offence and a threat which was an actual menace.

The fact that the victim of the offence was unknown at the time the threat was made did not preclude a conviction for the offence under this section. A threat to cause the death of a member of an ascertained group of persons contravenes this section: *R. v. Rémy* (1993), 82 C.C.C. (3d) 176, [1993] R.J.Q. 1383 (C.A.).

#### ASSAULT / Application / Consent / Accused's belief as to consent.

##### 265. (1) A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
  - (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or
  - (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
- (2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
- (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
- (a) the application of force to the complainant or to a person other than the complainant;
  - (b) threats or fear of the application of force to the complainant or to a person other than the complainant;
  - (c) fraud; or
  - (d) the exercise of authority.
- (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief. R.S., c. C-34, s. 244; 1974-75-76, c. 93, s. 21; 1980-81-82-83, c. 125, s. 19.

#### CROSS-REFERENCES

The terms "complainant" and "weapon" are defined in s. 2. The offences described in subsec. (2) may be found as follows: s. 266, punishment for assault *simpliciter* [formerly common assault]; s. 267, assault with weapon and assault causing bodily harm; s. 268, aggravated assault; s. 270, assault police; s. 271, sexual assault; s. 272, sexual assault with weapon, threats to a third party and causing bodily harm; s. 273, aggravated sexual assault.

As to defences see: s. 16, insanity; s. 17, compulsion by threats; s. 25, use of force in enforcement of law; s. 27, use of force to prevent commission of certain offences; ss. 34 to 37, self defence and defence of person under accused's protection; ss. 38 to 41, defence of property; s. 43, use of force by way of correction; s. 44, use of force by master of vessel.

As to notes respecting the intoxication and necessity defences see s. 8. These latter defences, especially intoxication are of limited application since most of the assault offences are general intent offences.

Section 273.1 defines consent for the sexual offences in ss. 271, 272 and 273 and, in

particular, defines circumstances additional to those set out in s. 265(3) in which no consent is obtained. For the same group of offences, s. 273.2 sets out circumstances where belief in consent is not a defence. For notes concerning the defence of honest belief in consent, see the notes following s. 273.2.

As to mode of trial and punishment, see the cross-references under particular assault offence.

## SYNOPSIS

This section describes what an assault is, when an assault is aggravated, and the extent to which *consent* can be used as a defence to a charge of assault. A person who directly or indirectly applies force *intentionally* to another person, or who attempts or threatens to do so, has committed an assault. If a person stops another person while openly wearing a weapon or an imitation weapon, he is also guilty of assault. All forms of assault, including sexual assault are covered by this section, but now see also s. 273.1. Consent may constitute a defence to a charge of assault but it cannot be invoked if the victim submits because force has been applied to, or is threatened to be applied to, the victim or another person. Furthermore, the defence of consent will not apply if a person has submitted as a result of fraud or the exercise of authority by the accused.

Section 265(4) requires that the jury in a case in which the defence of consent is raised, and which would be effective if accepted, be instructed by the judge to consider whether the accused had reasonable grounds for an honest belief that there was consent.

## ANNOTATIONS

**Elements of offence other than consent** – Where the application of force is the result of carelessness, as in *R. v. Starratt* (1971), 5 C.C.C. (2d) 32, [1972] 1 O.R. 227 (C.A.) or through a reflex action as in *R. v. Wolfe* (1974), 20 C.C.C. (2d) 382 (Ont. C.A.), the essential element of intent is lacking and the accused must be acquitted.

An accused may commit an assault although he exerts no degree of strength or power when touching the victim: *R. v. Burden* (1981), 64 C.C.C. (2d) 68, 25 C.R. (3d) 283 (B.C.C.A.).

In *R. v. Byrne*, [1968] 3 C.C.C. 179, 3 C.R.N.S. 190 (B.C.C.A.), it was held that words alone unaccompanied by any gesture do not constitute the act of assault.

Whether or not there has been an assault as defined by para. (1)(b) depends on the facts of a particular case. Thus, where the accused school teacher, by acts and gestures, directed his pupils to perform various sexual acts upon him, the trier of fact could find that there were not mere invitations but threats to apply force, coupled with a present ability to effect that purpose and thus an assault, or, as here, a sexual assault: *R. v. Cadden* (1989), 48 C.C.C. (3d) 122, 70 C.R. (3d) 340 (B.C.C.A.).

An assault is committed when a person threatens to apply force and has the ability to do so: *R. v. Horncastle* (1972), 8 C.C.C. (2d) 253, 19 C.R.N.S. 362 (N.B.C.A.).

An assault is committed within the meaning of subsec. (1)(b) where the accused fires a gun at someone who was within range, even if the shot missed and the victim had no idea that he was being shot at: *R. v. Melaragni* (1992), 75 C.C.C. (3d) 546 (Ont. Ct. (Gen. Div.)).

**Meaning of consent** – To be effective the consent to the assault must be freely given with appreciation of all the risks and not merely submission to an apparently inevitable situation: *R. v. Stanley* (1977), 36 C.C.C. (2d) 216, [1977] 4 W.W.R. 578 (B.C.C.A.).

In *R. v. Cey* (1989), 48 C.C.C. (3d) 480, [1989] 5 W.W.R. 169, 75 Sask. R. 53 (C.A.), the court had to consider the scope of consent as a result of a charge of assault causing bodily harm, arising out of events in the course of an amateur hockey game. By agreeing to play the game, a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms of bodily contact sanctioned by the rules are the clearest examples but, as well, even those forms denounced by the rules, but falling within the accepted standards by which the game is played, may also come within the scope of the implied consent. While ordinarily, consent, being a state of

mind, is a wholly subjective matter to be determined accordingly, when it comes to implied consent in the context of a team sport such as hockey, the scope of the implied consent must be determined by reference to objective criteria, at least in respect of those forms of conduct covered by the initial general consent. In determining the scope of the implied consent, the court will have regard to the conditions under which the game is played and the risk and degree of injury. Some forms of bodily contact carry with them such a high risk of injury and such a distinct probability of serious harm as to go beyond what, in fact, the players commonly consent to or what, in law, they are capable of consenting to.

In determining the scope of implied consent, the court must employ objective criteria and have regard to a number of factors, including the setting of the game, the extent of the force employed, the degree of risk of injury, the probabilities of serious harm and whether or not the rules of the game contemplate contact. Contact which evinces a deliberate purpose to inflict injury will generally be held to be outside of the immunity provided by implied consent in sporting events, but this does not mean that the prosecution must in all cases prove such deliberate purpose. Conversely, the fact that the rules do not allow for bodily contact is not itself determinative, especially where the ideal of non-contact is frequently breached in a spirited hockey game: *R. v. Leclerc* (1991), 67 C.C.C. (3d) 563, 7 C.R. (4th) 282, 4 O.R. (3d) 788 (C.A.).

In *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3n, 89 C.C.C. (3d) 96n, 30 C.R. (4th) 153, it was held that the court of appeal erred in holding that the 16-year-old complainant, who was the accused's step-daughter, had to have offered some minimal word or gesture of objection in order for there to be proof that she did not consent and erred in holding that lack of resistance could be equated with consent.

**Consensual fights** – The common law limits on consent imposed for policy reasons apply to assaults as defined by this section and, thus, consent is vitiated where adults intentionally apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl. These limits do not, however, affect the validity or effectiveness of freely given consent to participate in rough sporting activities, so long as the intentional application of force to which one consents is within the customary norms and rules of the game. This limitation on consent would also not apply to medical treatment or appropriate surgical intervention nor would it necessarily nullify consent between stuntmen engaged in the creation of a socially valuable cultural product. Finally, these limits do not apply to ordinary school yard scuffles between children who immaturely seek to resolve differences through fighting: *R. v. Jobidon* (1991), 66 C.C.C. (3d) 454, 7 C.R. (4th) 233, 49 O.A.C. 83 (S.C.C.) (7:0).

In view of the 16-year-old offender's intention to cause serious harm to the complainant who was of the same age, the nature of the force applied, and the serious consequences of those actions, the complainant's consent could not nullify the offender's culpability on a charge of assault causing bodily harm notwithstanding the young age of both the accused and the complainant. The offender's actions were more than socially useless, they were dangerous and intended to be dangerous. It was unnecessary to decide in this case whether the consent could operate as a defence where a young person engages in a consensual fight, not intending to cause serious harm: *R. v. W. (G.)* (1994), 90 C.C.C. (3d) 139, 30 C.R. (4th) 393, 18 O.R. (3d) 321 (C.A.).

However, where the 15-year-old offender did not intend to cause the victim more than trivial bodily harm, the consent was not vitiated notwithstanding that more serious harm may have been caused: *R. v. B. (T.B.)* (1994), 93 C.C.C. (3d) 191, 34 C.R. (4th) 241, 124 Nfld. & P.E.I.R. 328 (P.E.I.C.A.).

Similarly, where the 16-year-old offender did not intend to cause the victim harm and only minor bodily harm resulted, the offender's honest belief that the victim consented to the fight was a defence: *R. v. M. (S.)* (1995), 97 C.C.C. (3d) 281, 39 C.R. (4th) 60, 22 O.R. (3d) 605 (C.A.).



**Mistaken belief in consent [subsec. (4)]** – This subsection which is consistent with the common law applicable to all defences does not infringe either s. 11(d) or (f) of the Charter. The accused who seeks to rely upon the defence of mistaken belief only bears a tactical evidentiary burden: *R. v. Osolin*, [1993] 4 S.C.R. 595, 86 C.C.C. (3d) 481, 26 C.R. (4th) 1. [Also see s. 273.2.]

**Consent obtained by threats or fear of use of force [subsec. (3)(b)]** – The threats referred to in this paragraph are threats of the application of force. A threat made by the accused to expose certain pictures of the complainant was not the type of threat contemplated. As the conduct did not otherwise fall within this subsection, which is exhaustive of the circumstances vitiating consent, then no assault was committed: *R. v. Guerrero* (1988), 64 C.R. (3d) 65 (Ont. C.A.).

**Consent obtained by fraud [subsec. (3)(c)]** – The type of fraud referred to in this paragraph is limited to fraud as to the nature and quality of the act or to the identity of the offender and would not include the accused's false representation that he intended to pay the victim, a prostitute, for the sexual services: *R. v. Petrozzi* (1987), 35 C.C.C. (3d) 528, 58 C.R. (3d) 320, [1987] 5 W.W.R. 71 (B.C.C.A.).

**Consent obtained by exercise of authority [subsec. (3)(d)]** – Exercise of authority in this paragraph is not limited to relationships where there is a right to issue orders and to enforce obedience. Consent in the context of sexual relationships implies a reasonably informed choice, freely exercised. No such choice has been exercised where a person engages in sexual activity if, because of her mental state, she is incapable of understanding the sexual nature of the act or of realizing that she may choose to decline participation. Where there is a significant power imbalance between the accused and the complainant, this can have an effect on the apparent consent. It would be open to the court to find that there was no consent by reason of the overwhelming imbalance of power in the relationship between the accused psychiatrist and the particular patients: *R. v. Saint-Laurent* (1994), 90 C.C.C. (3d) 291, [1994] R.J.Q. 69 (C.A.), leave to appeal to S.C.C. refused 66 Q.A.C. 160n, 175 N.R. 240n.

## ASSAULT.

**266. Every one who commits an assault is guilty of**

- (a) **an indictable offence and liable to imprisonment for a term not exceeding five years; or**
- (b) **an offence punishable on summary conviction. R.S., c. C-34, s. 245; 1972, c. 13, s. 21; 1974-75-76, c. 93, s. 22; 1980-81-82-83, c. 125, s. 19.**

## CROSS-REFERENCES

Assault is defined in s. 265. For cases respecting consent, especially assaults in course of a “consensual fight”, see notes under s. 265. Where the prosecution elects to proceed by indictment on this offence, then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction, then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, will be liable to the discretionary prohibition order prescribed by s. 100(2), for possession of firearms, ammunition and explosives.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.). A threat to commit an offence under this section against an internationally protected person (defined in s. 2) is an offence under s. 424.

The accused's spouse is a competent and compellable witness at the instance of the Crown by vir-

tue of s. 4(4) of the Canada Evidence Act, R.S.C. 1985, c. C-5 where the complainant is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

## ANNOTATIONS

The conduct of the accused in pushing the complainant aside in order to leave his office, even if it amounted to an assault, was of such a trifling nature that the maxim *de minimis non curat lex* applied, and the accused was acquitted: *R. v. Lepage* (1989), 74 C.R. (3d) 368 (Sask. Q.B.).

The double jeopardy guarantee in s. 11(h) of the Charter of Rights is not a bar to the trial of an officer for an offence under this section notwithstanding his previous conviction for a major service offence under the Royal Canadian Mounted Police Act, R.S.C. 1970, c. R-9, as a result of that assault: *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385, 60 C.R. (3d) 193, [1987] 2 S.C.R. 541 (6:1). Also see *R. v. Shubley* (1990), 52 C.C.C. (3d) 481, 65 D.L.R. (4th) 193, 71 O.R. (2d) 63n (S.C.C.) (3:2) noted under s. 267.

## ASSAULT WITH A WEAPON OR CAUSING BODILY HARM.

**267. Every one who, in committing an assault,**

(a) carries, uses or threatens to use a weapon or an imitation thereof, or

(b) causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months. 1980-81-82-83, c. 125, s. 19; 1994, c. 44, s. 17.

## CROSS-REFERENCES

The terms "bodily harm", "complainant" and "weapon" are defined in s. 2. Assault is defined in s. 265.

For cases respecting consent, especially assaults in the course of a "consensual fight", see notes under s. 265.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

Where the Crown elects to proceed by indictment, the accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) of the Canada Evidence Act, where the complainant is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused may elect the mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person, found guilty of the offence in this section, will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives where the Crown proceeds by indictment. Otherwise, the accused may be subject to an order under s. 100(2). A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

Where the acts described in this section also involve a sexual assault, see s. 272. Using a firearm in commission of an indictable offence is an offence under s. 85. Unlawfully causing bodily harm is an offence under s. 269.

## ANNOTATIONS

**Assault with weapon [para. (a)]** – The offence under subsec. (1)(a) of this section or s. 272(a) may be committed although the accused did not in fact have possession of the weapon at the time of the threat: *R. v. Kelly* (1983), 37 C.R. (3d) 190 (B.C.Co.Ct.).

Provided the instrument used by the accused in the course of the assault falls within

the definition of weapon, then this offence is made out. It is not necessary to show that the weapon also caused injuries to the complainant: *R. v. Richard* (1992), 72 C.C.C. (3d) 349, 110 N.S.R. (2d) 345 (C.A.).

The term “weapon” is not limited to inanimate objects and can include a dog which the accused ordered to attack the complainant: *R. v. McLeod* (1993), 84 C.C.C. (3d) 336 (Y.T.C.A.).

**Assault causing bodily harm** – Reasonable foreseeability that harm will occur as a result of the assault is not a necessary element of this offence: *R. v. Brooks, infra*. Similarly, *R. v. Swenson* (1994), 91 C.C.C. (3d) 541, [1994] 9 W.W.R. 124, 74 W.A.C. 106 (Sask. C.A.).

Where the evidence fails to show whether the bruising caused by the accused’s acts was more than merely transient or trifling in nature the element of “bodily harm” as defined in subsec. (2) is not made out: *R. v. Dupperon* (1984), 16 C.C.C. (3d) 453, 43 C.R. (3d) 70, [1985] 2 W.W.R. 369 (Sask. C.A.).

In *R. v. Dixon* (1988), 42 C.C.C. (3d) 318, 64 C.R. (3d) 372, [1988] 5 W.W.R. 577 (Yukon Terr. C.A.), only Esson J.A. discussed at length the definition of bodily harm in subsec. (2) and considered that the words “transient or trifling in nature” import a very short period of time and an injury of a very minor degree which results in a very minor degree of distress.

As to the consent defence, also see cases noted under s. 265(1), *supra*.

**Constitutional considerations** – The offence created by para. (1)(b) does not violate the principles of fundamental justice as guaranteed by s. 7 of the Charter of Rights although there is no requirement of objective foreseeability that the consequences of the assault would be bodily harm: *R. v. Brooks* (1988), 41 C.C.C. (3d) 157, 64 C.R. (3d) 322 (B.C.C.A.).

Section 11(h) of the Charter of Rights and Freedoms (the double jeopardy provision) does not prevent the trial of an accused for an offence of assault causing bodily harm arising out of an assault by the accused, an inmate of a provincial correctional institution, on a fellow inmate, notwithstanding that the accused had previously been punished for the same conduct by the authorities within the institution. These prison disciplinary proceedings did not result in the accused being punished for an “offence” within the meaning of s. 11(h): *R. v. Shubley* (1990), 52 C.C.C. (3d) 481, 65 D.L.R. (4th) 193, 71 O.R. (2d) 63n (S.C.C.) (3:2).

## AGGRAVATED ASSAULT / Punishment.

**268. (1) Every one commits an aggravated assault who wounds, maims, disfigures or endangers the life of the complainant.**

**(2) Every one who commits an aggravated assault is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. 1980-81-82-83, c. 125, s. 19.**

## CROSS-REFERENCES

The term “complainant” is defined in s. 2. Assault is defined in s. 265.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) of the Canada Evidence Act, R.S.C. 1985, c. C-5 where the complainant is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.



The accuseds may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person, found guilty of the offence in this section, will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

Where the acts described in this section also involve a sexual assault, see s. 273.

## ANNOTATIONS

The element of wounding requires a breaking of the skin but is satisfied by proof that the blows of the accused led to a perforation of the victim's ear-drum: *R. v. Littlelet* (1985), 17 C.C.C. (3d) 520 (Alta. C.A.).

Consent is no defence to this offence where the injuries were caused by use of a weapon such as a knife: *R. v. Carriere* (1987), 35 C.C.C. (3d) 276, 56 C.R. (3d) 257, 76 A.R. 151 (C.A.).

This section creates a form of assault offence and the offence of assault causing bodily harm in s. 267(b) is an included offence: *R. v. Lucas* (1987), 34 C.C.C. (3d) 28 (Que. C.A.).

The commission of common assault is a necessary ingredient of the offence of aggravated assault. Where, however, the Crown relies upon a charge of aggravated assault based upon endangerment to life, the Crown need not prove that the endangerment was caused by bodily harm. The Crown must simply prove that the life of the complainant was in fact endangered as a result of an assault. *R. v. Melaragni* (1992), 75 C.C.C. (3d) 546 (Ont. Ct. (Gen. Div.)).

The *mens rea* of this offence is objective foresight of bodily harm and does not require proof of an intent to maim, wound or disfigure: *R. v. Godin*, [1994] 2 S.C.R. 484, 89 C.C.C. (3d) 574n, 31 C.R. (4th) 33.

## UNLAWFULLY CAUSING BODILY HARM.

- 269. Every one who unlawfully causes bodily harm to any person is guilty of**  
 (a) **an indictable offence and liable to imprisonment for a term not exceeding ten years; or**  
 (b) **an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.**  
**1980-81-82-83, c. 125, s. 19; 1994, c. 44, s. 18.**

## CROSS-REFERENCES

"Bodily harm" is defined in s. 2.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(4) of the Canada Evidence Act, R.S.C. 1985, c. C-5 where the complainant is under the age of 14 years. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused may elect the mode of trial pursuant to s. 536(2) where the Crown proceeds by indictment. Release pending trial is determined by s. 515. A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives in such a case. Otherwise, the accused may be subject to an order under s. 100(2). A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

The offence of assault causing bodily harm is found in s. 276(1)(b).

## ANNOTATIONS

The term “unlawfully” in this section refers only to provincial or federal offences and would not include any underlying offence of absolute liability. As well, the unlawful act must be at least objectively dangerous, an act that a reasonable person would inevitably realize would subject another person to the risk of bodily harm. This bodily harm must be more than merely trivial or transitory in nature and will, in most cases, involve an act of violence done deliberately to another person. So interpreted, this section does not violate s. 7 of the Charter, even though neither an intention to cause bodily harm nor subjective foresight of bodily harm is an element of the offence: *R. v. DeSousa* (1992), 76 C.C.C. (3d) 124, [1992] 2 S.C.R. 944, 15 C.R. (4th) 66 (5:0).

An accused may be convicted of the offence under this section although the bodily harm was caused by an assault and a charge under s. 267(1)(b) could have been laid: *R. v. Glowacki* (1984), 16 C.C.C. (3d) 575 (B.C.C.A.).

Consent is no defence to the charge under this section. However the accused’s good faith belief as to the effectiveness of the treatment that he as a “healer” was providing the victim was evidence which could negative the *mens rea* of the offence. The fact that the treatment was not authorized by provincial legislation regulating treatment of illness did not fully determine the accused’s guilt for this offence even though the treatment caused bodily harm: *R. v. Daigle* (1987), 39 C.C.C. (3d) 542, [1987] R.J.Q. 2374 (C.A.).

Although this offence is one of general intent and thus voluntary intoxication is no defence, an attempt to unlawfully cause bodily harm is an offence of specific intent and intoxication is a defence: *R. v. Colburne* (1991), 66 C.C.C. (3d) 235, [1991] R.J.Q. 1199 (C.A.).

## TORTURE / definitions / “official” / “torture” / no defence / evidence.

**269.1. (1)** Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

**(2)** For the purposes of this section, “official” means

- (a) a peace officer,
- (b) a public officer,
- (c) a member of the Canadian Forces, or
- (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada;

“torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

- (a) for a purpose including
  - (i) obtaining from the person or from a third person information or a statement,
  - (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
  - (iii) intimidating or coercing the person or a third person, or
- (b) for any reason based on discrimination of any kind,

but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

**(3)** It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission is alleged to have been justified by

exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained. R.S.C. 1985, c. 10 (3rd Supp.), s. 2.

#### CROSS-REFERENCES

The terms "peace officer", "public officer", "Canadian Forces" are defined in s. 2.

Section 7(3.7) enacts special jurisdictional rules where commission of this offence was outside Canada.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person, found guilty of the offence in this section, will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

In light of subsec. (3), the scope of the defence of obedience to *de facto* law in s. 15 is uncertain.

#### SYNOPSIS

This section makes it an offence for any person, either acting in an official capacity or acting at the instigation or acquiescence of an official, to inflict torture on another person. This is an indictable offence punishable by a maximum term of imprisonment of 14 years. The section contains complete definitions of the terms "official" and "torture". A person accused of an offence under this section may not escape criminal liability as a result of the fact that he was following the orders of a superior or a public authority, or that exceptional circumstances justified the action.

The contents of any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence in any proceedings over which Parliament has jurisdiction.

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#### ASSAULTING A PEACE OFFICER / Punishment.

##### 270. (1) Every one commits an offence who

- (a) assaults a public officer or peace officer engaged in the execution of his duty or a person acting in aid of such an officer;
- (b) assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person; or
- (c) assaults a person
  - (i) who is engaged in the lawful execution of a process against lands or goods or in making a lawful distress or seizure, or
  - (ii) with intent to rescue anything taken under lawful process, distress or seizure.

##### (2) Every one who commits an offence under subsection (1) is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction. R.S., c. C-34, s. 246; 1972, c. 13, s. 22; 1980-81-82-83, c. 125, s. 19.

#### CROSS-REFERENCES

The terms "peace officer" and "public officer" are defined in s. 2. Assault is defined in s. 265.

This offence may be the basis for a conviction for constructive murder under s. 230 and murder of a peace officer, acting in the course of his duties, is first degree murder under s. 231(4).

Where the prosecution elects to proceed by indictment on this offence, then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of



summary conviction, then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

A person, found guilty of the offence in this section, will be liable to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives.

The related offence of obstructing a peace officer in the execution of his duty is set out in s. 129. Misconduct by a peace officer in executing process is an offence under s. 128. Section 29 imposes certain duties on anyone executing a process. The use of force in enforcement of the law is principally dealt with under s. 25 and see notes under that section. Sections 494 and 495 deal specifically with warrantless arrest powers. Additional duties are imposed under other provisions of the Code, especially in Parts I and II respecting breach of the peace and more serious disorders. Personating a peace officer is an offence under s. 130.

## ANNOTATIONS

**“Engaged in the execution of his duty”** [subsec. (1)(a)] – Taking the facts as found by the trial Judge, regardless as to whether or not the police officer was a trespasser on private property when he was engaged in investigating a possible unlawful entry into the building, he was at the time in the execution of his duty and since he was not unlawfully interfering with either the liberty or the property of the respondent, who assaulted him while being questioned, an offence was proven under this subsection: *R. v. Stenning*, [1970] 3 C.C.C. 145, 11 C.R.N.S. 68 (S.C.C.).

In *R. v. Bushman*, [1968] 4 C.C.C. 17, 4 C.R.N.S. 13 (B.C.C.A.), it was held (2:1) that where the accused failed to give police officers investigating a hit and run offence reasonable opportunity to depart from his residence’s vestibule, it cannot be said that he properly revoked the implied leave and licence to attend at a convenient outer door to converse with him, and accordingly his striking an officer amounted to assaulting a policeman.

**Validity of arrest** – An officer is in execution of his duty where he is empowered to make a warrantless arrest by s. 495(1)(a), although the arrest is effected by entry on to private premises without the consent of the occupier, provided the officer has reasonable and probable grounds for the belief that the person sought is within the premises and proper announcement was made before entry: *R. v. Landry* (1986), 26 D.L.R. (4th) 368, 25 C.C.C. (3d) 1, [1986] 1 S.C.R. 145 (8:1).

In *R. v. Cottam and Cottam*, [1970] 1 C.C.C. 117, 7 C.R.N.S. 179 (B.C.C.A.), it was held that to determine whether the officers in apprehending the accused were engaged in the execution of their duty a jury should be instructed (a) as to circumstances in which the arrest would be lawful and (b), if the arrest was unlawful, whether the officers had thereby so far exceeded their duty and authority as to be no longer in the execution of their duty.

An arrest is a submission to restraint on one’s freedom and physical force is not an essential ingredient of that act. Where on the facts it was found that the accused was not told by the officer that he was under arrest or the reason for his arrest, when it was feasible to do so, he cannot be convicted of assaulting the officer under this section: *R. v. Acker*, [1970] 4 C.C.C. 269, 9 C.R.N.S. 371 (N.S.S.C. App. Div.).

A police officer arresting an accused pursuant to an outstanding warrant, but without possession of the warrant, fully discharges his duty under s. 29 by telling the person that the reason for the arrest is the existence of the warrant, he need not obtain the warrant, or ascertain its contents in order to tell the accused. An arrest in such circumstances is therefore lawful and a conviction under this subsection will lie where the accused assaults the officer: *Gamracy v. The Queen* (1973), 12 C.C.C. (2d) 209, [1974] S.C.R. 640, 22 C.R.N.S. 224 (3:2).

**Note:** Also see notes under s. 129 and s. 495.

## SEXUAL ASSAULT / No defence.

### 271. (1) Every one who commits a sexual assault is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 10; 1994, c. 44, s. 19.

### (2) [*Repealed. R.S.C. 1985, c. 19 (3rd Supp.), s. 10.*]

## CROSS-REFERENCES

While assault is defined in s. 265 as, in effect, a touching without the consent of the complainant, s. 273.1 gives a specific definition of consent for the purpose of the offence in this section. Section 265(4) deals with the defence of mistaken belief in consent generally, but again, s. 273.2 deals specifically with that defence in the context of this offence. A spouse may be charged with this offence (s. 278). Section 17 limits the availability of the statutory defence of compulsion by threats.

Section 150.1(1) and (2) set out the circumstances in which consent is a defence where the complainant is under 14 years of age. Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child. Section 150.1(4) provides a limited defence of mistake as to the age of the complainant. A person convicted of this offence, who is found to be loitering in or near a school ground playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179.

Where the prosecution elects to proceed by indictment on this offence, then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The maximum punishment for the offence is then 18 months and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under ss. 496, 497 or by the officer in charge under s. 498.

A person found guilty of the offence in this section, may, depending on the circumstances, be liable to either the mandatory prohibition order in s. 100(1) or to the discretionary prohibition order prescribed by s. 100(2) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183, or a video surveillance warrant under s. 487.01. This offence may be the basis for a conviction for first degree murder under s. 231(5) and also for a finding that the accused is a dangerous offender under Part XXIV. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada, when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

Other sexual offences are found in ss. 151 to 160 and 170 to 174.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. While assault is defined in s. 265 as, in effect, a touching without the consent of the complainant, s. 273.1 gives a specific definition of consent for the purpose of the offence in this section. Section 265(4) deals with the defence of mistaken belief in consent generally, but, again, s. 273.2 deals specifically with that defence in the context of this offence. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may

make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen, where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that in proceedings under this section a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under the age of 18 years at the time of the alleged offence and adopts its contents while testifying. Under s. 4(2) of the Canada Evidence Act, R.S.C. 1985, c. C-5 the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## ANNOTATIONS

**Meaning of “sexual assault”** – Sexual assault is an assault, within any one of the definitions of that concept in s. 265(1), which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: whether viewed in the light of all the circumstances the sexual or carnal context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. The existence of such a motive is, however, merely one of many factors to be considered: *R. v. Chase* (1987), 37 C.C.C. (3d) 97, 59 C.R. (3d) 193, [1987] 2 S.C.R. 293 (6:0).

The offence of sexual assault is one of general intent so that the issue is whether, notwithstanding the absence of a proven sexual intent, the touching was committed in circumstances of a sexual nature: *R. v. S. (P.L.)* (1991), 64 C.C.C. (3d) 193, 5 C.R. (4th) 351, 122 N.R. 321 (S.C.C.).

The importance of the accused’s purpose as a factor in determining whether or not there has been a sexual assault will vary depending on the circumstances. In this case, where the conduct involved “skylarking” which had been part of the regular life of the family for many years without any sexual connotations, the jury, in order to convict, would have to find that the impugned conduct had changed, from being incidental to the romping or “skylarking” but without sexual connotation, to acts with sexual intent. In such a case, the accused’s purpose or motivation would be very relevant: *R. v. J.(C.)* (1990), 58 C.C.C. (3d) 167, 78 C.R. (3d) 204 (Nfld. C.A.).

Sexual assault does not require proof of sexuality or sexual gratification which are merely factors. The conduct of the accused in grabbing his young child’s genitals as a form of ‘discipline’ was an aggressive act of domination which violated the sexual integ-



urity of the child which could be found to be a sexual assault: *R. v. V.(K.B.)* (1992), 71 C.C.C. (3d) 65, 13 C.R. (4th) 87, 8 O.R. (3d) 20 (C.A.), affd [1993] 2 S.C.R. 857, 82 C.C.C. (3d) 382, 22 C.R. (4th) 86.

**Intoxication defence** – Extreme drunkenness inducing a state akin to insanity or automatism is a defence to a general intent offence such as sexual assault. However, the burden is on the accused to prove the defence on a balance of probabilities and the accused's testimony would have to be supported by expert evidence: *R. v. Daviault*, [1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165.

**Abuse of process** – In several cases, the courts have had to consider an allegation of abuse of process where the Crown originally elected to proceed by way of summary conviction but either sought to change the election or to lay a new charge when it was discovered that the conduct was outside the six-month limitation period prescribed for summary conviction offences. In *Re Parkin and the Queen* (1986), 28 C.C.C. (3d) 252 (Ont. C.A.), on the face of the information, the election to proceed summarily was valid. It was only in the course of the trial, after the testimony of the complainant and after Crown counsel consulted with the complainant's mother, that the Crown sought to withdraw the charge because of counsel's belief that the offence must have occurred outside the six-month limitation period. The court held that to permit the Crown to proceed on a new information by way of indictment would amount to an abuse of process. However, in *R. v. Belair* (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.) the first information upon which the Crown had elected to proceed by way of summary conviction was quashed prior to plea since, on its face, it alleged an offence outside the limitation period. The laying of a new charge upon which the Crown elected to proceed by way of indictment did not constitute an abuse of process. The accused suffered no prejudice as a result of Crown counsel's initial error and it may even be that the initial election was a nullity. The public has an interest in the charge being properly tried and in trial not offending the community's sense of fair play and decency. Also see *R. v. Jans* (1990), 10 W.C.B. (2d) 622 (Alta. C.A.) where the court found no abuse of process in virtually identical circumstances. The court noted that there was no injustice to the accused. He had not changed his position in reliance on the Crown's initial election. The community would be offended if a significant sexual assault on a child were to go unpunished because the prosecutor temporarily made an obvious procedural error.

The burden is on the accused to establish the facts which he alleges amount to an abuse of process. Even lengthy delay in the laying of charges alleging sexual assault by a person in *loco parentis* will not of itself amount to an abuse of process nor necessarily lead to an unfair trial. An allegation by the accused that his right to make full answer and defence has been prejudiced by delay, as a result of the death of potential defence witnesses, is to be determined at trial and not by way of a pre-trial motion to stay proceedings: *R. v. D. (E.)* (1990), 57 C.C.C. (3d) 151, 78 C.R. (3d) 112, 73 O.R. (2d) 758 (C.A.). To a similar effect, see: *R. v. G. (W.G.)* (1990), 58 C.C.C. (3d) 263 (Nfld. C.A.).

For further notes on abuse of process, see the Annotations following s. 579.

## SEXUAL ASSAULT WITH A WEAPON, THREATS TO A THIRD PARTY OR CAUSING BODILY HARM / Punishment.

272. (1) Every person commits an offence who, in committing a sexual assault,
- (a) carries, uses or threatens to use a weapon or an imitation of a weapon;
  - (b) threatens to cause bodily harm to a person other than the complainant;
  - (c) causes bodily harm to the complainant; or
  - (d) is a party to the offence with any other person.

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for a term not exceeding fourteen years and to a minimum punishment of imprisonment for a term of four years; and**
  - (b) in any other case, to imprisonment for a term not exceeding fourteen years.**
- 1980-81-82-83, c. 125, s. 19; 1995, c. 39, s. 145.

#### CROSS-REFERENCES

While assault is defined in s. 265 as, in effect, a touching without the consent of the complainant, s. 273.1 gives a specific definition of consent for the purpose of the offence in this section. Section 265(4) deals with the defence of mistaken belief in consent generally, but again, s. 273.2 deals specifically with that defence in the context of this offence. The terms “firearm”, “weapon” and “complainant” are defined in s. 2. “Bodily harm” is defined in s. 2. A spouse may be charged with this offence (s. 278). Section 17 limits the availability of the statutory defence of compulsion by threats to the offences described by this section.

Section 150.1(1) provides that consent is not a defence where the complainant is under 14 years of age. Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child. Section 150.1(4) provides a limited defence of mistake as to the age of the complainant. A person convicted of this offence, who is found to be loitering in or near a school ground playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5). This offence may be the basis for first degree murder under s. 231(5) and also for a finding that the accused is a dangerous offender under Part XXIV. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

Other sexual offences are found in ss. 151 to 160 and 170 to 174.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Section 276 sets out the circumstances in which the complainant may be questioned as to her prior sexual conduct with the accused and others. Sections 276.1 and 276.2 then set out the procedure for dealing with an application by the accused to lead such evidence. Section 276.3 sets out the circumstances in which the proceedings relating to such evidence may be published. Section 276.4 directs the judge to give the jury a specific instruction as to the use of sexual conduct evidence. Section 276.5 clarifies that the determination as to the admissibility of such evidence is a question of law. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is, at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen, where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the com-

plainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under the age of 18 years at the time of the alleged offence and adopts its contents while testifying. Under s. 4(2) of the Canada Evidence Act, R.S.C. 1985, c. C-5 the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

## ANNOTATIONS

The offence described by para. (c) is a general intent offence for which drunkenness due to voluntary consumption of alcohol is no defence: *R. v. Bernard* (1985), 18 C.C.C. (3d) 574, 44 C.R. (3d) 398 (Ont. C.A.).

The offence under para. (b) does not require proof that the accused was actually in possession of a weapon. The offence is complete if the complainant believes, on reasonable grounds, that the accused had the present ability to affect his purpose: *R. v. Worobec* (1991), 63 C.C.C. (3d) 412 (B.C.C.A.).

## AGGRAVATED SEXUAL ASSAULT / Punishment.

**273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.**

**(2) Every person who commits an aggravated sexual assault is guilty of an indictable offence and liable**

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and**
- (b) in any other case, to imprisonment for life. 1980-81-82-83, c. 125, s. 19; 1995, c. 39, s. 146.**

## CROSS-REFERENCES

While assault is defined in s. 265 as, in effect, a touching without the consent of the complainant, s. 273.1 gives a specific definition of consent for the purpose of the offence in this section. Section 265(4) deals with the defence of mistaken belief in consent generally, but again, s. 273.2 deals specifically with that defence in the context of this offence. A spouse may be charged with this offence (s. 278). Section 17 limits the availability of the statutory defence of compulsion by threats. Firearm is defined in s. 2.

Section 150.1(1) provides that consent is not a defence where the complainant is under 14 years of age. Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child. Section 150.1(4) provides a limited defence of mistake as to the age of the complainant. A person convicted of this offence, who is found to be loitering in or near a school ground playground, public park or bathing area, is liable to be convicted of the vagrancy offence under s. 179.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. Where the accused is found guilty of this offence in respect of a person who is under 14 years of age then the court has the



discretion to impose an order of prohibition under s. 161 prohibiting the accused from attending certain public areas and facilities or taking certain employment which will bring him into contact with persons under 14 years of age. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5). This offence may be the basis for a conviction for first degree murder under s. 231(5) and also for a finding that the accused is a dangerous offender under Part XXIV. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.).

Other sexual offences are found in ss. 151 to 160 and 170 to 174.

Special evidentiary and procedural provisions: Section 274 specifically provides that no corroboration is required for a conviction for this offence and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. Section 275 provides that the rule relating to evidence of recent complaint is abrogated respecting this section. Section 276 sets out the circumstances in which the complainant may be questioned as to her prior sexual conduct with the accused and others. Sections 276.1 and 276.2 then set out the procedure for dealing with an application by the accused to lead such evidence. Section 276.3 sets out the circumstances in which the proceedings relating to such evidence may be published. Section 276.4 directs the judge to give the jury a specific instruction as to the use of sexual conduct evidence. Section 276.5 clarifies that the determination as to the admissibility of such evidence is a question of law. Section 277 provides that evidence of sexual reputation is inadmissible in proceedings under this section. Section 486(1) and (2) provide that the judge may make an order excluding all or any members of the public where such order is in the interest of public morals, the maintenance of order or the proper administration of justice. Where the accused is charged with an offence under this section and the application by the accused or the prosecutor for the exclusion order is dismissed then the judge shall state the reason for not making the order. Section 486(2.1) provides that, where an accused is charged with this offence and the complainant is at the time of the trial or preliminary inquiry, under the age of 18 years, the judge may order that the complainant testify outside the court room or behind a screen, where such procedure is necessary to obtain a full and candid account of the acts complained of. Section 486(4) provides that, in proceedings under this section, the judge shall inform the complainant and any witness under 18 years of age that an order may be made under s. 486(3) directing that the identity of the complainant or any such witness not be disclosed in any publication or broadcast. Where the complainant, witness under the age of 18 years or the prosecutor (defined in s. 2) applies for the order then it is mandatory. Section 486(3) also gives the judge a discretion respecting non-publication orders in proceedings under this section in other circumstances, as where the witness may not be the complainant or under 18 years of age. Section 715.1 provides that, in proceedings under this section, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant was under the age of 18 years at the time of the alleged offence and adopts its contents while testifying. Under s. 4(2) of the Canada Evidence Act, R.S.C. 1985, c. C-5 the spouse of an accused charged with this offence is a compellable witness at the instance of the prosecution. Section 16 of the Canada Evidence Act deals with the competency of witnesses under the age of 14 years.

As to cases concerning admissibility of evidence in child abuse cases, see notes under s. 150.1.

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### **MEANING OF “CONSENT” / Where no consent obtained / Subsection (2) not limiting.**

**273.1. (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.**

**(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where**

**(a) the agreement is expressed by the words or conduct of a person other than the complainant;**

- (b) the complainant is incapable of consenting to the activity;
  - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
  - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
  - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
- (3) Nothing in subsection (2) shall be construed as limiting the circumstance in which no consent is obtained; 1992, c. 38, s. 1.

#### CROSS-REFERENCES

The term "complainant" is defined in s. 2. Section 265(3) sets out additional circumstances in which no valid consent is given as where, for example, the consent is obtained by fraud or the exercise of authority. As to mistaken belief in consent as a defence, see s. 265(4) which sets out the minimum evidentiary requirement and the mandatory jury direction. Section 273.2 sets out circumstances where belief in consent is no defence.

#### SYNOPSIS

This section supplements the definition of consent in s. 265 which defines assault for all of the assault offences including sexual assault. The definition in this section applies only to the sexual assault offences. Subsection (1) provides a general definition which focuses on the voluntary agreement by the complainant. Subsection (2) then sets out a number of circumstances where the apparent agreement by the complainant cannot amount to consent. Subsection (2) makes a number of points: agreement cannot be based on the words or conduct of someone other than the complainant and there is no agreement where the complainant is incapable of giving consent [although incapacity is not defined], agreement is the result of abuse of a position of trust, power or authority, the complainant expresses lack of consent or the complainant, having initially consented, expresses a change of mind. This subsection is in addition to the circumstances set out in s. 265(3) where there is no consent to an assault generally.

#### ANNOTATIONS

Consent is not a defence to sexual assault causing bodily harm. A victim cannot consent to the infliction of bodily harm unless the accused is acting in the course of a generally approved social purpose when the harm is inflicted. Consensual acts of violence are not such an activity. The consent of an individual cannot detract from the inherently degrading and dehumanizing nature of the conduct. When the activity in question involves pursuing sexual gratification by deliberately inflicting pain upon another that gives rise to bodily harm, the personal interest of the individuals involved must yield to the more compelling societal interests which are challenged by such behaviour: *R. v. Welch* (1995), 101 C.C.C. (3d) 216, 43 C.R. (4th) 225, 25 O.R. (3d) 665 (C.A.).

#### WHERE BELIEF IN CONSENT NOT A DEFENCE.

**273.2.** It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused's belief arose from the accused's
  - (i) self-induced intoxication, or
  - (ii) recklessness or wilful blindness; or
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; 1992, c. 38, s. 1.

## CROSS-REFERENCES

The term “complainant” is defined in s. 2. Sections 265 and 273.1 set out circumstances in which no valid consent in fact is given. As to mistaken belief in consent as a defence see s. 265(4) which sets out the minimum evidentiary requirement and the mandatory jury direction.

## SYNOPSIS

This section attempts to clarify the circumstances in which the common law defence of mistaken belief in consent is a defence to a charge of sexual assault. Paragraph (a)(i) is consistent with the common law rule that self-induced intoxication is no defence to sexual assault and para. (a)(ii) reflects the decision of the Supreme Court of Canada in *Sansregret v. The Queen*, *infra*. Paragraph (b) is something of a departure from the common law in that it introduces a partly objective standard in determining whether the accused’s belief was honestly held. This paragraph must be read with s. 265(4) which requires that, where the defence is left to the jury, the jury is to be directed to consider the presence or absence of reasonable grounds in determining the honesty of the accused’s mistaken belief. A case such as *Pappajohn v. The Queen*, *supra*, noted under s. 265, must now be read in light of this paragraph which imposes the additional requirement of reasonable steps. Note, however, that it is reasonable steps in the circumstances known to the accused. In this respect, the defence is not unlike other sections of the Code, such as self-defence under s. 34, which impose an objective and subjective standard.

## ANNOTATIONS

While this section does not require in all cases that the accused first determine “unequivocally” that the complainant was consenting, there may be circumstances where nothing short of an unequivocal indication of consent from the complainant, at the time of the alleged offence, will suffice to meet the threshold test. In general, para. (b) creates a proportionate relationship between what will be required in the way of reasonable steps by the accused and the circumstances known to the accused at the time: *R. v. G.* (R.) (1994), 38 C.R. (4th) 123, 87 W.A.C. 254 (B.C.C.A.).

The following case arose prior to the enactment of this section.

For there to be an air of reality to the defence of mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence. Although there is not, strictly speaking, a requirement that the evidence of the accused be corroborated, a bare assertion of a mistaken belief is not sufficient. The fact that the stories of the accused and the complainant are diametrically opposed is but one factor in determining whether or not there is an air of reality to the defence. If it is not realistically possible for a properly instructed jury, acting judiciously, to splice together some of each person’s evidence with respect to the encounter, and settle upon a reasonably coherent set of facts, supported by the evidence, that is capable of sustaining a defence of mistaken belief in consent then the issue really is purely one of credibility, of consent or no consent, and the defence of mistaken belief in consent should not be put to the jury. When the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused’s conduct demonstrates recklessness or wilful blindness to the absence of consent. There is no requirement that the accused explicitly testify that he mistakenly believed that the complainant was consenting. Consent is a mental state experienced only by the complainant and thus an assertion by the accused that the complainant consented must mean that he in fact believed that she was consenting. The real question will be whether that belief was on honest one: *R. v. Park*, [1995] 2 S.C.R. 836, 99 C.C.C. (3d) 1, 39 C.R. (4th) 287. Also see: *R. v. Livermore* (1995), 102 C.C.C. (3d) 212, 43 C.R. (4th) 1, 129 D.L.R. (4th) 676 (S.C.C.).



**REMOVAL OF CHILD FROM CANADA / Punishment.**

**273.3 (1)** No person shall do anything for the purpose of removing from Canada a person who is ordinarily resident in Canada and who is

- (a) under the age of fourteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 151 or 152 or subsection 160(3) or 173(2) in respect of that person;
  - (b) over the age of fourteen years but under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 153 in respect of that person; or
  - (c) under the age of eighteen years, with the intention that an act be committed outside Canada that if it were committed in Canada would be an offence against section 155 or 159, subsection 160(2) or section 170, 171, 267, 268, 269, 271, 272 or 273 in respect of that person.
- (2)** Every person who contravenes this section is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
  - (b) an offence punishable on summary conviction. 1993, c. 45, s. 3.

**SYNOPSIS**

This section makes it an offence to do anything for the purpose of removing certain classes of persons from Canada who are ordinarily resident in Canada. It must be shown that the person to be removed from Canada is under a specified age and that the accused's intention was that an act be committed which would constitute one of the specified sexual offences if committed in Canada.

**CORROBORATION NOT REQUIRED.**

**274.** Where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 11.

**CROSS-REFERENCES**

As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1.

**SYNOPSIS**

This section states that in the trial of an offence under ss. 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, *corroboration* is not required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. The section is designed to ensure that, with the repeal of the statutory corroboration requirement, the courts do not revert to the common law position requiring corroboration of a sexual complainant's evidence. [See *R. v. Camp* (1977), 36 C.C.C. (2d) 511 (Ont. C.A.).] Also see s. 659 abrogating any mandatory rule as to the danger of acting on the evidence of children.

**ANNOTATIONS**

Notwithstanding this section, the trial judge still has a discretion when reviewing the facts with a jury to discuss with them the weight they might see fit to attach to the unsupported evidence of the complainant: *R. v. Saulnier* (1989), 48 C.C.C. (3d) 301, 89 N.S.R. (2d) 208 (N.S.C.A.).

There is no common law rule of practice which requires a judge to charge the jury as

to the danger of acting on the uncorroborated evidence of the complainant on a charge of gross indecency under former s. 157 of the Criminal Code, R.S.C. 1970, c. C-34. The trial judge does, however, have a discretion to give the jury an instruction with respect to the weight of the unsupported testimony of the complainant: *R. v. Stymiest* (1993), 79 C.C.C. (3d) 408, 38 W.A.C. 133 (B.C.C.A.).

## **RULES RESPECTING RECENT COMPLAINT ABROGATED.**

**275. The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 151, 152, 153, 155 and 159, subsections 160(2) and (3), and sections 170, 171, 172, 173, 271, 272 and 273. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 11.**

## **CROSS-REFERENCES**

The “recent complaint” rule abrogated by this section was the rule, developed at common law, which permitted the prosecution to elicit from the complainant or other person a complaint of a sexual assault made at the first reasonable opportunity. The complaint was admitted, not for its truth, but, to show consistency and rebut the adverse inference, which the trier of fact would otherwise be invited to draw, that the victim’s allegation was untrue. The rule was an exception to the rule at common law, that a witness’s testimony in chief may not be buttressed by the party calling the witness by proving that she has made a prior consistent statement. The recent complaint rule was often criticized because of the anachronistic assumptions underlying it (see *Timm v. The Queen* (1981), 59 C.C.C. (3d) 396, [1981] 2 S.C.R. 315, 21 C.R. (3d) 209, 124 D.L.R. (3d) 582) and was finally abolished by this provision. However, a form of this rule has now been revived in the case of youthful complainants by the provisions of s. 715.1 which permits the admission of a videotape of a complaint in some circumstances.

As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1.

## **ANNOTATIONS**

The effect of this section is that the Crown during its case in chief may not adduce evidence of recent complaints. However, since there was never a prohibition against the accused attempting to exploit the lack of a recent complaint, and since only the right of the Crown to lead the evidence in chief has been negated by this section, the defence can elect to cross-examine on this issue. In addition, prior consistent statements may be admissible as part of the Crown’s case in chief if they fall within one of the other existing exceptions to the rule against prior consistent statements such as to rebut an allegation of recent fabrication, as part of the *res gestae*, or as narrative. If the Crown is relying upon recent fabrication as the basis for admissibility of prior consistent statements, it must wait until the defence has clearly opened the door by making an opening statement, or through cross-examination of the complainant or other Crown witnesses or by the allegation of fabrication becoming implicit from the defence conduct of the case. The *res gestae* exception is limited to cases where the words spoken are so interrelated to the fact in issue that they become part of the fact itself. The statements by children who have allegedly been sexually assaulted may properly be admitted as part of the narrative in the sense that the statement advances the story from offence to prosecution or explains why so little was done to terminate the abuse or bring the perpetrator to justice. It is part of the narrative of a complainant’s testimony when she recounts the assaults, how they came to be terminated, and how the matter came to the attention of the police. This part of the narrative provides chronological cohesion and eliminates gaps which would divert the mind of the listener from the central issue. It may be supportive of the central allegation in the sense of creating a logical framework for its presentation but it cannot be used and the jury must be warned of this as confirmation of the truthfulness of the sworn allegations: *R. v. F.(J.E.)* (1993), 85 C.C.C. (3d) 457, 26 C.R. (4th) 220, 16 O.R. (3d) 1 (C.A.).

In determining whether there has been an allegation of recent fabrication so as to permit evidence of a complaint to be given as an exception to this provision, it is not sufficient to merely look at defence counsel's statements expressly disclaiming any such allegation. If having regard to the manner in which the complainant has been cross-examined, with defence counsel having elicited some but not all of the complainant's statements after the offence, so that the jury would wrongly infer that the complainant made no complaint on an earlier occasion, then the Crown must be permitted to correct the erroneous impression by re-examination and the adducing of other evidence. The accused cannot have an automatic unlimited power to choose among the complainant's various statements: *R. v. N.(L.)* (1989), 52 C.C.C. (3d) 1 (N.W.T.C.A.).

This section does not prevent evidence being given as to the fact of a complaint where such evidence is a necessary part of the narrative to understand an admission made by the accused when confronted with the complaint: *R. v. George* (1985), 23 C.C.C. (3d) 42 (B.C.C.A.).

If the full purpose underlying Parliament's abrogation of this rule is to be achieved, then evidence of when a complaint was first made, why it was not made at the first available opportunity if that was the case, and what it was that precipitated the complaint eventually made, must be receivable as part of the narrative, in order to ensure that the jury has all of the evidence of the complainant's conduct necessary to enable the jury to draw the right inference with respect to her credibility. The prior complaint, admissible under the narrative exception to the rule against prior consistent statements, is not, however, admissible to gauge the consistency and thus the credibility of the complainant's evidence at trial. Accordingly, unless it is necessary to provide the context for some other circumstance relevant to the jury's consideration, the actual content of the prior complaint has no relevance and is inadmissible: *R. v. Ay* (1994), 93 C.C.C. (3d) 456 (B.C.C.A.).

The child victims' complaints to their parents were admissible where the defence contended that the children's sworn testimony was inconsistent in vital respects with their prior statements and was the result of their parents' coaching or the product of suggestions made to them by their parents, and was not based on the children's antecedent memory of the event. The prior complaints became admissible under the common law exception to admission of prior consistent statements: *R. v. Owens* (1986), 33 C.C.C. (3d) 275, 55 C.R. (3d) 386 (Ont. C.A.).

In *R. v. B.(D.C.)* (1994), 91 C.C.C. (3d) 357, 32 C.R. (4th) 91, [1994] 7 W.W.R. 727 (Man. C.A.) the court held that the judge-made rule against prior consistent statements should no longer apply to the evidence of a child's complaint of sexual abuse.

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#### EVIDENCE OF COMPLAINANT'S SEXUAL ACTIVITY/*Idem*/Factors that judge must consider.

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence



- (a) is of specific instances of sexual activity;
- (b) is relevant to an issue at trial; and
- (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, provincial court judge or justice considers relevant. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 12; 1992, c. 38, s. 2.

#### CROSS-REFERENCES

The terms "complainant", "justice" and "provincial court judge" are defined in s. 2.

As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1. However, note in particular the companion provision in s. 277 respecting evidence of sexual reputation.

As to the procedure for determining the admissibility of sexual conduct evidence, see ss. 276.1 and 276.2. Section 276.3 limits the publications of the proceedings. Section 276.4 requires the judge to instruct the jury as to the proper use of sexual conduct evidence and s. 276.5 makes the determination of admissibility a question of law, thus giving the Attorney General a right of appeal.

#### SYNOPSIS

This section was enacted following the decision of the Supreme Court of Canada in *R. v. Seaboyer*, noted below. Unlike the predecessor provision which was found to violate s. 7 of the Charter, this section does not attempt to delineate all the circumstances in which sexual conduct activity would be admissible. Rather, subsec. (1) sets out the *purpose* for which the evidence is not admissible, *i.e.* the evidence is not admissible for the now discredited purposes of merely showing the complainant is more likely to have consented or is less worthy of belief. In this sense, the section is structured in a way similar to s. 277 which was found in the same case to be constitutional. Subsection (2) codifies the test enunciated in *Seaboyer* that defence evidence which is probative of an issue in the case can only be excluded if the prejudicial effect of that evidence substantially outweighs the probative value. The requirement that the evidence relate to specific instances of sexual activity excludes the use of more general character evidence. It is unclear as to the extent that this section could apply to expert psychiatric or psychological evidence of disposition. Subsection (3) attempts to identify a non-exhaustive list of factors to assist the judge in determining the prejudicial effect of the evidence as weighed against its probative value. Of the various factors, perhaps those in paras. (c) to (e) will prove to be most significant as they relate directly to the probative value and prejudicial effect of evidence as traditionally understood, *i.e.* whether the evidence will be misused by the trier of fact. In making this determination, the judge will bear in mind the mandatory requirement in s. 276.4 that the jury be instructed as to the proper use of the evidence. The other fac-

tors listed in subsec. (3) reflect the decision by Parliament that certain evidence may be excluded despite its apparent probative value because of policy considerations not strictly related to the potential improper use of the evidence by the trier of fact. The weight to be attached to these broader policy issues will be somewhat more difficult to quantify in the particular case.

#### ANNOTATIONS

In *R v. Seaboyer*; *R. v. Gayme* (1991), 66 C.C.C. (3d) 321, 7 C.R. (4th) 117, [1991] 2 S.C.R. 577 (7:2) the court held that the predecessor to this section was unconstitutional. The court held, however, that striking down the section did not serve to revive the old common law rules respecting sexual conduct evidence. Rather, the court suggested some guidelines for determining the admissibility of this type of evidence. In doing so, the court suggested some circumstances in which sexual activity evidence might be admissible. (A) Evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution; (B) Evidence of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant; (C) Evidence of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged (Without laying down absolute rules, normally one would expect some proximity in time between the conduct that is alleged to have given rise to an honest belief and the conduct charged.); (D) Evidence of prior sexual conduct which meets the requirements for the reception of similar act evidence, bearing in mind that such evidence cannot be used illegitimately merely to show that the complainant consented or is an unreliable witness; (E) Evidence tending to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

The phrase "engaged in sexual activity" refers to consensual sexual conduct and thus this section does not apply to questioning concerning other acts of sexual assault upon the complainant. Admissibility of evidence concerning other sexual assaults is to be determined by applying the common law rules of evidence of relevance and whether the prejudicial effect substantially outweighs the probative value: *R. v. B.(O.)* (1995), 103 C.C.C. (3d) 531, 146 N.S.R. (2d) 265 (C.A.). See also *R. v. Vanderest* (1994), 91 C.C.C. (3d) 5 (B.C.S.C.).

While the admissibility of evidence that the complainant was a virgin prior to the alleged assault by the accused is not covered either by this section or s. 277, the jury must be warned against the improper use of such evidence and in particular that the fact the complainant was a virgin does not mean that she was of better character and therefore more truthful: *R. v. Brothers* (1995), 99 C.C.C. (3d) 64, 40 C.R. (4th) 250, 97 W.A.C. 122 (Alta. C.A.).

Where the Crown adduced evidence from the complainant that she terminated her relationship with the accused prior to the alleged assault because she had a sexual preference for women with the apparent intention of asking the jury to draw the inference that the complainant was not the type of person to consent to intercourse with the male accused, then the defence should have been permitted to adduce evidence that the complainant, two days before the alleged assault, had sexual intercourse with a man. Such evidence would have been admissible according to the guidelines set out in *R. v. Seaboyer*, *supra*; *R. v. Morden* (1991), 69 C.C.C. (3d) 123, 9 C.R. (4th) 315, 15 W.A.C. 293 (B.C.C.A.).

The trial judge did not err in refusing to permit defence counsel to cross-examine the complainant (his step-daughter) as to whether she had lied in telling a police-officer that she had been sexually assaulted by persons other than the accused. There was no indication that the complainant's evidence on this collateral matter might be false. The evidence was of tenuous relevancy but had a significant potential to mislead the jury: *R. v. W. (B.A.)*, [1992] 3 S.C.R. 811, 145 N.R. 87, 59 O.A.C. 323.

The trial judge did not err in curtailing cross-examination of the complainant concern-

ing an allegation she made about another man, nor did he err in refusing the defence permission to call this man who would deny the allegation and testify that he had been charged with sexually assaulting the victim and had been acquitted. The only legal basis which would justify this cross-examination would be to lay the foundation for a pattern of fabrication by the complainant of similar allegations of sexual assault against other men. This should not be encouraged unless the defence is in a position to establish that the complainant has recanted her earlier accusations or that they are demonstrably false. The cross-examination was on a collateral matter being in the nature of an attack on the general character of the complainant: *R. v. Riley* (1992), 11 O.R. (3d) 151 (C.A.).

This section and the procedure set out in ss. 276.1 and 276.2 have no application to evidence tending to show that the complainant has fabricated stories of sexual activity in which she has admittedly never engaged. However, the trial judge must nevertheless determine whether the proposed evidence is sufficiently probative to warrant its admission: *R. v. Gauthier* (1995), 100 C.C.C. (3d) 563, 104 W.A.C. 184 (B.C.C.A.).

Evidence of a sexual relationship between the accused and the complainant proximate in time to the alleged offences might well support a defence of honest but mistaken belief in consent in some circumstances. However, such evidence should not have been admitted where the accused's defence to one count was consent, not mistaken belief in consent, and with respect to the other three counts a denial that the incidents ever occurred: *R. v. Dickson* (1993), 81 C.C.C. (3d) 224, 21 C.R. (4th) 8, 163 N.R. 59 (Y.T.C.A.), aff'd 86 C.C.C. (3d) 576n, [1994] 1 S.C.R. 153, 28 C.R. (4th) 194.

The trial judge erred in precluding cross-examination of the complainant on her statement to the police, wherein she admitted to having engaged in consensual sexual intercourse with the accused three days before the alleged assault and stated that was the reason for visiting the accused on the date of the alleged assault. At trial, the complainant denied visiting the accused on the date of the alleged assault with the intention of having sex with him. Ordinarily, nothing would prevent defence counsel from cross-examining the complainant on such a material inconsistency. The fact that the material inconsistency was inextricably linked in the police questioning to the earlier consensual sexual contact between the complainant and the accused should not prevent the cross-examination. Where the defence of honest but mistaken belief is not realistically advanced by the accused at trial, then evidence of prior, unrelated sexual activity between the complainant and the accused will seldom be relevant to an issue at trial. However, the circumstances of this case were exceptional, as the only reason the unrelated prior sexual activity was at all implicated was because it was directly referred to by the police while posing a question which did bear on the sexual activity forming the subject matter of the charge. It would be unfair for an accused to be denied access to evidence which is otherwise admissible and relevant to his defence if the prejudice related to admitting that evidence is uniquely attributable to the authorities' conduct: *R. v. Crosby*, [1995] 2 S.C.R. 912, 98 C.C.C. (3d) 225, 39 C.R. (4th) 315 (S.C.C.).

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#### APPLICATION FOR HEARING / Form and content of application / Jury and public excluded / Judge may decide to hold hearing.

**276.1. (1)** Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

**(2)** An application referred to in subsection (1) must be made in writing and set out

- (a) detailed particulars of the evidence that the accused seeks to adduce, and
- (b) the relevance of that evidence to an issue at trial,

and a copy of the application must be given to the prosecutor and to the clerk of the court.



(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

(4) Where the judge, provincial court judge or justice is satisfied

- (a) that the application was made in accordance with subsection (2),
- (b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
- (c) that the evidence sought to be adduced is capable of being admissible under subsection 276(2),

the judge, provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2). 1992, c. 38, s. 2.

#### CROSS-REFERENCES

The term's "complainant", "justice", "provincial court judge" and "clerk of the court" are defined in s. 2. The term "prosecutor" is defined in s. 2 and s. 785. As to the procedure for determining the admissibility of sexual conduct evidence, see s. 276.2. Section 276.3 limits the publication of the proceedings. Section 276.4 requires the judge to instruct the jury as to the proper use of sexual conduct evidence and s. 276.5 makes the determination of admissibility a question of law thus giving the Attorney General a right of appeal.

#### SYNOPSIS

This section sets out the first step of the procedure for making an application to adduce evidence of the sexual conduct of the complainant, other than the sexual activity which forms the subject matter of the charge. This section requires a written application setting out the particulars of the evidence sought to be adduced by the accused and the relevance of that evidence. The application to admit the evidence is actually a two-stage proceeding. Under this section, the judge determines whether the formal requirements have been met such as the written application and notice [seven days unless otherwise ordered] and whether the evidence is capable of being admissible. If these requirements are met, then the accused is entitled to an evidentiary hearing, conducted in accordance with s. 276.2, to determine whether the evidence should be admitted. The test for admissibility is set out in s. 276(2). The hearing under this section is held *in camera* and in the absence of the jury.

#### ANNOTATIONS

The inquiry under this section entails only a facial consideration of the matter and a tentative decision as to whether the evidence appears capable of being admissible. Any doubts that might exist at this stage are better left to be resolved at the evidentiary hearing under s. 276.2. The courts must be cautious in applying limits on the right of an accused to cross-examine and adduce evidence and so, unless the evidence clearly appears to be incapable of being admissible, having regard for the criteria set out in s. 276(2) and the *indicia* in s. 276(3), the judge should proceed to the evidentiary hearing stage: *R. v. Ecker* (1995), 96 C.C.C. (3d) 161, 37 C.R. (4th) 51, 85 W.A.C. 161 (Sask. C.A.).

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**JURY AND PUBLIC EXCLUDED / Complainant not compellable / Judge's determination and reasons / Record of reasons.**

276.2. (1) At a hearing to determine whether evidence is admissible under subsection 276(2), the jury and the public shall be excluded.

(2) The complainant is not a compellable witness at the hearing.

(3) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part thereof, is admissible under subsection 276(2) and shall provide reasons for that determination, and

- (a) where not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
- (b) the reasons must state the factors referred to in subsection 276(3) that affected the determination; and
- (c) where all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

(4) The reasons provided under subsection (3) shall be entered in the record of the proceedings or, where the proceedings are not recorded, shall be provided in writing; 1992, c. 38, s. 2.

#### CROSS-REFERENCES

The terms “complainant”, “justice”, and “provincial court judge” are defined in s. 2. As to the procedure for determining whether or not the accused is entitled to the evidentiary hearing prescribed by this section, see s. 276.1. Section 276.3 limits the publication of the proceedings. Section 276.4 requires the judge to instruct the jury as to the proper use of sexual conduct evidence and s. 276.5 makes the determination of admissibility a question of law, thus giving the Attorney General a right of appeal.

#### SYNOPSIS

This section sets out the final step in the procedure for making an application to adduce evidence of the sexual conduct of the complainant, other than the sexual activity which forms the subject matter of the charge. If the prerequisites set out in s. 276.1 have been met, then the accused becomes entitled to an evidentiary hearing, conducted in accordance with this section, to attempt to show that the evidence sought to be adduced meets the test for admissibility as set out in s. 276(2). The hearing under this section is held *in camera* and in the absence of the jury. Moreover, the complainant is not a compellable witness at the hearing. This section requires the court to provide reasons for the decision and to specify what parts of the evidence are to be admitted.

#### PUBLICATION PROHIBITED / Offence.

276.3. (1) No person shall publish in a newspaper, as defined in section 297, or in a broadcast, any of the following:

- (a) the contents of an application made under section 276.1;
- (b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;
- (c) the decision of a judge, provincial court judge or justice under subsection 276.1(4), unless the judge, provincial court judge or justice, after taking into account the complainant’s right of privacy and the interests of justice, orders that the decision may be published; and
- (d) the determination made and the reasons provided under section 276.2, unless
  - (i) that determination is that evidence is admissible, or
  - (ii) the judge, provincial court judge or justice, after taking into account the complainant’s right of privacy and the interests of justice, orders that the determination and reasons may be published.

(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction; 1992, c. 38, s. 2.

#### CROSS-REFERENCES

The terms “complainant”, “justice”, and “provincial court judge” are defined in s. 2. Procedure for summary conviction offences is found in Part XXVII which sets out the maximum penalties and the

time limitation. Whether or not proceedings may be published under this section, publishers should bear in mind the provisions of s. 648 restricting publication of proceedings in the absence of the jury.

### SYNOPSIS

This section makes it an offence to publish certain aspects of the hearings held under ss. 276.1 and 276.2 which are held *in camera* and in the absence of the jury, to determine the admissibility of sexual activity evidence as permitted by s. 276. This section prohibits publication of the application and the proceedings under ss. 276.1 and 276.2 and of the court's decisions under s. 276.1, unless otherwise ordered by the judge. As well, the decision under s. 276.2 cannot be published unless it is determined that the evidence is admissible or the court otherwise orders.

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### JUDGE TO INSTRUCT JURY RE USE OF EVIDENCE.

**276.4. Where evidence is admitted at trial pursuant to a determination made under section 276.2, the judge shall instruct the jury as to the uses that the jury may and may not make of that evidence; 1992, c. 38, s. 2.**

### CROSS-REFERENCES

The procedure for determining whether evidence is admissible under s. 276 is set out in ss. 276.1 and 276.2

### ANNOTATIONS

Cross-examination of the complainant on allegedly deviant and aberrant sexual behaviour, to support a defence by the accused psychologist that his acts were legitimate therapy, had a great potential for undue prejudice and the trial judge erred in failing to direct the jury as to the limited use of that evidence: *R. v. Figa* (1993), 87 C.C.C. (3d) 377, 145 A.R. 254, 55 W.A.C. 254 (C.A.). [Note: this case was tried prior to the enactment of this section.]

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### APPEAL.

**276.5. For the purposes of sections 675 and 676, a determination made under section 276.2 shall be deemed to be a question of law; 1992, c. 38, s. 2.**

### CROSS-REFERENCES

Sections 675 and 676 govern rights of appeal by the accused and the Attorney General respectively. The main importance of this section lies in the fact that the decision to admit sexual activity evidence being a question of law is appealable by the Crown should the accused be acquitted.

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### REPUTATION EVIDENCE.

**277. In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant. 1980-81-82-83, c. 125, s. 19; R.S.C. 1985, c. 19 (3rd Supp.), s. 13.**

### CROSS-REFERENCES

The term "complainant" is defined in s. 2. As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1. However, note in particular the companion provisions in s. 276 respecting evidence of sexual conduct with persons other than the accused.



**SYNOPSIS**

This section states that evidence of sexual reputation is not admissible to challenge or support the credibility of the complainant in proceedings under ss. 151, 152, 153, 155, 159, 170, 171, 172, 173, 271, 272, 273, or s. 160(2) or (3). It, in effect, reverses the common law rule that evidence of a reputation for sexual promiscuity was relevant to the complainant's credibility.

**ANNOTATIONS**

This section is not unconstitutional by reason of ss. 7 and 11(d) of the Charter: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 4 O.R. (3d) 383 (S.C.C.) (7:2).

**SPOUSE MAY BE CHARGED.**

**278.** A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred. 1980-81-82-83, c. 125, s. 19.

**CROSS-REFERENCES**

As to other evidentiary and procedural provisions respecting the offences listed in this section, see the cross-references in relation to those provisions and the notes under s. 150.1.

**SYNOPSIS**

This section specifies that a person may be charged with the offences of sexual assault, sexual assault with a weapon or causing bodily harm, or aggravated sexual assault against his or her spouse, whether or not they were living together at the time of the alleged offence. This reverses the common law rule that a husband could not be guilty of rape committed, by himself, upon his lawful wife, on the basis that, by virtue of the marriage contract, she was deemed to have irrevocably consented to intercourse.

**Kidnapping, Hostage Taking and Abduction****KIDNAPPING / Punishment / Forcible confinement / Non-resistance.**

- 279. (1)** Every person commits an offence who kidnaps a person with intent
- (a) to cause the person to be confined or imprisoned against the person's will;
  - (b) to cause the person to be unlawfully sent or transported out of Canada against the person's will; or
  - (c) to hold the person for ransom or to service against the person's will.
- (1.1)** Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable
- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
  - (b) in any other case, to imprisonment for life.
- (2)** Every one who, without lawful authority, confines, imprisons or forcibly seizes another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
- (3)** In proceedings under this section, the fact that the person in relation to whom the offence is alleged to have been committed did not resist is not a defence unless the accused proves that the failure to resist was not caused by threats, duress, force or

exhibition of force. R.S., c. C-34, s. 247; R.S.C. 1985, c. 27 (1st Supp.), s. 39; 1995, c. 39, s. 147.

## CROSS-REFERENCES

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of "forcible abduction". However, forcible abduction has been held not to include kidnapping: *R. v. Robins* (1982), 66 C.C.C. (2d) 550 (Que. C.A.).

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. These offences may be the basis for a conviction for constructive murder under s. 230 and first degree murder under s. 231(5). Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 (official premises, etc.). A threat to commit an offence under this section against an internationally protected person (defined in s. 2) is an offence under s. 424.

The accused may elect his mode of trial pursuant to s. 536(2) for either of the offences under this section. Release pending trial is determined by s. 515. A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

## SYNOPSIS

This section describes the offences of kidnapping and forcible confinement, the punishment for these offences, and the defence of non-resistance. Any person who kidnaps another person *against his will*, with intent to confine him, to cause him to be sent out of Canada, or to hold him for ransom or to service, is guilty of an indictable offence and liable to life imprisonment. Anyone who confines, imprisons or forcibly seizes another person *without lawful authority* is guilty of an indictable offence punishable by a maximum term of imprisonment of 10 years. Where a firearm is used in the commission of any of these offences, the offender is subject to a minimum punishment of four years' imprisonment. Evidence of the fact that the victim did not resist does not constitute a defence unless the accused proves that such failure to resist was not caused by threats, duress or force.

## ANNOTATIONS

**Kidnapping [subsec. (1)]** – To constitute kidnapping there must be a movement or taking of the person from one place to another and not simply the placing of the person in the area of confinement. Where an accused binds the victim who originally voluntarily entered his truck, places her in the back of the truck and continues on his trip until he can find a suitable place to sexually assault her the offence is made out: *R. v. Oakley* (1977), 36 C.C.C. (2d) 436, 39 C.R.N.S. 105 (Alta. S.C. App. Div.).

In *R. v. Elder* (1978), 40 C.C.C. (2d) 122, [1978] 3 W.W.R. 351 (Sask. Dist. Ct.) the accused was acquitted of the offences under both subsecs. (1) and (2) where during a hostage-taking incident at a prison while he assisted in moving the hostage from one area to another his only purpose was to remove him from danger. The accused's purpose negated the element of *mens rea* for both offences.

False statements by the accused which induced his victim to willingly enter into his custody constitutes kidnapping: *R. v. Brown* (1972), 8 C.C.C. (2d) 13 (Ont. C.A.).

Similarly, *R. v. Metcalfe* (1983), 10 C.C.C. (3d) 114 (B.C.C.A.) where it was held that "kidnap" includes to take and carry away a person against his will by unlawful force or by fraud. Leave to appeal to S.C.C. was refused April 2, 1984.

The *mens rea* of the offence under subsec. (1)(b) does not require proof that the accused knew that transportation of the victim out of Canada was unlawful: *R. v. Kear* (1989), 51 C.C.C. (3d) 574 (Ont. C.A.).

The powers which the accused, who were acting for an American bail bondsman, had

to arrest a fugitive did not extend outside the United States and could not give them authority to violate Canadian sovereignty. Accordingly, the accused, in seizing the fugitive in Canada, were acting unlawfully and were properly convicted of the offence under subsec. (1)(b): *R. v. Kear*, *supra*.

**Unlawful confinement [subsec. (2)]** – The offence under this subsection does not require proof of total physical restraint of the victim: *R. v. Gratton* (1985), 18 C.C.C. (3d) 462 (Ont. C.A.), leave to appeal to S.C.C. refused [1985] 1 S.C.R. viii.

**Constitutional considerations [subsec. (3)]** – The reverse onus provision created by this subsection is of no force and effect being inconsistent with the guarantee to the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms: *R. v. Gough* (1985), 18 C.C.C. (3d) 453, 43 C.R. (3d) 297 (Ont. C.A.); *R. v. Grift* (1986), 28 C.C.C. (3d) 120, 43 Alta. L.R. (2d) 365 (Q.B.).

## HOSTAGE TAKING / Punishment / Non-resistance.

### 279.1 (1) Every one takes a person hostage who

(a) confines, imprisons, forcibly seizes or detains that person, and

(b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued

with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage.

(2) Every person who takes a person hostage is guilty of an indictable offence and liable

(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.

(3) Subsection 279(3) applies to proceedings under this section as if the offence under this section were an offence under section 279. R.S.C. 1985, c. 27 (1st Supp.), s. 40(1); 1995, c. 39, s. 148.

## CROSS-REFERENCES

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of hostage taking. Firearm is defined in s. 2.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. This offence may be the basis for a conviction for constructive murder under s. 230 and first degree murder under s. 231(5). Section 7(3) and (3.1) enacts special jurisdictional rules where this offence is committed outside Canada. A threat to commit an offence under this section against an internationally protected person (defined in s. 2) is an offence under s. 424.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person found guilty of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives. A person found guilty of this offence may be subject to a dangerous offender application under Part XXIV.

Uttering threats is an offence under s. 264.1. The related offences of kidnapping and unlawful confinement are found in s. 279.

## SYNOPSIS

This section describes the offence of hostage-taking. Any one commits this offence when he unlawfully confines a person and threatens that the safety of that person will be compromised or that his detention will continue if another person or group of persons,



including states or international governments, does not comply with the offender's demands. Anyone convicted of an offence under this section is guilty of an indictable offence and liable to a maximum term of life imprisonment and to a minimum punishment of four years if a firearm is used in the commission of the offence. The *defence* of non-resistance applies in the same circumstances as are set out in s. 279(3).

#### ABDUCTION OF PERSON UNDER SIXTEEN / Definition of "guardian".

280. (1) Every one who, without lawful authority, takes or causes to be taken an unmarried person under the age of sixteen years out of the possession of and against the will of the parent or guardian of that person or of any other person who has the lawful care or charge of that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section and sections 281 to 283, "guardian" includes any person who has in law or in fact the custody or control of another person. R.S., c. C-34, s. 249; 1980-81-82-83, c. 125, s. 20.

#### CROSS-REFERENCES

Section 17 limits the availability of the statutory defence of compulsion by threats.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child.

Related offences: s. 279, kidnapping and unlawful confinement; s. 279.1, hostage taking; s. 281, abduction of child under 14 years of age; s. 282, abduction of child under 14 years of age in contravention of custody order; s. 283, abduction of child under 14 years of age where no custody order with intent to deprive parent, etc., of possession of child.

Defences: s. 285, where court satisfied that taking, etc., was necessary to protect young person from imminent harm; s. 286, *no* defence that young person consented to or suggested any conduct of the accused. As to mistake defence generally, see notes under ss. 19 and 150.1.

#### SYNOPSIS

This section makes it an offence for anyone to cause to be taken, without lawful authority, any unmarried person under the age of 16 from the possession of the parent, the guardian, or any other person who has the lawful care or charge of that person. This taking must occur without the consent of the parent, guardian or other responsible person. A person convicted under this section is guilty of an indictable offence and liable to a maximum term of imprisonment of five years.

#### ANNOTATIONS

The phrase "takes or causes to be taken" requires some participation by the accused in the removal of the girl either through physical involvement or inducement or enticement. The mere fact that the girl is aware she can find refuge with the accused does not constitute any inducement on his part: *R. v. Johnson* (1977), 37 C.C.C. (2d) 352 (Sask. Dist. Ct.).

Proof of the taking away does not require any element of persuasion and even if the girls involved took a very active, if not leading part, in what occurred a conviction will follow if it is proved that the taking was against the will of the parent: *R. v. Langevin and LaPensee* (1962), 133 C.C.C. 257, 38 C.R. 421 (Ont. C.A.). In this case the dicta by Lebel, J.A., in *R. v. Bebee* (1958), 120 C.C.C. 310 (Ont. C.A.), that persuasion by the accused was a necessary element of the offence, was disapproved.

**ABDUCTION OF PERSON UNDER FOURTEEN.**

**281.** Every one who, not being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, unlawfully takes, entices away, conceals, detains, receives or harbours that person with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 250; 1980-81-82-83, c. 125, s. 20.

**CROSS-REFERENCES**

The term “guardian” is defined in s. 280(2).

Section 17 limits the availability of the statutory defence of compulsion by threats. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child.

Related offences: s. 279, kidnapping and unlawful confinement; s. 279.1, hostage taking; s. 280, abduction of person under 16 years of age against will of parent; s. 282, abduction of child under 14 years of age in contravention of custody order; s. 283, abduction of child under 14 years of age where no custody order with intent to deprive parent, etc., of possession of child.

Defences: s. 284, where the accused establishes that the taking away, etc., was with the consent of the parent, guardian or other person having the lawful possession, care or charge of the young person; s. 285, where court satisfied that taking, etc., was necessary to protect young person from imminent harm; s. 286 no defence that young person consented to or suggested any conduct of the accused. As to mistake defence generally, see notes under ss. 19 and 150.1.

**ANNOTATIONS**

It was held under the predecessor to this section that the word “detains” was to be given its dictionary meaning of “withhold”. Thus the gravamen of the offence was not merely the keeping or confinement of the child but the intentional withholding of the child from the accused’s wife, who had lawful custody of the child, which had the effect of depriving her of her custodial rights. Thus, in Ontario, where the child had lived with its mother, the courts had jurisdiction to try an offence of detaining, although the child was taken and held by the accused in another province: *Re Bigelow and The Queen* (1982), 69 C.C.C. (2d) 204, 37 O.R. (2d) 304 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

The word “unlawfully” in the English version of this section is surplusage and does not require proof of commission of some additional unlawful act in the taking of the child. The term “possession” is not limited to circumstances in which the parent or guardian is actually in physical control of the child at the time of the taking. The concept of deprivation of possession relates to the ability of a parent to exercise his right of control over the child. Although proof of the intent required by this section can be met by the intentional and purposeful deprivation of the parent’s control over the child, the *mens rea* of the offence can also be proven by the mere fact of the deprivation of possession of the child through a taking as long as the trier of fact can infer that the accused knew or foresaw that his actions would be certain or substantially certain to result in the parents being deprived of the ability to exercise control over the child: *R. v. Chartrand*, [1994] 2 S.C.R. 864, 91 C.C.C. (3d) 396, 31 C.R. (4th) 1.

**ABDUCTION IN CONTRAVENTION OF CUSTODY ORDER / Where no belief in validity of custody order.**

282. (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

(2) Where a count charges an offence under subsection (1) and the offence is not proven only because the accused did not believe that there was a valid custody order but the evidence does prove an offence under section 283, the accused may be convicted of an offence under section 283. 1980-81-82-83, c. 125, s. 20; 1993, c. 45, s. 4.

#### CROSS-REFERENCES

The term "guardian" is defined in s. 280(2).

Section 17 limits the availability of the statutory defence of compulsion by threats. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences: s. 279, kidnapping and unlawful confinement; s. 279.1, hostage taking; s. 280, abduction of person under 16 years of age against will of parent; s. 281, abduction of child under 14 years of age by person other than parent, guardian or person having lawful care of child; s. 283, abduction of child under 14 years of age where no custody order with intent to deprive parent, etc., of possession of child.

Defences: s. 284, where the accused establishes that the taking away, etc., was with the consent of the parent, guardian or other person having the lawful possession, care or charge of the young person; s. 285, where court satisfied that taking, etc., was necessary to protect young person from imminent harm; s. 286, no defence that young person consented to or suggested any conduct of the accused. As to mistake defence generally, see notes under ss. 19 and 150.1.

#### SYNOPSIS

Subsection (1) describes the offence of abduction of a person under the age of 14 years in contravention of a custody order. Anyone who is the parent, guardian or person lawfully in charge of a person under 14 who takes, entices away, conceals, detains, receives or harbours that person in violation of a custody order of a Canadian court, with the intention of depriving another parent, guardian or person in charge of possession of the person under 14, commits this offence. The offence may be prosecuted by indictment or summarily, and is punishable on indictment by imprisonment not exceeding 10 years.

Where the accused would otherwise be found not guilty only because he or she did not believe there was a valid custody order in existence then by virtue of subsec. (2) the accused may be convicted of the offence under s. 283, if that offence is made out.

#### ANNOTATIONS

The words "lawful care or charge" do not modify the word "parent" and the parent may



therefore be convicted of the offence under this section although at the time of the taking he did not have lawful care or charge of the child: *R. v. Van Herk* (1984), 12 C.C.C. (3d) 359, 40 C.R. (3d) 264 (Alta. C.A.).

The *mens rea* of the offence under this section is proof that the accused intended to deprive the person with lawful care of the child, of the possession of the child, and with an intent to do so in contravention of a valid and subsisting court order. A mistaken belief as to the legal effect of a custody order is a defence to this charge. Such a mistake although a mistake of law is an error as to the legal effect of civil law and therefore a defence. However, the fact that the accused knew the terms of the custody order and acted in contravention of its terms would, in most cases, be sufficient to persuade the trier of fact that she intended to do so. *Quaere*, whether the mistaken belief as to the legal effect of the order must be based on reasonable grounds: *R. v. Ilczyszyn* (1988), 45 C.C.C. (3d) 91 (Ont. C.A.).

In the subsequent case of *R. v. Hammerbeck* (1991), 68 C.C.C. (3d) 161 (B.C.C.A.) that court held that an honest belief by the accused that he was not bound by the terms of the custody order was a defence and that the mistake need not be based on reasonable grounds.

The term “detain” in this section means “withhold” and thus the mere fact that a parent keeps a child longer than the prescribed access period would not necessarily constitute a withholding and thus a detention of the child. Further, to prove the requisite intent for the offence, there must be proof that the act was done for the express purpose of depriving the other parent of possession of the child. Mere recklessness would not suffice. There must be an intention to somehow put the child beyond the reach of the other parent’s custody or control. An intention not to assist or co-operate in the regaining of physical control of the child by the other parent cannot be equated with the intention to deprive that parent of possession of the child: *R. v. McDougall* (1990), 62 C.C.C. (3d) 174, 3 C.R. (4th) 112, 1 O.R. (3d) 247 (C.A.).

A clause in a custody order, providing that neither parent may remove any of the children without consent of the other party or a court order, was a “custody provision” of the custody order within the meaning of this section. Further, although, by virtue of the order, the accused’s wife did not have a right to custody of the child, the right of access given to her by the court order involved transfer of the lawful care or charge of the child to the mother for the duration of the access. While the order was not one contemplating joint custody, what is granted by such an “access” order is more than merely a right to visit while the child is in the possession, care or charge of the other parent. It involves transfer of the child from the possession, care or charge of the custodial parent, here the accused, to that of the non-custodial parent. If prevented from the exercise of the right to lawful care or charge of the child during these access periods, then the person entitled to such access is denied possession of the child for that period within the meaning of this section: *R. v. Petropoulos* (1990), 59 C.C.C. (3d) 393, 29 R.F.L. (3d) 289 (B.C.C.A.).

Where the order made under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), while providing for rights of access for the accused spouse, made no provision for custody of the child then the Territorial legislation making the spouses joint guardians applied and the accused could not be convicted of the offence under this section. While the order was a custody order, it did not contain “custody provisions”: *R. v. Gustaw* (1991), 65 C.C.C. (3d) 296 (N.W.T.S.C.).

Every custody order is subject to variation and particularly where the order is only an interim custody order, police officers before attempting to arrest a parent for abduction in contravention of such an order should take reasonable steps and make such inquiries as are appropriate and possible to ensure that the order accurately reflects the true legal relationship between the parties: *R. v. McCoy* (1984), 17 C.C.C. (3d) 114 (Ont. Prov. Ct.).

**ABDUCTION / Consent required.**

283. (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, whether or not there is a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

(2) No proceedings may be commenced under subsection (1) without the consent of the Attorney General or counsel instructed by him for that purpose. 1980-81-82-83, c. 125, s. 20; 1993, c. 45, s. 5.

**CROSS-REFERENCES**

The term "guardian" is defined in s. 280(2). "Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained (as to notes concerning sufficiency of consent, see s. 583).

Section 17 limits the availability of the statutory defence of compulsion by threats. Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). Age is determined by s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 658 provides a means of proving the age of a child.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences: s. 279, kidnapping and unlawful confinement; s. 279.1, hostage taking; s. 280, abduction of person under 16 years of age against will of parent; s. 281, abduction of child under 14 years of age by person other than parent, guardian or person having lawful care of child; s. 282, abduction of child under 14 years of age in contravention of custody order with intent to deprive parent, etc., of possession of child.

Defences: s. 284, where the accused establishes that the taking away, etc., was with the consent of the parent, guardian or other person having the lawful possession, care or charge of the young person; s. 285, where court satisfied that taking, etc., was necessary to protect young person from imminent harm; s. 286, no defence that young person consented to or suggested any conduct of the accused. As to mistake defence generally, see notes under ss. 19 and 150.1.

**SYNOPSIS**

This section describes the offence of abduction by a parent, guardian or person lawfully in charge of a person under 14 years of age whether or not there is a custody order of a Canadian court in existence. In such circumstances, the offence is committed if the person under 14 is taken, enticed away, concealed, detained, received or harboured with the intention of depriving another parent, guardian or person lawfully in charge, of possession of the person under 14. The offence may be prosecuted by indictment or summarily, but only with the consent of an Attorney General, or counsel instructed by him. The offence is punishable, on indictment, by imprisonment not exceeding 10 years.

### ANNOTATIONS

A parent may be convicted of the offence under this section where he has the requisite intent notwithstanding that under provincial legislation he has a right to custody of the child: *R. v. Cook* (1984), 12 C.C.C. (3d) 471, 40 C.R. (3d) 270, 63 N.S.R. (2d) 35 (C.A.), leave to appeal to S.C.C. refused October 11, 1984.

While provincial legislation may define “parent” it is not clear whether such definition could apply or whether the common law definition applies. At common law “parent” is *prima facie* confined to the lawful mother and father and exceptionally includes the father of a child born out of wedlock: *R. v. Levesque* (1984), 15 C.C.C. (3d) 413 (N.S. Co.Ct.).

The term “possession” includes not only physical custody of the child but an existing right to possession. There is no requirement that the parent be shown to have taken the child out of the physical possession of the other parent: *R. v. Dawson* (1995), 100 C.C.C. (3d) 123, 143 N.S.R. (2d) 1, 16 R.F.L. (4th) 279 (C.A.).

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### DEFENCE.

**284. No one shall be found guilty of an offence under sections 281 to 283 if he establishes that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was done with the consent of the parent, guardian or other person having the lawful possession, care or charge of that young person. 1980-81-82-83, c. 125, s. 20.**

### CROSS-REFERENCES

The term “guardian” is defined in s. 280(2). The term “young person” is not defined but presumably was intended to refer to the child under the age of fourteen years referred to in ss. 281 to 283.

### SYNOPSIS

This section provides a defence of consent to the abduction offences found in ss. 281 to 283. The consent must be given by the parent, guardian or other person in charge of a person under 14 who has lawful possession, care, or charge of that person. Consent of a young person provides no defence, by virtue of s. 286.

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### DEFENCE.

**285. No one shall be found guilty of an offence under sections 280 to 283 if the court is satisfied that the taking, enticing away, concealing, detaining, receiving or harbouring of any young person was necessary to protect the young person from danger of imminent harm or if the person charged with the offence was escaping from danger of imminent harm. 1980-81-82-83, c. 125, s. 20; 1993, c. 45, s. 6.**

### CROSS-REFERENCES

The term “young person” is not defined but presumably was intended to refer to the child under the age of fourteen years or sixteen years, as the case may be, referred to in ss. 280 to 283.

### ANNOTATIONS

An honest but mistaken belief that the child is in danger of imminent harm is a defence, provided that the taking of the child was necessary, in an objective sense, based on the circumstances as the accused honestly believed them to be. In considering the defence, the jury should be instructed to consider other remedial steps which might have been taken and to consider the reasonableness of the accused’s mistaken belief: *R. v. Adams* (1993), 79 C.C.C. (3d) 193, 19 C.R. (4th) 277, 12 O.R. (3d) 248 (C.A.).

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### NO DEFENCE.

**286. In proceedings in respect of an offence under sections 280 to 283, it is not a**



defence to any charge that a young person consented to or suggested any conduct of the accused. 1980-81-82-83, c. 125, s. 20.

#### CROSS-REFERENCES

The term "young person" is not defined but presumably was intended to refer to the child under the age of fourteen years or sixteen years, as the case may be, referred to in ss. 280 to 283.

#### SYNOPSIS

This section clarifies the fact that although a defence of consent by a person in charge of a young person exists with respect to ss. 281 to 283 (see s. 284), the consent or suggestion of a *young person* cannot provide a defence to abduction under any of ss. 280 to 283. They might, however, be relevant to establish necessity under s. 285.

### Abortion

PROCURING MISCARRIAGE / Woman procuring her own miscarriage / Definition of "means" / Exceptions / Information requirement / Definitions / "accredited hospital" / "approved hospital" / "board" / "Minister of Health" / "qualified medical practitioner" / "therapeutic abortion committee" / Requirement of consent not affected.

287. (1) Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offence and liable to imprisonment for life.

(2) Every female person who, being pregnant, with intent to procure her own miscarriage, uses any means or permits any means to be used for the purpose of carrying out her intention is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(3) In this section, "means" includes

- (a) the administration of a drug or other noxious thing;
- (b) the use of an instrument; and
- (c) manipulation of any kind.

(4) Subsections (1) and (2) do not apply to

- (a) a qualified medical practitioner, other than a member of a therapeutic abortion committee for any hospital, who in good faith uses in an accredited or approved hospital any means for the purpose of carrying out his intention to procure the miscarriage of a female person, or
- (b) a female person who, being pregnant, permits a qualified medical practitioner to use in an accredited or approved hospital any means for the purpose of carrying out her intention to procure her own miscarriage,

if, before the use of those means, the therapeutic abortion committee for that accredited or approved hospital, by a majority of the members of the committee and at a meeting of the committee at which the case of the female person has been reviewed,

- (c) has by certificate in writing stated that in its opinion the continuation of the pregnancy of the female person would or would be likely to endanger her life or health, and
- (d) has caused a copy of such certificate to be given to the qualified medical practitioner.

(5) The Minister of Health of a province may by order

- (a) require a therapeutic abortion committee for any hospital in that province, or

any member thereof, to furnish him with a copy of any certificate described in paragraph (4)(c) issued by that committee, together with such other information relating to the circumstances surrounding the issue of that certificate as he may require, or

- (b) require a medical practitioner who, in that province, has procured the miscarriage of any female person named in a certificate described in paragraph (4)(c), to furnish him with a copy of that certificate, together with such other information relating to the procuring of the miscarriage as he may require.

(6) For the purposes of subsections (4) and (5) and this subsection,

“accredited hospital” means a hospital accredited by the Canadian Council on Hospital Accreditation in which diagnostic services and medical, surgical and obstetrical treatment are provided;

“approved hospital” means a hospital in a province approved for the purposes of this section by the Minister of Health of that province;

“board” means the board of governors, management or directors, or the trustees, commission or other person or group of persons having the control and management of an accredited or approved hospital;

“Minister of Health” means

- (a) in the Provinces of Ontario, Quebec, New Brunswick, Prince Edward Island, Manitoba and Newfoundland, the Minister of Health,
- (b) in the Provinces of Nova Scotia and Saskatchewan, the Minister of Public Health, and
- (c) in the Province of British Columbia, the Minister of Health Services and Hospital Insurance,
- (d) in the Province of Alberta, the Minister of Hospitals and Medical Care,
- (e) in the Yukon Territory and the Northwest Territories, the Minister of National Health and Welfare;

**NOTE:** Definition “Minister of Health” amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting subsec. (6)(e). The text of para. (e), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (e) *in the Yukon Territory, the Northwest Territories and Nunavut, the Minister of National Health and Welfare;*

“qualified medical practitioner” means a person entitled to engage in the practice of medicine under the laws of the province in which the hospital referred to in subsection (4) is situated;

“therapeutic abortion committee” for any hospital means a committee, comprised of not less than three members each of whom is a qualified medical practitioner, appointed by the board of that hospital for the purpose of considering and determining questions relating to terminations of pregnancy within that hospital.

(7) Nothing in subsection (4) shall be construed as making unnecessary the obtaining of any authorization or consent that is or may be required, otherwise than under this Act, before any means are used for the purpose of carrying out an intention to procure the miscarriage of a female person. R.S., c. C-34, s. 251; 1974-75-76, c. 93, s. 22.1.

#### CROSS-REFERENCES

The related offence of supplying noxious things, etc., for purpose of procuring a miscarriage is found in s. 288.

## ANNOTATIONS

This section is of no force and effect by reason of its violation of s. 7 of the Charter of Rights: *R. v. Morgentaler, Smoling and Scott* (1988), 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, [1988] 1 S.C.R. 30 (5:2).

Provincial legislation, whose central purpose and dominant characteristic was the restriction of abortion as a socially undesirable practice which should be suppressed or punished, is *ultra vires* the province. The prohibition of the performance of abortions in certain circumstances with penal consequences is traditionally regarded as a part of the criminal law. The legislation in this case was designed to prevent the defendant from opening free-standing abortion clinics within the province: *R. v. Morgentaler*, [1993] 3 S.C.R. 463, 85 C.C.C. (3d) 118, 25 C.R. (4th) 179.

There are no substantive rights under the Quebec Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, nor the Civil Code of Lower Canada, upon which an injunction could be founded to restrain a woman from having an abortion. Similarly, the common law did not recognize any right in the foetus until born alive. Additionally, a father's interest in a foetus cannot support a right to veto a woman's decision in respect of that foetus, including the decision to have an abortion. Accordingly, the courts of Quebec were not entitled to grant an injunction to the father to restrain the mother from having an abortion: *Tremblay v. Daigle* (1989), 62 D.L.R. (4th) 634, [1989] 2 S.C.R. 530, 102 N.R. 81 (9:0).

## SUPPLYING NOXIOUS THINGS.

**288. Every one who unlawfully supplies or procures a drug or other noxious thing or an instrument or thing, knowing that it is intended to be used or employed to procure the miscarriage of a female person, whether or not she is pregnant, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.** R.S., c. C-34, s. 252.

## CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498. The actual offence of procuring a miscarriage (abortion) is found in s. 287. However, as noted thereunder, s. 287 has been held to be unconstitutional.

## SYNOPSIS

This section describes the indictable offence of supplying or procuring a drug or instrument which is to be used to cause the miscarriage of a female person. The accused must know that the item referred to above is intended to be employed to cause a miscarriage. The female need not be pregnant for the offence to be committed. Punishment upon conviction on indictment is a maximum jail term of two years.

## ANNOTATIONS

In determining whether the accused knew that the drug he supplied was intended to be used to procure a miscarriage, it was irrelevant that the abortifacient was supplied to an unidentified policewoman who had no intention of using it: *Irwin v. The Queen*, [1968] 4 C.C.C. 119, 3 C.R.N.S. 377 (S.C.C.).

**Venereal Diseases**

**289. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 41.]**



## *Offences Against Conjugal Rights*

**BIGAMY / Matters of defence / Incompetency no defence / Validity presumed / Act or omission by accused.**

**290. (1) Every one commits bigamy who**

- (a) in Canada,**
  - (i) being married, goes through a form of marriage with another person,**
  - (ii) knowing that another person is married, goes through a form of marriage with that person, or**
  - (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or**
- (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.**

**(2) No person commits bigamy by going through a form of marriage if**

- (a) that person in good faith and on reasonable grounds believes that his spouse is dead,**
- (b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years,**
- (c) that person has been divorced from the bond of the first marriage, or**
- (d) the former marriage has been declared void by a court of competent jurisdiction.**

**(3) Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.**

**(4) Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.**

**(5) No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid. R.S., c. C-34, s. 254.**

### **CROSS-REFERENCES**

“Form of marriage” is defined in s. 214.

The punishment for bigamy is found in s. 291(1). The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). Section 291(2) provides for a means of proof of the marriage by way of certificate. Section 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21, provides that “Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary”.

The related offence of polygamy is found in s. 293 and of solemnizing a marriage in contravention of the laws of the province in s. 295.

### **SYNOPSIS**

This section describes the offence of bigamy. Every one commits this offence who, in Canada goes through a form of marriage with a person while already married to another person, who goes through a form of marriage with another person knowing that person

to be married to someone else, or who goes through a form of marriage with more than one other person simultaneously. If a resident Canadian citizen leaves Canada to do any of the things described above, that person also commits the offence of bigamy. These general prohibitions do not apply if the person in *good faith* and on *reasonable grounds* believes that his spouse is dead, if the person has been divorced from the spouse, if the spouse of the person has been absent for seven years without interruption and nothing has been heard of the spouse during that time, or if the former marriage has been declared void by a court of competent jurisdiction. A person charged under this section cannot use as a defence the fact that there would be a legal impediment to the original marriage in the place where the offence is alleged to have been committed. Unless the accused establishes otherwise, there is a presumption in this section that all forms of marriage are valid and no act or omission of the accused may be set up as invalidating the marriage.

## ANNOTATIONS

All that is necessary is to prove that the ceremony was one known to and recognized by the law as capable of producing a valid marriage, and accordingly independent circumstances, such as the lack of a marriage licence, which might otherwise create a legal disability, are irrelevant: *R. v. Howard*, [1966] 3 C.C.C. 91, 54 W.W.R. 484 (B.C.Co.Ct.).

It has been held in a number of cases that a *bona fide* but mistaken belief that the first marriage had been dissolved through divorce was no defence to a charge under this section: *R. v. Bleiler* (1912), 19 C.C.C. 249, 1 D.L.R. 787 (Alta. S.C.); *R. v. Morgan* (1942), 78 C.C.C. 129, [1942] 4 D.L.R. 321 (N.S.S.C.); *R. v. Brinkley* (1907), 12 C.C.C. 454, 14 O.L.R. 434 (C.A.); *Queneau v. The King* (1949), 95 C.C.C. 187, 8 C.R. 235 (Que. C.A.). These cases are in accord with what was the leading English case of *R. v. Wheat and Stocks* (1921), 15 Cr. App. R. 134. In the later case of *R. v. King* (1963), 48 Cr. App. R. 17, *R. v. Wheat and Stocks* was distinguished and explained as being limited to the case where the accused's belief is that the first marriage was dissolved as a result of a divorce. In *R. v. King* the court held that a belief that the first marriage was invalid would be a defence although the defence was rejected on the facts of the case. Interestingly, the accused's belief that the first marriage was invalid was due to his mistaken belief that he had not been validly divorced from an even earlier marriage. *R. v. Wheat and Stocks* was finally overruled by the Court of Appeal in *R. v. Gould* (1968), 52 Cr. App. R. 152 where it was held that a belief that the former marriage had been dissolved is a defence to the charge. It was held in *Gould* that the belief must be an honest one based on reasonable grounds.

The defence was accepted in *R. v. Woolridge* (1979), 49 C.C.C. (2d) 300 (Sask. Prov. Ct.) where the trial Judge held that an honest *and* reasonable belief that the previous marriage had been dissolved by divorce was a defence to the charge under this section applying *R. v. Haugen* (1923), 41 C.C.C. 132, [1923] 2 W.W.R. 709 (Sask. C.A.) where it was held that an honest and reasonable belief that the accused's first marriage was a nullity because his first wife was still validly married was a defence.

It is submitted that such a defence is properly recognized and that a mistaken belief that the previous marriage had been dissolved by divorce should be a defence if the belief is honestly held. While some cases have foundered on the issue of whether the accused's mistake is one of fact or law, it is submitted that applying the decision of the Supreme Court of Canada in *R. v. Prue*; *R. v. Baril* (1979), 46 C.C.C. (2d) 257, [1979] 2 S.C.R. 547, 8 C.R. (3d) 68 (a case under former s. 238(3)) this kind of mistake should be recognized as a mistake of fact. Finally, it is submitted that it is sufficient if the belief is honestly held and need not be based on reasonable grounds, applying *R. v. Rees* (1956), 115 C.C.C. 1, [1956] S.C.R. 640, 24 C.R. 1; *D.P.P. v. Morgan* (1975), 61 Cr. App. R. 136 (H.L.) and *Pappajohn v. The Queen* (1980), 52 C.C.C. (2d) 481, [1980] 2 S.C.R. 120, 111 D.L.R. (3d) 1.

**PUNISHMENT / Certificate of marriage.**

**291. (1) Every one who commits bigamy is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(2) For the purposes of this section a certificate of marriage issued under the authority of law is evidence of the marriage or form of marriage to which it relates without proof of the signature or official character of the person by whom it purports to be signed. R.S., c. C-34, s. 255.**

**CROSS-REFERENCES**

“Form of marriage” is defined in s. 214.

The offence of bigamy is defined in s. 290. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

With respect to subsec. (2), note that s. 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21 provides that “Where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary”.

For notes respecting mistake generally, see notes under s. 19.

The related offence of polygamy is found in s. 293 and of solemnizing a marriage in contravention of the laws of the province in s. 295.

**PROCURING FEIGNED MARRIAGE / Corroboration.**

**292. (1) Every person who procures or knowingly aids in procuring a feigned marriage between himself and another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(2) No person shall be convicted of an offence under this section on the evidence of only one witness unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused. R.S., c. C-34, s. 256; 1980-81-82-83, c. 125, s. 21.**

**CROSS-REFERENCES**

“Form of marriage” is defined in s. 214.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of pretending to solemnize a marriage is found in s. 294 and of solemnizing a marriage in contravention of the laws of the province in s. 295.

**SYNOPSIS**

This section imposes criminal liability upon any person, *male or female*, who procures or *knowingly* aids in procuring a feigned marriage between that person and another person. The offence is indictable and the maximum sentence is a term of five years of imprisonment. No person can be convicted of an offence under this section on the *uncorroborated evidence* of one witness.

**ANNOTATIONS**

In *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 161, [1990] 2 S.C.R. 3, [1990] 4 W.W.R. 577, 77 C.R. (3d) 327 (5:0) the court considered the effect of, now repealed, s. 586 which pro-



vided that no person shall be convicted on the unsworn evidence of a child, "unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused". The wording is thus almost identical to subsec. (2) of this section. It was there held that the requirement that the corroborating evidence implicate the accused requires only that the evidence confirm in some material particular the story of the witness giving the evidence which required corroboration. The confirming evidence need not also itself implicate the accused.

#### POLYGAMY / Evidence in case of polygamy.

##### 293. (1) Every one who

- (a) practises or enters into or in any manner agrees or consents to practise or enter into
    - (i) any form of polygamy, or
    - (ii) any kind of conjugal union with more than one person at the same time, whether or not it is by law recognized as a binding form of marriage; or
  - (b) celebrates, assists or is a party to a rite, ceremony, contract or consent that purports to sanction a relationship mentioned in subparagraph (a)(i) or (ii),
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Where an accused is charged with an offence under this section, no averment or proof of the method by which the alleged relationship was entered into, agreed to or consented to is necessary in the indictment or upon the trial of the accused, nor is it necessary on the trial to prove that the persons who are alleged to have entered into the relationship had or intended to have sexual intercourse. R.S., c. C-34, s. 257.

#### CROSS-REFERENCES

"Form of marriage" is defined in s. 214.

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of bigamy is found in s. 291 and of solemnizing a marriage in contravention of the laws of the province in s. 295.

#### SYNOPSIS

This section makes it a criminal offence to agree, consent to or practise any form of polygamy or conjugal union with more than one person at the same time. It also imposes criminal liability on anyone who celebrates, assists or is party to a rite, ceremony, contract or consent that sanctions a relationship described above. The offence is indictable with a maximum term of imprisonment of five years. Subsection (2) states that it is not necessary to include in the indictment or to prove at trial the method by which the relationship was entered into, agreed to or consented to, nor is it necessary to establish at trial that the parties had, or intended to have, sexual intercourse.

#### ANNOTATIONS

The words "any kind of conjugal union" in subsec. (1)(a)(ii) predicate some form of union under the guise of marriage and were not intended to apply to adultery even where one or both of the persons are married at the time they are living together: *R. v. Tolhurst, R. v. Wright* (1937), 68 C.C.C. 319, [1937] 3 D.L.R. 808 (Ont. C.A.).

## Unlawful Solemnization of Marriage

### PRETENDING TO SOLEMNIZE MARRIAGE.

#### 294. Every one who

- (a) solemnizes or pretends to solemnize a marriage without lawful authority, the proof of which lies on him, or
  - (b) procures a person to solemnize a marriage knowing that he is not lawfully authorized to solemnize the marriage,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 258.

#### CROSS-REFERENCES

“Form of marriage” is defined in s. 214.

The accused’s spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of procuring a feigned marriage is found in s. 292.

#### SYNOPSIS

This section prohibits any person who does not have the lawful authority to do so from solemnizing or pretending to solemnize a marriage. It also prohibits any person from knowingly procuring an unqualified person to solemnize a marriage. A person charged with an offence under this section must prove that he is, in fact, lawfully entitled to solemnize a marriage – a requirement that has potential Charter implications.

A person convicted under this section is guilty of an indictable offence and liable to a maximum term of imprisonment of two years.

### MARRIAGE CONTRARY TO LAW.

295. Every one who, being lawfully authorized to solemnize marriage, knowingly and wilfully solemnizes a marriage in contravention of the laws of the province in which the marriage is solemnized is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 259.

#### CROSS-REFERENCES

“Form of marriage” is defined in s. 214.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of bigamy is found in s. 291 and of polygamy in s. 293.

#### SYNOPSIS

This section imposes criminal liability on any person who is lawfully authorized to solemnize a marriage, but who *knowingly* and *wilfully* solemnizes a marriage which contravenes the law of the province where the marriage takes place. The offence is indictable and the maximum term of imprisonment is two years.

## Blasphemous Libel

### OFFENCE / Question of fact / Saving.

296. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

(3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject. R.S., c. C-34, s. 260.

#### CROSS-REFERENCES

The term "publishes" is not defined in this section, but it may be that the definition in s. 299 applies in part to this section as well as to the defamatory libel offence.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Section 584(1) provides that no count for publishing a blasphemous libel is insufficient by reason only that it does not set out the words that are alleged to be libellous. However, under s. 587(1)(e), particulars may be ordered further describing any writing or words that are the subject of the charge. Under s. 584(2), a count for publishing a libel may charge that the published matter was written in a sense that, by innuendo, made the publication thereof criminal and may specify that sense without any introductory assertion to show how the matter was written in that sense. Under s. 584(3), it is sufficient to prove that the matter was libellous, with or without innuendo.

Seditious libel is dealt with in ss. 59 to 61, defamatory libel in ss. 297 to 317 and hate propaganda in ss. 318 to 320. Publishing false news is an offence under s. 181.

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## *Defamatory Libel*

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#### DEFINITION OF "NEWSPAPER".

297. In sections 303, 304 and 308, "newspaper" means any paper, magazine or periodical containing public news, intelligence or reports of events, or any remarks or observations thereon, printed for sale and published periodically or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and any paper, magazine or periodical printed in order to be dispersed and made public, weekly or more often, or at intervals not exceeding thirty-one days, that contains advertisements, exclusively or principally. R.S., c. C-34, s. 261.

#### CROSS-REFERENCES

The calculation of days is dealt with in s. 27 of the Interpretation Act, R.S.C. 1985, c. I-21.

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#### DEFINITION / Mode of expression.

298. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked upon any substance; or

(b) by any object signifying a defamatory libel otherwise than by words. R.S., c. C-34, s. 262.

#### CROSS-REFERENCES

Publishing a libel is defined in s. 299.

The punishment for publishing a defamatory libel known to be false is a maximum of five years under s. 300. The punishment for publishing a defamatory libel is a maximum of two years under



s. 301. The punishment for extortion by libel is a maximum of five years under s. 302. For all these offences, the accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Liability of the proprietor of a newspaper is dealt with in s. 303. Various defences or excuses for publishing a defamatory libel are set out in ss. 304 to 316. Section 317 provides for a special verdict in the case of defamatory libel. Section 584(1) provides that no count for publishing a defamatory libel is insufficient by reason only that it does not set out the words that are alleged to be libellous. However, under s. 587(1)(e), particulars may be ordered further describing any writing or words that are the subject of the charge. Under s. 584(2), a count for publishing a libel may charge that the published matter was written in a sense that, by innuendo, made the publication thereof criminal and may specify that sense without any introductory assertion to show how the matter was written in that sense. Under s. 584(3), it is sufficient to prove that the matter was libellous, with or without innuendo. The plea of justification in cases of defamatory libel is dealt with in ss. 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Under s. 637, a private prosecutor has no right to stand jurors aside. Sections 728 and 729 make special provision for costs in cases of defamatory libel.

Seditious libel is dealt with in ss. 59 to 61, blasphemous libel in s. 296 and hate propaganda in ss. 318 to 320. Publishing false news is an offence under s. 181.

## SYNOPSIS

This section defines defamatory libel and specifies that it may be expressed directly or by insinuation or irony in words legibly marked or through an object otherwise than by words. A defamatory libel is a matter published that is likely to injure the reputation of any person by exposing that person to hatred, contempt, ridicule or insult. Furthermore, a defamatory libel must be published *without lawful justification*.

## PUBLISHING.

### **299. A person publishes a libel when he**

- (a) exhibits it in public;
  - (b) causes it to be read or seen; or
  - (c) shows or delivers it, or causes it to be shown or delivered, with intent that it should be read or seen by the person whom it defames or by any other person.
- R.S., c. C-34, s. 263.**

## CROSS-REFERENCES

Defamatory libel is defined in s. 298.

## PUNISHMENT OF LIBEL KNOWN TO BE FALSE.

**300. Every one who publishes a defamatory libel that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**  
**R.S., c. C-34, s. 264.**

## CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

## SYNOPSIS

This section imposes criminal liability upon any person who publishes, as defined in

s. 299, a defamatory libel, as defined in s. 298. In order to be convicted under this section, the accused person must know that the defamatory libel is false. Any person convicted under this section is guilty of an indictable offence with a maximum term of imprisonment of five years.

#### ANNOTATIONS

This section is a reasonable limit on freedom of expression as guaranteed by s. 2(b) of the Charter and is, therefore, valid: *R. v. Stevens* (1995), 96 C.C.C. (3d) 238, [1995] 4 W.W.R. 153, 91 W.A.C. 81 (Man. C.A.). See also *R. v. Lucas* (unreported, January 12, 1996, Sask. C.A.) [096/059/029-6 pp.].

This offence requires proof of an intention to publish defamatory libel, knowledge of falsity and an intention to defame: *R. v. Lucas, supra*. See also *R. v. Stevens, supra*.

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#### PUNISHMENT FOR DEFAMATORY LIBEL.

**301. Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 265.**

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

#### SYNOPSIS

This section provides that a person who is convicted of publishing a defamatory libel is guilty of an indictable offence, with a maximum term of imprisonment of two years. The difference between this section and s. 300 is that there is no requirement in this section that the libel be false.

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#### EXTORTION BY LIBEL / *Idem* / Punishment.

**302. (1) Every one commits an offence who, with intent**

**(a) to extort money from any person, or**

**(b) to induce a person to confer on or procure for another person an appointment or office of profit or trust,**

**publishes or threatens to publish or offers to abstain from publishing or to prevent the publication of a defamatory libel.**

**(2) Every one commits an offence who, as the result of the refusal of any person to permit money to be extorted or to confer or procure an appointment or office of profit or trust, publishes or threatens to publish a defamatory libel.**

**(3) Every one who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 266.**

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and defences or excuses. Publishing is defined in s. 299. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The general extortion offence is found in s. 346.

**SYNOPSIS**

This section describes the offence of extortion by libel. It states that anyone who, *with intent*, publishes, threatens to publish, or offers to refrain from or prevent the publication of a defamatory libel in order to extort money from a person or to induce that person to confer an appointment or office of profit or trust upon another person, commits an offence. An offence under this section is also committed if, as a result of a person's refusal to do any of the things described in subsec. (1), anyone threatens to publish, or in fact publishes a defamatory libel. The offences set out in this section are indictable and carry a maximum term of imprisonment of five years.

**PROPRIETOR OF NEWSPAPER PRESUMED RESPONSIBLE / General authority to manager when negligence / Selling newspapers.**

**303. (1)** The proprietor of a newspaper shall be deemed to publish defamatory matter that is inserted and published therein, unless he proves that the defamatory matter was inserted in the newspaper without his knowledge and without negligence on his part.

**(2)** Where the proprietor of a newspaper gives to a person general authority to manage or conduct the newspaper as editor or otherwise, the insertion by that person of defamatory matter in the newspaper shall, for the purposes of subsection (1), be deemed not to be negligence on the part of the proprietor unless it is proved that

- (a)** he intended the general authority to include authority to insert defamatory matter in the newspaper; or
- (b)** he continued to confer general authority after he knew that it had been exercised by the insertion of defamatory matter in the newspaper.

**(3)** No person shall be deemed to publish a defamatory libel by reason only that he sells a number or part of a newspaper that contains a defamatory libel, unless he knows that the number or part contains defamatory matter or that defamatory matter is habitually contained in the newspaper. R.S., c. C-34, s. 267.

**CROSS-REFERENCES**

The term "newspaper" is defined in s. 303. Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and defences or excuses. Publishing is defined in s. 299. The liability of a party generally is set out in ss. 21 and 22.

**SYNOPSIS**

This section sets out the conditions under which a proprietor or vendor of a newspaper, as that term is defined in s. 297, is *deemed to publish defamatory matter*. The proprietor of a newspaper must prove that any *defamatory matter* in his newspaper was inserted *without his knowledge and without negligence* on his part or else he is deemed to have published it. If the proprietor has given authority to another person as manager or editor of the newspaper and that person has inserted *defamatory matter* in the newspaper, no negligence will be ascribed to the proprietor unless the prosecution proves that he intended to give the manager or editor the authority to insert *defamatory matter* in the newspaper, or allowed the manager or editor to continue to exercise general authority after the *defamatory matter* had been inserted in the newspaper. Subsection (3) states that a vendor of newspapers containing a *defamatory libel* will not be deemed to have published that *defamatory libel* unless the vendor *knows* that such material is, in fact, contained in the newspaper or that the newspaper habitually carries it.

**SELLING BOOK CONTAINING DEFAMATORY LIBEL / Sale by servant.**

**304. (1)** No person shall be deemed to publish a defamatory libel by reason only that



he sells a book, magazine, pamphlet or other thing, other than a newspaper that contains a defamatory matter if, at the time of the sale, he does not know that it contains the defamatory matter.

(2) Where a servant, in the course of his employment, sells a book, magazine, pamphlet or other thing, other than a newspaper, the employer shall be deemed not to publish any defamatory matter contained therein unless it is proved that the employer authorized the sale knowing that

(a) defamatory matter was contained therein; or

(b) defamatory matter was habitually contained therein, in the case of a periodical.  
R.S., c. C-34, s. 268.

#### CROSS-REFERENCES

The term "newspaper" is defined in s. 303. Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

#### SYNOPSIS

This section sets out the circumstances in which a person who sells a book, pamphlet or publication other than a newspaper that contains *defamatory matter* is not deemed to have published a *defamatory libel*. The seller of the item mentioned in subsec. (1) is not deemed to have published a *defamatory libel* if, at the time of sale, he did not know that the item contained *defamatory matter*. Similarly, where an employee sells an item containing *defamatory matter*, the employer will not be deemed to have published that *defamatory matter* unless the prosecution proves that the employer knew the matter was contained in the item or, in the case of a periodical, that the item habitually contained such *defamatory matter*.

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#### PUBLISHING PROCEEDINGS OF COURTS OF JUSTICE.

**305. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter**

(a) in a proceeding held before or under the authority of a court exercising judicial authority; or

(b) in an inquiry made under the authority of an Act or by order of Her Majesty, or under the authority of a public department or a department of the government of a province. R.S., c. C-34, s. 269.

#### CROSS-REFERENCES

The term "newspaper" is defined in s. 303. Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

Note s. 166 which makes it an offence to publish certain judicial proceedings calculated to injure public morals or respecting marriage, judicial separation or restitution of conjugal rights.

#### SYNOPSIS

This section describes a general exemption from the provisions that apply to publishing *defamatory libel* for those persons who publish *defamatory matter* in a court proceeding or an authorized inquiry.

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#### PARLIAMENTARY PAPERS.

**306. No person shall be deemed to publish a defamatory libel by reason only that he**

(a) publishes to the Senate or House of Commons or to a legislature of a province,

defamatory matter contained in a petition to the Senate or House of Commons or to the legislature of a province, as the case may be;

- (b) publishes by order or under the authority of the Senate or House of Commons or of a legislature of a province, a paper containing defamatory matter; or
- (c) publishes, in good faith and without ill-will to the person defamed, an extract from or abstract of a petition or paper mentioned in paragraph (a) or (b). R.S., c. C-34, s. 270.

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. Section 307 creates the related defence of publication of fair reports of parliamentary, legislative or judicial proceedings. Section 316 contains provision for proof that the matter alleged to be defamatory was published by order or under the authority of Parliament or of the legislature.

#### SYNOPSIS

This section, like s. 305, describes a general exemption from the provisions that apply to publishing a *defamatory libel* for those persons who publish *defamatory matter* contained in a petition to the Senate, House of Commons, or legislature of a province, who publish under the authority of these bodies a paper containing *defamatory matter*, or who publish, *in good faith* and without *ill-will* to the person defamed, an extract from or abstract of the documents referred to above.

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#### FAIR REPORTS OF PARLIAMENTARY OR JUDICIAL PROCEEDINGS / Divorce proceedings an exception.

307. (1) No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons or the legislature of a province, or a committee thereof, or of the public proceedings before a court exercising judicial authority, or publishes, in good faith, any fair comment on any such proceedings.

(2) This section does not apply to a person who publishes a report of evidence taken or offered in any proceeding before the Senate or House of Commons or any committee thereof, on a petition or bill relating to any matter of marriage or divorce, if the report is published without authority from or leave of the House in which the proceeding is held or is contrary to any rule, order or practice of that House. R.S., c. C-34, s. 271.

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. Section 306 creates the related defence of publication of parliamentary or legislative papers. Section 316 contains provision for proof that the matter alleged to be defamatory was published by order or under the authority of Parliament or of the legislature.

With reference to subsec. (2) of this section, note that s. 166 makes it an offence to publish certain judicial proceedings calculated to injure public morals or respecting marriage, judicial separation or restitution of conjugal rights.

#### SYNOPSIS

This section, like ss. 305 and 306, establishes an exemption from the provisions that apply to publishing a *defamatory libel* to a person who publishes *in good faith* or *for public information*, a fair report of, or fair comment on the proceedings of the Senate, House of

Commons, provincial legislature, a committee of any of these bodies, or court matters that are open to the public. This exemption does not apply in relation to publication of evidence or a petition or bill relating to a matter of marriage or divorce in proceedings before the Senate, the House of Commons, or any committee thereof if the person who publishes the material does so without the authority of the appropriate House or the publication is contrary to any rule, order or practice of that House.

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#### **FAIR REPORT OF PUBLIC MEETING.**

**308. No person shall be deemed to publish a defamatory libel by reason only that he publishes in good faith, in a newspaper, a fair report of the proceedings of any public meeting if**

- (a) the meeting is lawfully convened for a lawful purpose and is open to the public;**
- (b) the report is fair and accurate;**
- (c) the publication of the matter complained of is for the public benefit; and**
- (d) he does not refuse to publish in a conspicuous place in the newspaper a reasonable explanation or contradiction by the person defamed in respect of the defamatory matter. R.S., c. C-34, s. 272.**

#### **CROSS-REFERENCES**

The term "newspaper" is defined in s. 303. Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. The general defence of publication for the public benefit is set out in s. 309.

#### **SYNOPSIS**

This section provides an exemption for any person who publishes defamatory libel when that person publishes in a newspaper, in *good faith*, a *fair report* of what occurred at a public meeting. The person who publishes the report may only resort to this exemption if the meeting is *lawfully convened* for a *lawful purpose* and is open to the public, the report is *fair* and *accurate*, the publication of the material complained of is for the *benefit of the public*, and the person agrees to publish, in a conspicuous place in the newspaper, any explanation or contradiction of the offending material by the person defamed. This section applies to publication of defamatory matter in newspapers only.

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#### **PUBLIC BENEFIT.**

**309. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter that, on reasonable grounds, he believes is true, and that is relevant to any subject of public interest, the public discussion of which is for the public benefit. R.S., c. C-34, s. 273.**

#### **CROSS-REFERENCES**

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. The special defence of publication for the public benefit in a newspaper is set out in s. 308.

#### **SYNOPSIS**

This section provides a more general exemption than the one found in s. 308 in that it applies to any publication, not just newspapers. So long as the person who publishes the defamatory matter believes, on *reasonable grounds*, that the material is true, relevant to a



subject of public interest and that it is in the public interest to discuss it, the exemption in this section applies.

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#### FAIR COMMENT ON PUBLIC PERSON OR WORK OF ART.

**310. No person shall be deemed to publish a defamatory libel by reason only that he publishes fair comments**

- (a) on the public conduct of a person who takes part in public affairs; or
- (b) on a published book or other literary production, or on any composition or work of art or performance publicly exhibited, or on any other communication made to the public on any subject, if the comments are confined to criticism thereof. R.S., c. C-34, s. 274.

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

#### SYNOPSIS

This section provides that a person will not be deemed to have published a defamatory libel by reason of the fact that he makes *fair comment* about the *public* conduct of a person who participates in *public* affairs. Similarly, a person who makes *fair comment* in the form of criticism of any published book, literary production, publicly exhibited composition, work of art, performance or other communication, may avail himself of this section. This section allows for fair comment on public matters only.

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#### WHEN TRUTH A DEFENCE.

**311. No person shall be deemed to publish a defamatory libel where he proves that the publication of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published and that the matter itself was true. R.S., c. C-34, s. 275.**

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. The related defence of publication for the public benefit is set out in ss. 308 and 309.

#### SYNOPSIS

This section, like s. 309, provides an exemption from criminal liability under s. 300 for any person who publishes defamatory matter that was true and the publication of which, both in manner and time, was for the public benefit. This section, unlike s. 309, however, requires the person charged under s. 300 to prove both of these elements.

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#### PUBLICATION INVITED OR NECESSARY.

**312. No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter**

- (a) on the invitation or challenge of the person in respect of whom it is published,  
or
- (b) that it is necessary to publish in order to refute defamatory matter published in respect of him by another person,

if he believes that the defamatory matter is true and it is relevant to the invitation, challenge or necessary refutation, as the case may be, and does not in any respect exceed what is reasonably sufficient in the circumstances. R.S., c. C-34, s. 276.

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303. The related defence of publication for the public benefit is set out in ss. 308 and 309.

#### SYNOPSIS

This section provides an exemption to an offence under s. 300 for any person who publishes defamatory matter upon the invitation or challenge of the person to whom the matter is relevant, or which is necessary to refute defamatory matter published by another person in respect of himself. In order to qualify for this exemption, the person using it must believe that the defamatory matter is true, relevant to the invitation, challenge or refutation, and does not go beyond what could be considered to be reasonably sufficient in the circumstances.

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#### ANSWERS TO INQUIRIES.

**313.** No person shall be deemed to publish a defamatory libel by reason only that he publishes, in answer to inquiries made to him, defamatory matter relating to a subject-matter in respect of which the person by whom or on whose behalf the inquiries are made has an interest in knowing the truth or who, on reasonable grounds, the person who publishes the defamatory matter believes has such an interest, if

- (a) the matter is published, in good faith, for the purpose of giving information in answer to the inquiries;
- (b) the person who publishes the defamatory matter believes that it is true;
- (c) the defamatory matter is relevant to the inquiries; and
- (d) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. R.S., c. C-34, s. 277.

#### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

#### SYNOPSIS

If a person publishes defamatory matter in response to inquiries made by another person who has, or is believed to have, an interest in knowing the truth, that person, subject to certain restrictions, will not be guilty of an offence under s. 300. This excuse applies if the person who publishes the defamatory matter believes that it is true, if the defamatory matter is relevant to the inquiries and does not exceed what is *reasonably sufficient* in the circumstances, and if the defamatory matter is published in *good faith* for the purpose of responding to the inquiries.

**GIVING INFORMATION TO PERSON INTERESTED.**

**314.** No person shall be deemed to publish a defamatory libel by reason only that he publishes to another person defamatory matter for the purpose of giving information to that person with respect to a subject-matter in which the person to whom the information is given has, or is believed on reasonable grounds by the person who gives it to have, an interest in knowing the truth with respect to that subject-matter if

- (a) the conduct of the person who gives the information is reasonable in the circumstances;
- (b) the defamatory matter is relevant to the subject-matter; and
- (c) the defamatory matter is true, or if it is not true, is made without ill-will toward the person who is defamed and is made in the belief, on reasonable grounds, that it is true. **R.S., c. C-34, s. 278.**

**CROSS-REFERENCES**

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

**SYNOPSIS**

This section, like s. 313, provides an exemption from criminal liability under s. 300 to a person who publishes defamatory matter to another person whom the person *believes*, on *reasonable grounds*, has an interest in knowing the truth. This section applies only if the conduct of the person who gives out this matter is *reasonable*, if the defamatory matter is relevant to the subject, and if the defamatory matter is true or, if not true, if the person who gives the defamatory matter does so *without ill-will* and *believes*, on *reasonable grounds*, that the matter is true.

**PUBLICATION IN GOOD FAITH FOR REDRESS OF WRONG.**

**315.** No person shall be deemed to publish a defamatory libel by reason only that he publishes defamatory matter in good faith for the purpose of seeking remedy or redress for a private or public wrong or grievance from a person who has, or who on reasonable grounds he believes has, the right or is under an obligation to remedy or redress the wrong or grievance, if

- (a) he believes that the defamatory matter is true;
- (b) the defamatory matter is relevant to the remedy or redress that is sought; and
- (c) the defamatory matter does not in any respect exceed what is reasonably sufficient in the circumstances. **R.S., c. C-34, s. 279.**

**CROSS-REFERENCES**

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Publishing is defined in s. 299. As to vicarious liability of a newspaper proprietor, see s. 303.

**SYNOPSIS**

A person will not be criminally liable under s. 300 only by reason of the fact that he publishes defamatory matter in *good faith* for the purpose of seeking a redress for a private or public wrong from another person whom he *believes*, on *reasonable grounds*, to be obliged



to remedy that wrong or grievance. This section requires that the person who publishes the defamatory matter believes that this material is true, that it is relevant to the remedy being sought, and that it does not exceed what is reasonably sufficient in the circumstances.

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**PROVING PUBLICATION BY ORDER OF LEGISLATURE / Directing verdict / Certificate of order.**

**316. (1)** An accused who is alleged to have published a defamatory libel may, at any stage of the proceedings, adduce evidence to prove that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature of a province.

**(2)** Where at any stage in proceedings referred to in subsection (1) the court, judge, justice or provincial court judge is satisfied that the matter alleged to be defamatory was contained in a paper published by order or under the authority of the Senate or House of Commons or a legislature of a province, he shall direct a verdict of not guilty to be entered and shall discharge the accused.

**(3)** For the purposes of this section, a certificate under the hand of the Speaker or clerk of the Senate or House of Commons or a legislature of a province to the effect that the matter that is alleged to be defamatory was contained in a paper published by order or under the authority of the Senate, House of Commons or legislature of a province, as the case may be, is conclusive evidence thereof. R.S., c. C-34, s. 280.

**CROSS-REFERENCES**

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. This section relates back to the defence set out in s. 307.

**SYNOPSIS**

This section provides a means by which a person, charged under s. 300, may prove that the matter alleged to be defamatory, was contained in a paper published by order or under the authority of the Senate or House of Commons or provincial legislature. (See s. 306(b).) The accused may raise s. 306(b) at any stage of the proceedings and, if the court is satisfied that the section applies, he shall direct a verdict of not guilty and discharge the accused. A certificate of the Speaker or clerk of the Senate, House of Commons or provincial legislature, to the effect that the matter alleged to be defamatory was contained in a paper published by order or under the authority of any of the bodies specified in s. 306(b), is conclusive evidence of facts contained in that certificate.

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**Verdicts**

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**VERDICTS IN CASES OF DEFAMATORY LIBEL.**

**317.** Where, on the trial of an indictment for publishing a defamatory libel, a plea of not guilty is pleaded, the jury that is sworn to try the issue may give a general verdict of guilty or not guilty on the whole matter put in issue on the indictment, and shall not be required or directed by the judge to find the defendant guilty merely on proof of publication by the defendant of the alleged defamatory libel, and of the sense ascribed thereto in the indictment, but the judge may, in his discretion, give a direction or opinion to the jury on the matter in issue as in other criminal proceedings, and the jury may, on the issue, find a special verdict. R.S., c. C-34, s. 281.

### CROSS-REFERENCES

Defamatory libel is defined in s. 298 and see cross-references under that section concerning related offences, special procedural provisions and other defences or excuses. Note however, in particular, that the plea of justification in cases of defamatory libel is dealt with in ss. 311, 607(2), 611 and 612. Under s. 612(3), where the accused is convicted, the court may consider, in pronouncing sentence, whether the offence was aggravated or mitigated by the plea. Section 584(1) provides that no count for publishing a defamatory libel is insufficient by reason only that it does not set out the words that are alleged to be libellous. However, under s. 587(1)(e), particulars may be ordered further describing any writing or words that are the subject of the charge. Under s. 584(2), a count for publishing a libel may charge that the published matter was written in a sense that, by innuendo, made the publication thereof criminal and may specify that sense without any introductory assertion to show how the matter was written in that sense. Under s. 584(3), it is sufficient to prove that the matter was libellous, with or without innuendo.

### SYNOPSIS

This section describes the kinds of verdicts that may flow from the trial on an indictment for publishing a defamatory libel. When the accused pleads not guilty to such an indictment, the jury may give a general verdict of guilty or not guilty on the whole matter. The judge is not empowered to direct the jury to find the accused guilty merely on the basis of proof of publication of the defamatory libel. The jury may, if the judge has exercised his discretion to give an opinion or direction to the jury on the matter in issue, find a special verdict.

## Hate Propaganda

### ADVOCATING GENOCIDE / Definition of “genocide” / Consent / Definition of “identifiable group”.

**318. (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(2) In this section, “genocide” means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,**

- (a) killing members of the group; or**
- (b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.**

**(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.**

**(4) In this section, “identifiable group” means any section of the public distinguished by colour, race, religion or ethnic origin. R.S., c. 11 (1st Supp.), s. 1.**

### CROSS-REFERENCES

“Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183.

Procedure for an *in rem* proceeding against hate propaganda, which includes material advocating genocide, is set out in s. 320. The offences in relation to inciting hatred and hate propaganda are set out in s. 319. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

## SYNOPSIS

This section describes the offence of advocating or promoting genocide. Genocide is defined as the act of killing members of an identifiable group or of deliberately inflicting conditions on an identifiable group calculated to bring about the destruction of that group, in whole or in part. An identifiable group is defined as any section of the public distinguished by colour, race, religion or ethnic origin. The offence is indictable, and may be prosecuted only with the consent of an Attorney General and is punishable by imprisonment not exceeding five years.

## ANNOTATIONS

There is little authority, Canadian or British, in the area of hate propaganda but as to the origins of these provisions reference might be made to *The Report of the Special Committee on Hate Propaganda in Canada* (Ottawa, Queen's Printer, 1966) (The Cohen Committee) and R. E. Hage "The Hate Propaganda Amendment to the Criminal Code", 28 U.T. Fac. L. Rev. 63 (1970).

**PUBLIC INCITEMENT OF HATRED / Wilful promotion of hatred / Defences / Forfeiture / Exemption from seizure of communication facilities / Consent / Definitions / "communicating" / "identifiable group" / "public place" / "statements".**

**319. (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of**

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

**(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of**

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

**(3) No person shall be convicted of an offence under subsection (2)**

- (a) if he establishes that the statements communicated were true;
- (b) if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject;
- (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or
- (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada.

**(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.**

**(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.**

**(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.**

**(7) In this section,**



“communicating” includes communicating by telephone, broadcasting or other audible or visible means;

“identifiable group” has the same meaning as in section 318;

“public place” includes any place to which the public have access as of right or by invitation, express or implied;

“statements” includes words spoken or written or recorded electronically or electromagnetically or otherwise, and gestures, signs or other visible representations. R.S., c. 11 (1st Supp.), s. 1.

#### CROSS-REFERENCES

“Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

Where the prosecution elects to proceed by indictment on either of these offences then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Procedure for an *in rem* proceeding against hate propaganda is set out in s. 320. The offence of advocating genocide is in s. 318. The offence of publishing false news is in s. 181. The offence of defamatory libel is dealt with in ss. 297 to 317.

#### SYNOPSIS

This section creates two offences involving the inciting or promoting of hatred against an identifiable group.

In subsec. (1), the offence is committed if such hatred is incited by the communication, in a public place, of words likely to lead to a breach of the peace.

In subsec. (2) the offence is committed only by the *wilful* promotion of hatred against an identifiable group through the communication of statements other than in private conversation.

Subsection (3) creates defences to the offence where it is established that the statements are true, that they amount to the good faith expression of an opinion on a religious subject, that they are reasonably believed to be true and are published with respect to a matter of public interest and to the public good, or that they are published in a good faith effort to identify hate engendering matters in order to have them removed. The wording seems to place the onus of establishing only the first of these four defences on the accused.

Both offences created in this section may be prosecuted by indictment or summarily, and are punishable, on indictment, to a term of imprisonment not exceeding two years. The offence in subsec. (2) may only be prosecuted with the consent of an Attorney General.

Subsections (4) and (5) specify that where a person is convicted of offences under this section or s. 318, the means of communication by which the offence is committed may be forfeited to the Crown, with the exception of communication facilities and equipment as described in s. 199(6) and (7).

Subsection (7) defines “communicating” to include audible or visible means, defines “identifiable group” as in s. 318, defines “public place” to include places in which the public has access by right or by express or implied invitation, and defines “statement” to include spoken, written or recorded words, and gestures, signs, or other visible representation.

## ANNOTATIONS

**Subsec. (2)** – “Wilful” in this subsection means with the intention of promoting hatred and does not include recklessness. The offence would therefore be made out only if the accused had as their conscious purpose the promotion of hatred against the identifiable group or if they foresaw that the promotion of hatred against that group was certain or morally certain to result and communicated the statements as a means of achieving some other purpose: *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369, 101 D.L.R. (3d) 488 (Ont. C.A.).

This definition of the term “wilful” was approved by the Supreme Court of Canada in *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1, [1991] 2 W.W.R. 1, 1 C.R. (4th) 129 (S.C.C.). In that case, the court also considered the meaning to be attached to the other elements of the offence. The term “promotes” indicates active support or instigation. The term “hatred” connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation. It is an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation.

It constitutes misdirection to instruct the jury that if they found that the accused in his actions was aware that there was a danger that his conduct would cause the promotion of hatred against an identifiable group and knowing this he chose to persist in his conduct then the jury could make a finding of wilfulness. At most, the jury should be instructed that they may consider the risks known to the accused: *R. v. Keegstra* (1991), 63 C.C.C. (3d) 110, [1991] 4 W.W.R. 136, 79 Alta. L.R. (2d) 97 (C.A.).

Although this subsection infringes freedom of expression, as guaranteed by s. 2(b) of the Charter, it constitutes a reasonable limit on that right and is therefore valid legislation: *R. v. Keegstra*, *supra*.

**Subsec. (3)(a)** – Reversing the burden of proof to the defence that the statements were true as provided for in this paragraph while infringing the guarantee to the presumption of innocence in s. 11(d) of the Charter is a reasonable limit and therefore valid: *R. v. Keegstra*, *supra*.

**Subsec. (3)(d)** – It would seem that this defence was simply provided out of an abundance of caution since it would be rare that a person could successfully invoke this exemption where it was shown that he *wilfully* promoted hatred: *R. v. Buzzanga and Durocher*, *supra*.

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WARRANT OF SEIZURE / Summons to occupier / Owner and author may appear / Order of forfeiture / Disposal of matter / Appeal / Consent / Definitions / “court” / “genocide” / “hate propaganda” / “judge”.

320. (1) A judge who is satisfied by information on oath that there are reasonable grounds for believing that any publication, copies of which are kept for sale or distribution in premises within the jurisdiction of the court, is hate propaganda, shall issue a warrant under his hand authorizing seizure of the copies.

(2) Within seven days of the issue of the warrant under subsection (1), the judge shall issue a summons to the occupier of the premises requiring him to appear before the court and show cause why the matter seized should not be forfeited to Her Majesty.

(3) The owner and the author of the matter seized under subsection (1) and alleged to be hate propaganda may appear and be represented in the proceedings in order to oppose the making of an order for the forfeiture of the matter.

(4) If the court is satisfied that the publication referred to in subsection (1) is hate propaganda, it shall make an order declaring the matter forfeited to Her Majesty in right of the province in which the proceedings take place, for disposal as the Attorney General may direct.

(5) If the court is not satisfied that the publication referred to in subsection (1) is hate propaganda, it shall order that the matter be restored to the person from whom it was seized forthwith after the time for final appeal has expired.

(6) An appeal lies from an order made under subsection (4) or (5) by any person who appeared in the proceedings

(a) on any ground of appeal that involves a question of law alone,

(b) on any ground of appeal that involves a question of fact alone, or

(c) on any ground of appeal that involves a question of mixed law and fact,

as if it were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, on a question of law alone under Part XXI, and sections 673 to 696 apply with such modifications as the circumstances require.

(7) No proceeding under this section shall be instituted without the consent of the Attorney General.

(8) In this section,

“court” means

(a) in the Province of Quebec, the Court of Quebec,

(a.1) in the Province of Ontario, the Ontario Court (General Division),

(b) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen’s Bench,

(c) in the Provinces of Prince Edward Island and Newfoundland, the Supreme Court, Trial Division, and

(c.1) [*Repealed. 1992, c. 51, s. 36.*]

(d) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, the Supreme Court;

**NOTE:** Definition “court” amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting para. (d). The text of para. (d), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(d) *in the Provinces of Nova Scotia and British Columbia, the Yukon Territory, the Northwest Territories and Nunavut, the Supreme Court;*

“genocide” has the same meaning as in section 318;

“hate propaganda” means any writing, sign or visible representation that advocates or promotes genocide or the communication of which by any person would constitute an offence under section 319;

“judge” means a judge of a court. R.S., c. 11 (1st Supp.), s. 1; 1974-75, c. 48, s. 25; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 4; 1990, c. 17, s. 11; 1992, c. 1, s. 58.

#### CROSS-REFERENCES

The procedure in this section resembles the *in rem* procedure for obscene publications in s. 164 and thus see notes under that section respecting procedure. The procedure for obtaining a normal search warrant to obtain evidence of commission of an offence is set out in ss. 487 and 487.1.

#### SYNOPSIS

This section authorizes a judge of a court as defined in subsec. (8), with the consent of an Attorney General, to issue a warrant to seize copies of any publication where *reasonable grounds exist for believing* that the subject publication is hate propaganda and that copies are kept for sale or distribution in premises located within the court’s jurisdiction. Hate propaganda means writings, signs or representations that advocate or promote genocide or which would constitute the incitement or promotion of hatred against an identifiable group contrary to s. 319. Subsection (2) requires the judge to issue a summons to the



occupier of the premises that have been searched within seven days of the issuance of the warrant, requiring him to show cause why the seized copies should not be forfeited. The owner and author of the publication may appear and oppose forfeiture. Subsections (4) to (6) describe the procedure for forfeiture, restoration and appeal.

### ANNOTATIONS

A warrant may be issued under the general search warrant provision, s. 487, although the investigation relates to hate literature offences: *R. v. Keegstra* (1984), 19 C.C.C. (3d) 254 (Alta. Q.B.), revd on other grounds 43 C.C.C. (3d) 150, 65 C.R. (3d) 289 (C.A.).

## Part IX / OFFENCES AGAINST RIGHTS OF PROPERTY

### Interpretation

**DEFINITIONS / "break" / "credit card" / "document" / "exchequer bill" / "exchequer bill paper" / "false document" / "revenue paper".**

#### 321. In this Part

"break" means

- (a) to break any part, internal or external, or
- (b) to open any thing that is used or intended to be used to close or to cover an internal or external opening;

"Credit card" means any card, plate, coupon book or other device issued or otherwise distributed for the purpose of being used

- (a) on presentation to obtain, on credit, money, goods, services or any other thing of value, or
- (b) in an automated teller machine, a remote service unit or a similar automated banking device to obtain any of the services offered through the machine, unit or device;

"document" means any paper, parchment or other material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device, and includes a credit card, but does not include trade-marks on articles of commerce or inscriptions on stone or metal or other like material;

"exchequer bill" means a bank-note, bond, note, debenture or security that is issued or guaranteed by Her Majesty under the authority of Parliament or the legislature of a province;

"exchequer bill paper" means paper that is used to manufacture exchequer bills;

"false document" means a document

- (a) the whole or a material part of which purports to be made by or on behalf of a person
  - (i) who did not make it or authorize it to be made, or
  - (ii) who did not in fact exist,
- (b) that is made by or on behalf of the person who purports to make it but is false in some material particular,
- (c) that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made;

"revenue paper" means paper that is used to make stamps, licences or permits or for any purpose connected with the public revenue. R.S., c. C-34, s. 282; R.S.C. 1985, c. 27 (1st Supp.), s. 42.

## CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section.

*Theft*

**THEFT / Time when theft completed / Secrecy / Purpose of taking / Wild living creature.**

**322.** (1) Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it;
- (b) to pledge it or deposit it as security;
- (c) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform; or
- (d) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time it was taken or converted.

(2) A person commits theft when, with intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

(3) A taking or conversion of anything may be fraudulent notwithstanding that it is effected without secrecy or attempt at concealment.

(4) For the purposes of this Act, the question whether anything that is converted is taken for the purpose of conversion, or whether it is, at the time it is converted, in the lawful possession of the person who converts it is not material.

(5) For the purposes of this section, a person who has a wild living creature in captivity shall be deemed to have a special property or interest in it while it is in captivity and after it has escaped from captivity. R.S., c. C-34, s. 283.

## CROSS-REFERENCES

The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. For notes on the defence of mistake generally, see notes under s. 19. Section 323 deals with special property or interest in the case of oyster beds. Also, note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Section 583(b) deals with sufficiency of an indictment which fails to name the person who owns or has a special property or interest in property mentioned in the count. Sections 324 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. The related offence of false pretences is dealt with in ss. 361 to 363. Fraudulently obtaining food and lodging is an offence under s. 364. The general offence of fraud is contained in s. 380. The offence of secret commissions is set out in s. 426. The offence of possession of goods obtained by commission of an indictable offence is set out in ss. 354 and 355. The break and enter offences are dealt with in ss. 348 to 352. Robbery is dealt with in ss. 343 and 344. For notes on doctrine of recent possession, see s. 354.

## SYNOPSIS

This section describes the offence of theft.

Subsection (1) states that a person commits theft when the person takes or converts anything with the intent to deprive the owner or person who has special property in it, to deposit it as security, to part with it under conditions that make its return dubious, or to deal with it in a manner that makes it impossible to return it in the condition it was in

when it was taken. The person who commits theft as defined above must deal *fraudulently* and *without colour of right* with the subject matter of the charge. Subsection (3) states that a taking or conversion of a thing may be fraudulent even if it is done without secrecy or attempt at concealment. The section further sets out that a person who moves or causes a thing to be moved, or begins to make the thing moveable, with the *intent to steal* that thing, commits the offence of theft. Under subsection (4), the question of whether a converted item was taken for the purpose of conversion, or whether it is lawfully in the possession of the person who converted it is not material to an offence under this section. Finally, subsection (4) establishes that a person who has kept a wild living creature in captivity is deemed to have a special property or interest in the creature when it is in captivity and after it has escaped.

## ANNOTATIONS

**Special property or interest [also see s. 328]** – The special property or interest must be in the very thing alleged to have been stolen. The interest a person may have in protecting himself against loss or damage resulting from the use of a forged document by and in the possession of another is neither property nor special property nor interest in the forged document. Further, the property or the special property or interest must exist at the time at which the theft, either by taking or conversion, is committed: *Smith et al. v. The Queen* (1961), 131 C.C.C. 403, 36 C.R. 384 (S.C.C.).

In *R. v. Ben Smith; R. v. Harry Smith*, [1963] 1 C.C.C. 68, 38 C.R. 378 (Ont. C.A.) convictions for theft were upheld where the accused, who were directors of a company, without the knowledge of the other directors and without any authority from the company used the company's money to purchase certain shares which they then pledged with a bank to cover a personal overdraft. It was immaterial that the accused honestly intended, with reasonable prospects, to redeem the shares and pay back the company or that they in fact did so to the eventual profit of the company or that the accused were trustees for the company. On the facts the accused had temporarily deprived the company of a special property or interest in the shares, which includes the equitable interest of a *cestui que trust*.

A holder of a conditional sale agreement has an interest in his goods which are in the possession of the conditional buyer: *R. v. Maroney* (1974), 18 C.C.C. (2d) 257, 27 C.R.N.S. 185 (S.C.C.) (5:0).

Notwithstanding that it is being illegally held, a narcotic may be the subject of a theft as defined in this section, the person with *de facto* ownership of the narcotic having a special property or interest in it: *R. v. Grassier* (1981), 64 C.C.C. (2d) 520, 50 N.S.R. (2d) 230 (S.C. App. Div.).

**“Anything”** – In *R. v. Scallen* (1974), 15 C.C.C. (2d) 441 (B.C.C.A.) it was held that the word “anything” in this section was wide enough to include a bank credit and that “anything” need not be something tangible or material.

Similarly, in *R. v. Hardy* (1980), 57 C.C.C. (2d) 73 (B.C.C.A.), a conviction for theft of “money” from his employer was upheld where the accused caused cheques to be made out to himself as additional salary, caused other cheques to be issued to cover repairs to his own cars and home, and instructed the company bookkeeper to offset a supplier's invoice for supplies or services delivered to the accused against the supplier's indebtedness of the company. The majority of the Court were of the view that these various money credits with the employer's banker and with its customers which the accused diverted to himself or to his benefit were “anything” within the meaning of this section. Lambert J.A. although concurring in the result was of the view that dealings whereby the employer's accounts receivable were set-off were not within the indictment, a trade account receivable not properly being described as “money”.

To come within the term “anything” in this section, the thing which is taken, whether tangible or intangible, must be of a nature such that it can be the subject of a proprietary right and the property must be capable of being taken or converted in a manner that



results in the deprivation of the victim. Confidential information per se, rather than a list or other tangible object containing confidential information does not fall within this definition. Confidential information does not qualify as property for the purposes of this section and except in very unusual circumstances is not of a nature such that it can be taken or converted: *R. v. Stewart* (1988), 41 C.C.C. (3d) 481, 63 C.R. (3d) 305, [1988] 1 S.C.R. 963 (6:0).

A promissory note falls within the definition of property in s. 2 and is thus “anything” capable of being stolen within the meaning of this section: *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.).

**Proof of ownership** – In *Little and Wolski v. The Queen* (1974), 19 C.C.C. (2d) 385, 52 D.L.R. (3d) 1 (S.C.C.) (5:0), an appeal from conviction for theft was dismissed where although the owner of the goods allegedly stolen was named in the indictment as “Westwood Jewellers Limited” the only evidence was that the goods were stolen from “Westwood Jewellers” which was owned and managed by one of the witnesses. The Court divided on the effect of this apparent failure to prove ownership in the entity named in the indictment. de Grandpré, J., for the majority held that: . . . if the owner of the object allegedly stolen is mentioned in the indictment and if his ownership is not proven and there are no other circumstances to indicate to the accused the true nature of the charge, an acquittal should be entered. However, when, as in the present case there cannot be any possibility for the accused to fail to identify the transaction about which they are charged, there is no reason to discharge the accused for the sole reason that the owner mentioned in the indictment has not been mentioned in the evidence. Dickson, J., for himself and Beetz, J., while agreeing that the conviction was proper, held that except in exceptional circumstances as where the theft can be inferred from the suspicious circumstances of the accused’s possession, an allegation of ownership is not mere surplusage. However, the identity of the owner is sufficiently established: . . . in instances in which the owner is named in the indictment when, (i) the evidence adduced by the Crown reasonably identifies the owner with the person named in the indictment as owner, and (ii) it is clear that failure to prove the identity of the owner with greater precision has not misled or prejudiced the accused in preparation or presentation of his defence. In this case both (i) and (ii) were met and therefore the conviction was proper.

**Conversion** – In *R. v. Konken* (1971), 3 C.C.C. (2d) 348, [1971] 3 W.W.R. 752 (B.C.C.A.), the accused was acquitted of theft through conversion of a water pump. The majority held that the accused’s explanation for retaining the pump, after overhearing conversation which might have led him to believe the pump was not abandoned as he thought, was reasonable and therefore the Crown had failed to prove that the accused had fraudulently and without colour of right converted the pump. Nemetz, J.A., agreed that the accused should be acquitted and went on to hold that where a person retains goods innocently taken the essential element to support a conversion is that the knowledge subsequently acquired by the person must be of an unequivocal and unambiguous nature. In this case no knowledge of ownership was brought home to the accused.

**Intent to deprive owner** – In *R. v. O’Mahoney*, [1966] 2 C.C.C. 264, 47 C.R. 22 (B.C.C.A.), the accused was personally responsible for any shortages in accounts. Some shortages he made up by switching funds from one account to the other, but the ultimate deficiency he always made up from his own pocket. It was held that he did not have an intent to steal as set out in s. 322(1).

**“Fraudulently” including “prank” defence** – In *R. v. Ben Smith*; *R. v. Harry Smith*, *supra*, with respect to the issue of fraudulent intent the Court stated as follows (at p. 83 C.C.C.): “In *Stephen’s History of the Criminal Law*, 1883, vol. II, pp. 121-2 two essential elements of fraudulent intent are stated to be ‘deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that

deceit or secrecy'. In vol. III of the same work the learned author adds to these two essential elements a possible third element, really implicit in the first one, which is that the conduct must not only be wrongful but intentionally and knowingly wrongful."

In *R. v. Kerr*, [1965] 4 C.C.C. 37, 47 C.R. 268 (Man. C.A.), the accused openly took a large ashtray "as a prank", intending to return it. It was held that there was no *animus furandi* as is required by the Code. The "prank" defence was rejected in *R. v. Heminger and Hornigold*, [1969] 3 C.C.C. 201 (Man. C.A.), the Court distinguishing *Kerr* on the facts. In this case the accused had taken a chair from a beer parlour.

In *Bogner v. The Queen* (1975), 33 C.R.N.S. 349 (2:1) (Que. C.A.), the Court appears to have rejected the concept of a "prank" defence. The majority held that a general dishonest state of mind in addition to the intent to do the acts constituting the *actus reus* was not required.

In *R. v. Théroux*, [1993] 2 S.C.R. 5, 79 C.C.C. (3d) 449, 19 C.R. (4th) 194 the court considered the *mens rea* of fraud under s. 380 of the Criminal Code. In that context, the court held that "an act of deceit which is made carelessly without any expectation of consequences, as for example, an innocent prank or a statement made in debate which is not intended to be acted upon, would not amount to fraud because the accused would have no knowledge that the prank would put the property of those who heard it at risk." It is unclear whether this would have an application to the question of prank under this section.

The element of fraud cannot be inferred merely from the accused's failure to return goods which were given to him by the owner, although the time set for the return of the goods has expired: *Washington (State) v. Johnson* (1988), 40 C.C.C. (3d) 546, 62 C.R. (3d) 225, [1988] 1 S.C.R. 327 (4:3).

**Colour of right** – In *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369, 22 C.R.N.S. 258 (Ont. C.A.), it was held that an honestly asserted proprietary or possessory claim constitutes a colour of right notwithstanding it is unfounded in law or fact. Further, an absence of fraudulent intent may exist apart from a colour of right as conduct to be fraudulent must be dishonest and morally wrong. Also see *R. v. Howson*, [1966] 3 C.C.C. 348, 47 C.R. 322 (Ont. C.A.).

It was held in *R. v. Pace*, [1965] 3 C.C.C. 55, 48 D.L.R. (2d) 532 (N.S.S.C. App. Div.) that theft may still be committed though the object is of no use or value to the owner. The Court considered that a belief that the owner would consent to the taking if asked might constitute a colour of right defence but such a defence is not made out where the accused's belief is merely that no one would object to the taking.

The accused did not act under a colour of right where he obtained and then destroyed a promissory note evidencing his indebtedness to the complainant, because he believed that he was the victim of a fraud and feared losing his money. It was apparent that the accused was acting merely on the basis of a moral right in order to avoid having to exercise his legal rights through the court. A moral right cannot of itself found a colour of right: *R. v. Cinq-Mars* (1989), 51 C.C.C. (3d) 248 (Que. C.A.).

On a charge of theft involving alleged misappropriation by a travel agent, of money held in his trust account, the issue on the availability of the defence of colour of right was not what the jury thought the accused's rights were in relation to the account but whether the accused had an honest belief he had a right to the money: *Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1, 34 C.R. (3d) 297, [1983] 1 S.C.R. 794 (7:0).

An honest belief in a moral as opposed to a legal right cannot constitute a colour of right defence. However, a belief in a moral right may negative a fraudulent intent: *R. v. Hemmerly* (1976), 30 C.C.C. (2d) 141 (Ont. C.A.).

**Passing of property** – In determining whether property passed so that the offence, if any, could not constitute theft, the focus should be on the knowledge of the accused rather than the knowledge of the victim. Where a transferor mistakenly transfers prop-

erty to a recipient, and the recipient knows of the mistake, property does not pass for the purpose of the criminal law if the law of property creates a right of recovery, no matter whether the original transfer is said to be void or voidable. If the recipient then converts the property to his own use, fraudulently and without colour of right, and with intent to deprive the transferor of the property, then he is guilty of theft: *R. v. Milne* (1992), 70 C.C.C. (3d) 481, 12 C.R. (4th) 175, [1992] 1 S.C.R. 697 (5:0).

Where the accused received goods because the victim was induced to deliver them through the accused's fraud in providing a cheque which the accused knew would be dishonoured, then no title in the goods passed to the accused and he could be convicted of conversion. The civil law, such as the provincial Sale of Goods Act, had no application, provided that, as here, the victim had a right to recover the goods. It would be open to find an act of conversion when the accused took delivery and asserted ownership and control or later when he effected sales to third parties: *R. v. Smith* (1992), 77 C.C.C. (3d) 182 (Ont. C.A.), affd 84 C.C.C. (3d) 160n (S.C.C.) (5:0).

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### OYSTERS / Oyster bed.

**323. (1) Where oysters and oyster brood are in oyster beds, layings or fisheries that are the property of any person and are sufficiently marked out or known as the property of that person, that person shall be deemed to have a special property or interest in them.**

**(2) An indictment is sufficient if it describes an oyster bed, laying or fishery by name or in any other way, without stating that it is situated in a particular territorial division. R.S., c. C-34, s. 284.**

### CROSS-REFERENCES

The general offence of theft is set out in s. 322 and see cross-references under that section respecting related offences. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Also, note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Section 583(b) deals with sufficiency of an indictment which fails to name the person who owns or has a special property or interest in property mentioned in the count. Sections 324 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342.

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### THEFT BY BAILEE OF THINGS UNDER SEIZURE.

**324. Every one who is a bailee of anything that is under lawful seizure by a peace officer or public officer in the execution of the duties of his office, and who is obliged by law or agreement to produce and deliver it to that officer or to another person entitled thereto at a certain time and place, or on demand, steals it if he does not produce and deliver it in accordance with his obligation, but he does not steal it if his failure to produce and deliver it is not the result of a wilful act or omission by him. R.S., c. C-34, s. 285.**

### CROSS-REFERENCES

The term 'steal' is defined in s. 2 as committing theft. The general offence of theft is defined in s. 322. The terms "peace officer" and "public officer" are defined in s. 2. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Also, note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Section 583(b) deals with sufficiency of an indictment which fails to name the person who owns or has a special property or interest in property mentioned in the count. Sections 325 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See, in particular, criminal breach of trust under s. 336 and public servant refusing



to deliver property under s. 337. The offence of secret commission by an agent is set out in s. 426. See cross-references under s. 322 respecting other related offences.

### SYNOPSIS

This section describes the offence of theft by a bailee of things under seizure. When a person is the bailee of any item that has been lawfully seized by a peace officer or a public officer and is obliged by law or agreement to produce that item to a specific person at a certain time and place, or on demand, he is deemed by this section to have stolen the item if he does not deliver it in accordance with his obligation. This section only applies if his failure to deliver the item is the result of a wilful act or omission on his part.

### ANNOTATIONS

It is a necessary element of the offence under this section that the goods were lawfully seized. Where there is no evidence that the bailiff had ascertained that the goods which he purported to seize were on the premises at the time there was no valid seizure. An undertaking signed by the accused acknowledging the seizure and agreeing to hold the goods as a bailee could not be taken as an admission that the goods were on the premises if in fact they were not. Moreover whatever the civil consequences of signing the undertaking, in the absence of evidence that the accused read the undertaking it could not be taken as an admission in criminal proceedings: *R. v. Vroom* (1975), 23 C.C.C. (2d) 345, 58 D.L.R. (3d) 565 (Alta. S.C. App. Div.) (2:1).

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### AGENT PLEDGING GOODS, WHEN NOT THEFT.

**325.** A factor or an agent does not commit theft by pledging or giving a lien on goods or documents of title to goods that are entrusted to him for the purpose of sale or for any other purpose, if the pledge or lien is for an amount that does not exceed the sum of

- (a) the amount due to him from his principal at the time the goods or documents are pledged or the lien is given; and
- (b) the amount of any bill of exchange that he has accepted for or on account of his principal. R.S., c. C-34, s. 286.

### CROSS-REFERENCES

The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. As to meaning of "bill of exchange", see Bills of Exchange Act, R.S.C. 1985, c. B-4. Sections 324, 326 and 328 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See cross-references under s. 322 respecting other related offences.

### SYNOPSIS

This section sets out the circumstances in which an agent *does not* commit the offence of theft when dealing with goods entrusted to him for the purpose of sale or otherwise. An agent who pledges or gives a lien on goods is not guilty of theft if the pledge or lien is for an amount that does not exceed the sum of the amount due to him from his principal or the amount of any bill of exchange that he has accepted for or on account of his principal.

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### THEFT OF TELECOMMUNICATION SERVICE / Definition of "telecommunication".

**326.** (1) Every one commits theft who fraudulently, maliciously, or without colour of right,

- (a) abstracts, consumes or uses electricity or gas or causes it to be wasted or diverted; or

**(b) uses any telecommunication facility or obtains any telecommunication service.**

**(2) In this section and in section 327, “telecommunication” means any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual, or other electromagnetic system. R.S., c. C-34, s. 287; 1974-75-76, c. 93, s. 23.**

#### CROSS-REFERENCES

The term “radio” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Section 327(2) provides for an order of forfeiture of an instrument or device in relation to which an offence under para. (1)(b) was committed. Sections 328 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. The related offence of possession of a device for unlawfully obtaining a telecommunication facility or service is in s. 327 and unauthorized use of a computer service in s. 342.1. See cross-references under s. 322 respecting other related offences. Part VI deals with interception of private communications and note, in particular, the offence in s. 191 of possession of a device designed for surreptitious interception of private communications.

#### ANNOTATIONS

The word “fraudulently” does not mean that the Crown must prove that the accused deceived the utility company into willingly providing the service; the expression only connotes an intentional and deliberate taking of service that was not his to obtain: *R. v. Brais* (1972), 7 C.C.C. (2d) 301, 20 C.R.N.S. 190, [1972] 5 W.W.R. 671 (B.C.C.A.).

A charge of fraudulently using a telecommunication wire requires that the accused acted intentionally and deliberately with knowledge that the service was not the accused’s to obtain. Where the accused added several extension phones to the one properly installed by the telephone company the evidence failed to prove the element of knowledge that the incoming wire was not made available to him for use as he did and he was acquitted: *R. v. Renz* (1974), 18 C.C.C. (2d) 492 (B.C.C.A.).

The unauthorized use of the programmes and other information stored in a university computer did not involve use of a telecommunication facility within the meaning of this section notwithstanding access was gained to the computer through a remote terminal. This section is aimed at theft of information from a facility through which it is channelled; and a computer system is not a facility constructed to serve a telecommunication function as defined in subsec. (2) but is rather a data processing facility: *R. v. McLaughlin* (1980), 53 C.C.C. (2d) 417, [1980] 2 S.C.R. 331, 18 C.R. (3d) 339 (5:0). [Note: now see s. 342.1, *infra*.]

The offence under para. (b) is not made out where the accused having innocently obtained the pay-TV signal continued to watch the signal without paying the cable company: *R. v. Miller and Miller* (1984), 12 C.C.C. (3d) 466, 33 Alta. L.R. (2d) 97 (C.A.).

#### POSSESSION OF DEVICE TO OBTAIN TELECOMMUNICATION FACILITY OR SERVICE / Forfeiture / Limitation.

**327. (1) Every one who, without lawful excuse, the proof of which lies on him, manufactures, possesses, sells or offers for sale or distributes any instrument or device or any component thereof, the design of which renders it primarily useful for obtaining the use of any telecommunication facility or service, under circumstances that give rise to a reasonable inference that the device has been used or is or was intended to be used to obtain the use of any telecommunication facility or service without payment of a lawful charge therefor, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

**(2) Where a person is convicted of an offence under subsection (1) or paragraph**

326(1)(b), any instrument or device in relation to which the offence was committed or the possession of which constituted the offence, upon such conviction, in addition to any punishment that is imposed, may be ordered forfeited to Her Majesty, whereupon it may be disposed of as the Attorney General directs.

(3) No order for forfeiture shall be made under subsection (2) in respect of telephone, telegraph or other communication facilities or equipment owned by a person engaged in providing telephone, telegraph or other communication service to the public or forming part of the telephone, telegraph or other communication service or system of such a person by means of which an offence under subsection (1) has been committed if such person was not a party to the offence. 1974-75-76, c. 93, s. 24.

#### CROSS-REFERENCES

The term "telecommunication" is defined in s. 326(2). Possession is defined in s. 4(3). A party to an offence is defined in ss. 21 and 22. The related offence of theft of a telecommunication service is in s. 326. See cross-references under s. 322 respecting other related offences. Part VI deals with interception of private communications and note, in particular, the offence in s. 191 of possession of a device designed for surreptitious interception of private communications.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

#### SYNOPSIS

This section makes it an offence for a person to manufacture, possess, sell or offer for sale, or distribute any device or component which is primarily useful in the activity described in s. 326(1)(b), *i.e.*, theft of a telecommunication service. The section specifies that no criminal liability will be found where the accused has a lawful excuse for possession of the described device. The section puts the onus of establishing the lawful excuse upon the accused and may thereby give rise to a challenge under s. 11(d) of the Charter. Subsections (2) and (3) deal with the issue of forfeiture of the device described above upon conviction, but such forfeiture will not be imposed in respect of a telephone, telegraph or other communications equipment which is owned by a person in the business of providing a telecommunications service to the public who was not a party to the offence.

#### ANNOTATIONS

A device used to descramble pay-TV signals is a device the design of which renders it primarily useful for obtaining the use of a telecommunication service within the meaning of this section although the pay-TV service is carried on the same cable as the regular television service which the accused legitimately receives: *R. v. Lefave* (1984), 15 C.C.C. (3d) 287 (Ont. Gen. Sess. Peace).

The possession offence under this section does not require proof that the accused intended to use the device himself and would cover circumstances where the accused is in possession for storage purposes under circumstances which give rise to a reasonable inference that he knows that the intended use of the device is to be by other persons who will eventually receive them for the purposes of obtaining the telecommunications service without payment of lawful charges: *R. v. Fulop* (1988), 46 C.C.C. (3d) 427, 32 O.A.C. 44 (C.A.), *affd* 63 C.C.C. (3d) 288, 116 N.R. 79 (S.C.C.).

A computer program on a computer disc by which the accused could make long-distance telephone calls without charge constitutes an instrument or device within the meaning of this section: *R. v. Duck* (1985), 21 C.C.C. (3d) 529 (Ont. Dist. Ct.).

#### THEFT BY OR FROM PERSON HAVING SPECIAL PROPERTY OR INTEREST.

**328. A person may be convicted of theft notwithstanding that anything that is alleged to have been stolen was stolen**

(a) by the owner of it from a person who has a special property or interest in it;



- (b) by a person who has a special property or interest in it from the owner of it;
- (c) by a lessee of it from his reversioner;
- (d) by one of several joint owners, tenants in common or partners of or in it from the other persons who have an interest in it; or
- (e) by the directors, officers or members of a company, body corporate, unincorporated body or of a society associated together for a lawful purpose from the company, body corporate, unincorporated body or society, as the case may be. R.S., c. C-34, s. 288.

#### CROSS-REFERENCES

The term 'steal' is defined in s. 2 as committing theft. The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Also, note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Section 583(b) deals with sufficiency of an indictment which fails to name the person who owns or has a special property or interest in property mentioned in the count. Sections 324, 326 and 329 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See cross-references under s. 322 respecting other related offences.

#### SYNOPSIS

This section describes the circumstances in which the offence of theft may be committed by the owner of an item or a person who has a special property or interest in it. The following are situations in which the offence will have been committed: (a) when an item is taken by the owner from a person who has a special property or interest in it; (b) when a person who has a special property or interest in an item steals it from the owner; (c) when an item is stolen by a lessee from the person to whom it reverts; (d) when one of several joint owners, tenants in common or partners of or in an item, takes it from the others; and (e) when the directors, officers or members of a corporation, an unincorporated body or society steal an item from that corporation, body or society.

#### ANNOTATIONS

In *R. v. Ben Smith*; *R. v. Harry Smith*, [1963] 1 C.C.C. 68, 36 D.L.R. (2d) 613 (Ont. C.A.), it was held that a special property or interest included the equitable interest of a *cestui que trust*. In this case the accused had converted the shares of a company for their own personal use. See s. 322.

A neighbour taking care of a dwelling-house in the absence of the owner, at the owner's request, has a special property or interest in the house and the moveable property in it: *R. v. Rodrigue* (1987), 61 C.R. (3d) 381 (Que. C.A.).

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#### HUSBAND OR WIFE / Theft by spouse while living apart / Assisting or receiving.

**329. (1) Subject to subsection (2), no husband or wife, during cohabitation, commits theft of anything that is by law the property of the other.**

**(2) A husband or wife commits theft who, intending to desert or on deserting the other or while living apart from the other, fraudulently takes or converts anything that is by law the property of the other in a manner that, if it were done by another person, would be theft.**

**(3) Every one commits theft who, during cohabitation of a husband and wife, knowingly**

- (a) assists either of them in dealing with anything that is by law the property of the other in a manner that would be theft if they were not married; or
- (b) receives from either of them anything that is by law the property of the other

and has been obtained from the other by dealing with it in a manner that would be theft if they were not married. R.S., c. C-34, s. 289.

#### CROSS-REFERENCES

The accused's spouse is a competent and compellable witness at the instance of the Crown by virtue of s. 4(2). The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Also note s. 328 which provides for theft by persons who own or have a special property or interest in property. Sections 324, 326 and 330 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See cross-references under s. 322 respecting other related offences.

#### SYNOPSIS

This section sets out the general rule that no husband or wife commits theft of any item which is the property of the other during the period in which the spouses are living together. This rule does not apply when a husband or wife fraudulently takes or converts the property of the other if that spouse intends to desert or, in fact, lives apart from the other spouse. Subsection (3) stipulates that a person who knowingly assists a husband or a wife who are cohabiting in dealing with the other spouse's property in a manner that would be theft if they were not married, or who receives from either of them anything that is the property of the other and that has been obtained in a manner that would be theft if they were not married, himself commits the offence of theft.

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#### THEFT BY PERSON REQUIRED TO ACCOUNT / Effect of entry in account.

**330. (1)** Every one commits theft who, having received anything from any person on terms that require him to account for or pay it or the proceeds of it or a part of the proceeds to that person or another person, fraudulently fails to account for or pay it or the proceeds of it or the part of the proceeds of it accordingly.

(2) Where subsection (1) otherwise applies, but one of the terms is that the thing received or the proceeds or part of the proceeds of it shall be an item in a debtor and creditor account between the person who receives the thing and the person to whom he is to account for or to pay it, and that the latter shall rely only on the liability of the other as his debtor in respect thereof, a proper entry in that account of the thing received or the proceeds or part of the proceeds of it, as the case may be, is a sufficient accounting therefor, and no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for shall be deemed to have taken place. R.S., c. C-34, s. 290.

#### CROSS-REFERENCES

As to limitation on restitution of property see s. 491.1(3). The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Sections 324, 326, 328, 329 and 331 to 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See, in particular, criminal breach of trust under s. 336. The offence of secret commission by an agent is set out in s. 426. See cross-references under s. 322 respecting other related offences.

#### SYNOPSIS

This section describes a kind of theft which can be committed by a person who is required to account for, pay for or account for the proceeds of anything received from another person and *fraudulently* fails to do so. Subsection (2) creates an exception to this offence where a debtor-creditor account has been set up between two parties and a proper entry of the transaction is entered into that account.

## ANNOTATIONS

**Fraudulently** – The element of fraud cannot be inferred merely from the accused's failure to return the goods within a reasonable time: *Washington (State) v. Johnson* (1988), 40 C.C.C. (3d) 546, 62 C.R. (3d) 225, [1988] 1 S.C.R. 327 (4:3).

**Terms requiring accused to account** – In *Preston v. The Queen* (1958), 28 C.R. 51, 40 M.P.R. 220 (N.S.S.C., *in banco*), it was held (4:1) that the conviction failed upon lack of proof of the terms of accounting and fraudulent failure to account.

This section does not apply where the accused is required to return the specific article entrusted to him: *R. v. Kimbrough* (1918), 30 C.C.C. 56, 41 D.L.R. 40 (Alta. S.C. App. Div.).

An accused may be convicted of the offence described by this section where he failed to account for the proceeds of a cheque which he had been given while employed by a corporation, even if the improper dealings with the cheque may have arisen after the accused was fired by the corporation. The accused's obligation to account did not necessarily cease with his termination from the company: *R. v. Fischer* (1987), 31 C.C.C. (3d) 303, 53 Sask. R. 263 (C.A.).

**Debtor and creditor account [subsec. (2)]** – The saving provision of subsec. (2) does not apply where although the accused has a debtor and creditor relationship with persons to whom he is to pay the funds, it is no part of the terms on which the accused received the funds from a third party that the funds would be an item in a debtor and creditor account between the accused and the person to whom the funds were to be paid: *R. v. Lowden* (1981), 59 C.C.C. (2d) 1, 15 Alta. L.R. (2d) 250 (C.A.), *affd* on other grounds 68 C.C.C. (2d) 531, 139 D.L.R. (3d) 257 (S.C.C.) (9:0).

**Charging offence** – In *R. v. McKenzie* (1971), 4 C.C.C. (2d) 296, 16 C.R.N.S. 374, (S.C.C.), the accused was convicted on a charge that "... unlawfully did commit theft of the sum of approximately sixteen dollars and fifty cents, the property of Dominic Louis Christian contrary to the form of the statute in such case made and provided", where as a taxi driver he failed to remit to the taxi's owner all the money due to him. On appeal by the Crown it was held (5:0), that the information was by virtue of s. 492(2)(b) [now s. 581(2)(b)] framed to declare the matter charged to be an indictable offence in the words of s. 280 [now s. 334] and was therefore sufficient and that the accused's failure to account to his employer was theft within this section.

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## THEFT BY PERSON HOLDING POWER OF ATTORNEY.

**331. Every one commits theft who, being entrusted, whether solely or jointly with another person, with a power of attorney for the sale, mortgage, pledge or other disposition of real or personal property, fraudulently sells, mortgages, pledges or otherwise disposes of the property or any part of it, or fraudulently converts the proceeds of a sale, mortgage, pledge or other disposition of the property, or any part of the proceeds, to a purpose other than that for which he was entrusted by the power of attorney. R.S., c. C-34, s. 291.**

## CROSS-REFERENCES

The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Sections 324, 326, 328 to 330, 332 and 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See, in particular, criminal breach of trust under s. 336. The offence of secret commission by an agent is set out in s. 426. See cross-references under s. 322 respecting other related offences.

As to limitation on restitution of property see, s. 491.1(3).



## SYNOPSIS

This section sets out the offence of theft committed by a person who holds power of attorney. Any person entrusted solely or jointly with a power of attorney for the sale, mortgage, or other disposition of real or personal property, who *fraudulently* disposes of all or part of that property or *fraudulently* converts the proceeds of such disposition to a purpose other than that which the power of attorney specifies, commits the offence of theft.

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**MISAPPROPRIATION OF MONEY HELD UNDER DIRECTION / Effect of entry in account.**

**332. (1)** Every one commits theft who, having received, either solely or jointly with another person, money or valuable security or a power of attorney for the sale of real or personal property, with a direction that the money or a part of it, or the proceeds or a part of the proceeds of the security or the property shall be applied to a purpose or paid to a person specified in the direction, fraudulently and contrary to the direction applies to any other purpose or pays to any other person the money or proceeds or any part of it.

**(2)** This section does not apply where a person who receives anything mentioned in subsection (1) and the person from whom he receives it deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, unless the direction is in writing. **R.S., c. C-34, s. 292.**

## CROSS-REFERENCES

The term "valuable security" is defined in s. 2 and its value determined by reference to s. 4(2). The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334 and therefore see that section for cross-references respecting mode of trial and release pending trial as well as special procedural provisions. Sections 324, 326, 328, 329 to 331 and 333 define other means by which theft may be committed. Offences resembling theft are set out in ss. 335 to 342. See, in particular, criminal breach of trust under s. 336. The offence of secret commission by an agent is set out in s. 426. See cross-references under s. 322 respecting other related offences.

As to limitation on restitution of property see, s. 491.1(3).

## SYNOPSIS

This section describes the offence of theft of money held under direction. Any person who, *fraudulently* and *contrary to a direction* that money or valuable security be applied or paid to a specific person, applies to another purpose or pays to another person, part or all of the money or proceeds, commits the offence of theft. Subsection (1) does not apply if a debtor-creditor account exists, unless the direction referred to in subsec. (1) is in writing.

## ANNOTATIONS

A conviction under this section was upheld where the accused, president of a brokerage house, received money for the purchase of a portion of a bond issue and on the date that the bonds were to be delivered was unable to effect delivery as the bonds were held by a bank and the accused lacked the funds to obtain delivery. The accused in the meantime had applied the money received for the purchase of the bonds to cover debts of his company. The offence under this section does not depend on the existence of a mandate. All that is required is a direction which in this case was the confirmation given by the accused confirming the sale and the date of delivery. The defence under subsec. (2) did not apply as by the terms of the agreement the accused was not to apply the funds to the credit of the victim's account generally but was to use the funds for a particular purpose, namely to pay for the bonds on the day they were issued. Finally, it was no defence to

the charge that the accused was not required to keep the money *in specie*: *R. v. Legare* (1977), 36 C.C.C. (2d) 463, 78 D.L.R. (3d) 645 (S.C.C.) (4:3).

The existence of a debtor and creditor relationship in the absence of a direction is a question of fact to be decided by the jury: *R. v. Finlay*, [1968] 2 C.C.C. 157 (Y.T.C.A.).

Where the only evidence of a direction is the expectation on the part of the person who gave the money to the accused then the offence under this section is not made out. However, expectations known to the accused as a result of express instructions are directions and there need not also be instructions as to what not to do with the money. Thus, an accused travel agent was properly convicted where money was paid to him by his clients for the express purpose of purchasing airline tickets for a particular trip on a regular carrier and the accused accepted the money for the purpose of satisfying those expectations and then dealt with the money so as to defeat that purpose: *Lowden v. The Queen* (1982), 68 C.C.C. (2d) 531, 139 D.L.R. (3d) 257, [1982] 2 S.C.R. 60 (9:0).

## **TAKING ORE FOR SCIENTIFIC PURPOSE.**

**333. No person commits theft by reason only that he takes, for the purpose of exploration or scientific investigation, a specimen of ore or mineral from land that is not enclosed and is not occupied or worked as a mine, quarry or digging. R.S., c. C-34, s. 293.**

### **CROSS-REFERENCES**

The general offence of theft is defined in s. 322. The punishment for theft is set out in s. 334. For offences in relation to minerals and mines, see ss. 394 to 396.

## **PUNISHMENT FOR THEFT.**

**334. Except where otherwise provided by law, every one who commits theft**

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the property stolen is a testamentary instrument or the value of what is stolen exceeds five thousand dollars; or**
- (b) is guilty**
  - (i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or**
  - (ii) of an offence punishable on summary conviction, where the value of what is stolen does not exceed five thousand dollars. R.S., c. C-34, s. 294; 1972, c. 13, s. 23; 1974-75-76, c. 93, s. 25; R.S.C. 1985, c. 27 (1st Supp.), s. 43; 1994, c. 44, s. 20.**

### **CROSS-REFERENCES**

This section applies to theft as defined in ss. 322, 324, 326, 328 to 332. The terms “property” and “testamentary instrument” are defined in s. 2.

The offence in para. (a) may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or for a warrant to conduct video surveillance by reason of s. 487.01(5). Theft is an enterprise crime offence for the purposes of Part XII.2.

As to admission of photographic evidence of property, see s. 491.2. For proof by way of affidavit of ownership, lawful possession, value, and that the person was deprived of property by fraud or otherwise without the person’s lawful consent, see s. 657.1.

Where the offence, although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4).

The offence in para. (a) is an indictable offence for which the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by indictment for the offence under para. (b) then, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to

continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). As well, under s. 555(2), where, in the course of the trial, evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds \$1000 then the provincial court judge shall put the accused to his election under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). For the offence under para. (b), release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The value of a valuable security is determined in accordance with s. 4(2) and of a postal card or stamp in accordance with s. 4(1).

Section 588 deems certain persons to have a property interest in property of which they have the management, control or custody. By virtue of s. 583(b), an indictment which otherwise complies with s. 581 is not insufficient by reason that it fails to name the person who owns or has a special property or interest in property mentioned in the count. Offences resembling theft are set out in ss. 335 to 342. The related offence of false pretences is dealt with in ss. 361 to 363. Fraudulently obtaining food and lodging is an offence under s. 364. The general offence of fraud is contained in s. 380. The offence of secret commission is set out in s. 426. The offence of possession of goods obtained by commission of an indictable offence is set out in ss. 354 and 355. The break and enter offences are dealt with in ss. 348 to 352. Robbery is dealt with in ss. 343 and 344. Under s. 357, it is an offence to bring into or have in Canada anything that the accused has obtained outside Canada by an act that, if it had been committed in Canada, would have been the offence of theft.

## SYNOPSIS

This section sets out the punishment for the offence of theft as described in the preceding sections. Where the value of the property stolen is greater than five thousand dollars or it is a testamentary instrument, the offence of theft is indictable and a person convicted of the offence faces a maximum term of 10 years' imprisonment. In other cases, the offence is either indictable, with a maximum of two years of imprisonment, or summary. This section only applies if there is no other specific provision for punishment in law [for example, theft of a credit card under s. 342 which contains its own punishment section].

## Offences Resembling Theft

### TAKING MOTOR VEHICLE OR VESSEL WITHOUT CONSENT / Definition of "vessel".

**335. (1)** Every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated is guilty of an offence punishable on summary conviction.

**(2)** For the purposes of subsection (1), "vessel" has the meaning assigned by section 214. R.S., c. C-34, s. 296; 1972, c. 13, s. 23; R.S.C. 1985, c. 1 (4th Supp.), s. 15.

### CROSS-REFERENCES

The term "motor vehicle" is defined in s. 2.

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of theft is defined in s. 322 and punished in accordance with s. 334. While the offence under this section is not specifically made an included offence of theft under s. 334,



under s. 606(4), the accused may be permitted to plead guilty to this offence with the consent of the prosecutor.

### ANNOTATIONS

The offence under this section is not an included offence of theft under s. 334. The two offences are separate and in certain fact situations the accused may be prosecuted under either section at the option of the Crown. In particular an intent by the accused to return the vehicle does not preclude his conviction for theft: *LaFrance v. The Queen* (1973), 13 C.C.C. (2d) 289, 23 C.R.N.S. 100 (S.C.C.) (6:3).

Mere presence in a motor vehicle that had been unlawfully taken is not *per se* proof that he was a party to the original taking: *R. v. Eden*, [1970] 3 C.C.C. 280, [1970] 2 O.R. 161 (C.A.).

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### CRIMINAL BREACH OF TRUST.

**336. Every one who, being a trustee of anything for the use or benefit, whether in whole or in part, of another person, or for a public or charitable purpose, converts, with intent to defraud and in contravention of his trust, that thing or any part of it to a use that is not authorized by the trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 296.**

### CROSS-REFERENCES

The term “trustee” is defined in s. 2.

Related offences: s. 122, breach of trust by official (defined in s. 118); s. 426, secret commission; s. 331, theft by person holding power of attorney; s. 322, conversion; s. 332, theft by person holding money, etc., under direction; s. 380, fraud.

Pursuant to s. 583, an indictment, which otherwise complies with s. 581, is not insufficient by reason (b), that it does not name the person who owns the property or (c), that it charges an intent to defraud without naming the person whom it was intended to defraud.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

### SYNOPSIS

This section describes the offence of criminal breach of trust. Any person who acts as a trustee and who, *with intent to defraud and in contravention of his trust*, converts the object of the trust, or any part of it, to a use not authorized by the trust, commits an indictable offence and is liable to a maximum term of imprisonment of 14 years.

### ANNOTATIONS

The intent to defraud in this section is a limited intent directed to the trust duties: *R. v. Patricia* (1974), 17 C.C.C. (2d) 27, [1974] 4 W.W.R. 425 (B.C.C.A.).

Having charged the individual accused with the offence under this section in that “being a trustee of funds” he converted those funds to an unauthorized use, the Crown was required to prove that the accused was a trustee and it was not sufficient to prove he was party to an offence committed by the actual trustee, a corporate entity: *Rosen v. The Queen* (1985), 16 C.C.C. (3d) 481, 44 C.R. (3d) 232, [1985] 1 S.C.R. 83 (7:0).

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### PUBLIC SERVANT REFUSING TO DELIVER PROPERTY.

**337. Every one who, being or having been employed in the service of Her Majesty in right of Canada or a province, or in the service of a municipality, and entrusted by virtue of that employment with the receipt, custody, management or control of anything, refuses or fails to deliver it to a person who is authorized to demand it and does demand it, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 297.**

**CROSS-REFERENCES**

Related offences: s. 122, breach of trust by official (defined in s. 118); s. 426, secret commission; s. 322, conversion; s. 331, theft by person holding power of attorney; s. 332, theft by person holding money, etc., under direction; s. 380, fraud; s. 399, false return by public officer.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

**SYNOPSIS**

This section describes an offence which can only be committed by a public servant in the employ of the federal government or a provincial or municipal government. If such a public servant is entrusted in the course of employment with the custody, management or control of anything and *refuses or fails to deliver it upon the demand of a person authorized to make a demand*, that public servant commits an indictable offence under this section and is liable to imprisonment for a term not exceeding 14 years.

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**FRAUDULENTLY TAKING CATTLE OR DEFACING BRAND / Punishment for theft of cattle / Evidence of property in cattle / Presumption from possession.**

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**338. (1) Every one who, without the consent of the owner,**

(a) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells cattle that are found astray, or

(b) fraudulently, in whole or in part,

(i) obliterates, alters or defaces a brand or mark on cattle, or

(ii) makes a false or counterfeit brand or mark on cattle,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Every one who commits theft of cattle is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(3) In any proceedings under this Act, evidence that cattle are marked with a brand or mark that is recorded or registered in accordance with any Act is, in the absence of any evidence to the contrary, proof that the cattle are owned by the registered owner of that brand or mark.

(4) Where an accused is charged with an offence under subsection (1) or (2), the burden of proving that the cattle came lawfully into the possession of the accused or his employee or into the possession of another person on behalf of the accused is on the accused, if the accused is not the registered owner of the brand or mark with which the cattle are marked, unless it appears that possession of the cattle by an employee of the accused or by another person on behalf of the accused was without the knowledge and authority, sanction or approval of the accused. R.S., c. C-34, s. 298; 1974-75-76, c. 93, s. 26.

**CROSS-REFERENCES**

The term "cattle" is defined in s. 2. Possession is defined by s. 4(3). The general theft offence is defined in s. 322 and the general offence of possession of goods obtained by crime in s. 354. Other offences in relation to cattle are in s. 444. Under s. 357, it is an offence to bring into or have in Canada anything that the accused has obtained outside Canada by an act that, if it had been committed in Canada, would have been the offence of theft.

Pursuant to s. 583(b), an indictment, which otherwise complies with s. 581, is not insufficient by reason that it does not name the person who owns the property.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498 for the offence under subsec. (1).

## SYNOPSIS

This section sets up a code to govern the offence of stealing cattle, the punishment for this offence and some evidence and procedural provisions. Subsection (1) states that any person who, without the consent of the owner, *fraudulently* takes, keeps in his possession, holds, conceals, receives, appropriates, purchases or sells stray cattle is guilty of an indictable offence and liable to a maximum term of imprisonment of five years. Subsection (1) applies the same punishment to any person who *fraudulently* obliterates, alters or defaces a brand or mark, in whole or in part, on cattle, or who makes a false or counterfeit brand or mark on cattle. Subsection (2) describes the punishment for the more serious offence of cattle theft. This offence is also indictable but carries a maximum term of imprisonment of 10 years. Subsection (3) states that, in any proceedings under the Criminal Code, evidence that cattle are marked with a brand or mark registered in accordance with any Act is proof, in the absence of evidence to the contrary, that the cattle are owned by the registered owner of that brand. Subsection (4) puts the burden upon a person charged under subsec. (1) or (2) of proving that the cattle came lawfully into his possession or constructive possession, if that person is not the registered owner of the brand with which the cattle are marked. The accused will not bear the burden of proof under subsec. (4), if it appears that the possession of the cattle by an employee or other person on his behalf, was without the knowledge and authority, sanction or approval of the accused.

## ANNOTATIONS

A charge under this section was dismissed where, although the circumstances were suspicious and established negligence on the part of the accused in that he failed to make any attempt to verify the identity of the cattle and make those inspections which a reasonably prudent rancher would make, still the Crown had not established the requisite *mens rea*. This case was interesting in that expert evidence was adduced as to the behaviour of cows in “mothering up” to their own calves in order to establish that certain calves were not the offspring of the accused’s own cattle: *R. v. Galpin* (1977), 34 C.C.C. (2d) 545 (B.C. Prov. Ct.).

**TAKING POSSESSION ETC., OF DRIFT TIMBER / Dealer in second-hand goods / Search for timber unlawfully detained / Evidence of property in timber / Presumption from possession / Definitions / “coastal waters of Canada” / “lumber” / “lumbering equipment”.**

**339. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, without the consent of the owner,**

- (a) fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells,**
  - (b) removes, alters, obliterates or defaces a mark or number on, or**
  - (c) refuses to deliver up to the owner or to the person in charge thereof on behalf of the owner or to a person authorized by the owner to receive it,**
- any lumber or lumbering equipment that is found adrift, cast ashore or lying on or embedded in the bed or bottom, or on the bank or beach, of a river, stream or lake in Canada, or in the harbours or any of the coastal waters of Canada.**

**(2) Every one who, being a dealer in second-hand goods of any kind, trades or traffics in or has in his possession for sale or traffic any lumbering equipment that is marked with the mark, brand, registered timber mark, name or initials of a person, without the written consent of that person, is guilty of an offence punishable on summary conviction.**

**(3) A peace officer who suspects, on reasonable grounds, that any lumber owned by any person and bearing the registered timber mark of that person is kept or detained in or on any place without the knowledge or consent of that person, may enter into or**



on that place to ascertain whether or not it is detained there without the knowledge or consent of that person.

(4) Where any lumber or lumbering equipment is marked with a timber mark or a boom chain brand registered under any Act, the mark or brand is, in proceedings under subsection (1), and, in the absence of any evidence to the contrary, proof that it is the property of the registered owner of the mark or brand.

(5) Where an accused or his servants or agents are in possession of lumber or lumbering equipment marked with the mark, brand, registered timber mark, name or initials of another person, the burden of proving that it came lawfully into his possession or into possession of his servants or agents is, in proceedings under subsection (1), on the accused.

(6) In this section,

“coastal waters of Canada” includes all of Queen Charlotte Sound, all of the Strait of Georgia and the Canadian waters of the Strait of Juan de Fuca;

“lumber” means timber, mast, spar, shingle bolt, sawlog or lumber of any description;

“lumbering equipment” includes a boom chain, chain, line and shackle. R.S., c. C-34, s. 299.

#### CROSS-REFERENCES

Possession is defined by s. 4(3). The term “peace officer” is defined in s. 2. The power given a peace officer under subsec. (3) would seem to be a search within the meaning of s. 8 of the Charter of Rights and Freedoms and therefore see notes under that section.

Pursuant to s. 583(b), an indictment, which otherwise complies with s. 581, is not insufficient by reason that it does not name the person who owns the property.

The accused may elect his mode of trial pursuant to s. 536(2) for the offence under subsec. (1) and release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498. Trial of the offence described by subsec. (2) is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although note the maximum fine for a corporation is as set out in s. 719(b)] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section sets out a number of provisions that deal with offences in relation to certain specified kinds of lumber and lumbering equipment. Subsection (1)(a) states that any person who, *without the consent of the owner, fraudulently* takes, holds, keeps in his possession, appropriates, purchases or sells any lumber or lumbering equipment found adrift or embedded in the shore, bottom or bed of any river, stream or lake in Canada, or in the harbours of coastal waters of Canada commits an indictable offence with a maximum term of imprisonment of five years. Subsection (1)(b) and (c) apply the same punishment to any person who, *without the consent of the owner*, removes, alters, obliterates or defaces a mark or number, or who refuses to deliver to the owner or person authorized to receive it, any lumber found in the places described above. It is to be noted that subsec. (1)(a) specifies that the acts described therein be committed *fraudulently* whereas subsec. (1)(b) and (c) do not have the same requirement. Subsection (2) makes it a summary conviction offence for a second-hand dealer to trade, or have in his possession to sell, lumbering equipment that is marked with the name or initials of a person or with a name, brand or registered timber mark, unless the dealer has the *written consent* of that person. Subsection (3) empowers a peace officer, who has *reasonable grounds to suspect* that lumber owned by another person is being kept or detained in any place without the

owner's knowledge or consent, to enter that place to ascertain whether or not his suspicions are founded. This section, which permits entry into a place without a warrant, may be found to offend s. 8 of the Charter. Any lumber or lumbering equipment marked with a registered timber mark or boom chain brand is presumed to be the property of the registered owner of the mark or brand in proceedings under subsec. (1), unless there is evidence to the contrary. Subsection (5) places on a person charged under subsec. (1) the burden of proving that lumber or lumbering equipment marked with a brand mark, registered timber mark, name or initials of another person, that is in the possession of the accused came to be so possessed lawfully.

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### DESTROYING DOCUMENTS OF TITLE.

**340. Every one who, for a fraudulent purpose, destroys, cancels, conceals or obliterates**

- (a) a document of title to goods or lands,**
- (b) a valuable security or testamentary instrument, or**
- (c) a judicial or official document,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 300.**

### CROSS-REFERENCES

The terms "document of title to goods", "document of title to lands", "valuable security" and "testamentary instrument" are defined in s. 2. The value of a valuable security is determined in accordance with s. 4(2).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

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### FRAUDULENT CONCEALMENT.

**341. Every one who, for a fraudulent purpose, takes, obtains, removes or conceals anything is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 301.**

### CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498. The related offences of fraudulent concealment of title documents are in ss. 340 and 385.

Where the offence, although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4).

### SYNOPSIS

This section describes the offence of fraudulent concealment. Any person who, *for a fraudulent purpose*, takes, removes or conceals *anything* commits the offence. The offence is indictable and carries a maximum term of two years' imprisonment.

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### THEFT, FORGERY, ETC., OF CREDIT CARD / Jurisdiction.

**342. (1) Every one who**

- (a) steals a credit card,**
- (b) forges or falsifies a credit card,**
- (c) has in his possession, uses or deals in any other way with a credit card that he knows was obtained**
  - (i) by the commission in Canada of an offence, or**
  - (ii) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence, or**
- (d) uses a credit card that he knows has been revoked or cancelled**

is guilty of

- (e) an indictable offence and is liable to imprisonment for a term not exceeding ten years, or
- (f) an offence punishable on summary conviction.

(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be commenced in that place without the consent of the Attorney General of that province. 1974-75-76, c. 93, s. 27; R.S.C. 1985, c. 27 (1st Supp.), s. 44.

(3) [*Repealed.* R.S.C. 1985, c. 27 (1st Supp.), s. 44.]

#### CROSS-REFERENCES

The term "credit card" is defined in s. 321. The term "steal" is defined in s. 2 as theft. Possession is defined by s. 4(3), however, s. 358 defines circumstances in which possession is complete. "Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.] Section 359 enacts a special evidentiary rule. Under s. 359, evidence that stolen property was found in the accused's possession in the previous 12 months is admissible to prove knowledge that the property that forms the subject-matter of the proceedings was stolen property. For the section to be invoked, notice must be given to the accused.

The general theft offence is defined by s. 322; the general offence of possession of goods obtained by crime by s. 354; the general forgery and uttering offences by ss. 366 to 368. Obtaining credit by fraud or by false pretences is an offence under s. 362. Bringing into Canada anything obtained outside Canada by an act that, if committed in Canada, would have been an offence under this section if committed in Canada, is an offence under s. 357.

It would seem that where the prosecution elects to proceed by indictment then the accused may elect his mode of trial pursuant to s. 536(2). However, s. 553(a) provides that a provincial court judge has absolute jurisdiction to try an accused charged with "theft" where the value of the subject-matter of the offence does not exceed \$1000 and, therefore, query whether the offence described by para. (1)(a) is governed by s. 553(a). Where the prosecution elects to proceed by way of summary conviction then the trial of the offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial in any case is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section deals with offences in relation to a credit card. Subsection (1) makes it a hybrid offence, with a maximum term of imprisonment of ten years upon conviction for the indictable offence, to steal, forge or falsify a credit card, or to use a credit card which the accused knows has been revoked or cancelled. Subsection (1) further states that any person who has in his possession, uses or deals in any way with a credit card which that person *knows* was obtained anywhere by an action which, in Canada, is or would be an offence, commits an offence. Subsection (2) provides that the trial of an offence under subsec. (1) may be held either where the offence is alleged to have been committed or anywhere the accused is found, arrested or in custody. If the accused is found, arrested or in custody outside the province where the offence under subsec. (1) is alleged to have been committed, *the consent of the Attorney General* of that province is required before a trial may be commenced.



## ANNOTATIONS

Where the information is drafted to come within subsec. (1)(c)(ii) but specifies that the credit card was obtained by an “offence” that if it had occurred in Canada would have constituted an offence then the Crown having particularized the act or omission as an “offence” must prove that it was an offence known to the law of the place where it allegedly took place. This would require proof of the foreign law: *R. v. Ingram et al.* (1978), 43 C.C.C. (2d) 211 (Ont. Prov. Ct.).

It was held in *R. v. Colman*, [1981] 3 W.W.R. 572, 29 A.R. 170 (Q.B.) that inasmuch as subsec. (1)(c) in the French version creates only one offence an accused charged with possession of the credit card may successfully plead *autrefois acquit* based on a prior acquittal on an information charging that she unlawfully did “use or deal” with the credit card. Since the French version was more favourable to the accused it was that version which must be adopted. Cavanagh J. noted that the Yukon Territory Court of Appeal came to a contrary conclusion in *R. v. McKay* (1978), 39 C.C.C. (2d) 101, 3 C.R. (3d) 1, but without any reference to the French version of this subsection.

A credit card was “obtained by” commission of an indictable offence where it was originally simply found by the accused but he subsequently formed the intention to convert the card to his own use: *R. v. Costello* (1982), 1 C.C.C. (3d) 403, [1983] 1 W.W.R. 666 (B.C.C.A.). Folld: *R. v. Zurowski* (1983), 5 C.C.C. (3d) 285, 33 C.R. (3d) 93 (Alta. C.A.); *R. v. Elias* (1986), 33 C.C.C. (3d) 476 (Que. C.A.), affd 46 C.C.C. (3d) 447 (S.C.C.) (5:0).

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**UNAUTHORIZED USE OF COMPUTER / Definitions / “computer program” / “computer service” / “computer system” / “data” / “electro-magnetic, acoustic, mechanical or other device” / “function” / “intercept”.**

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**342.1. (1) Every one who, fraudulently and without color of right,**

- (a) obtains, directly or indirectly, any computer service,
- (b) by means of an electro-magnetic, acoustic, mechanical or other device, intercepts or causes to be intercepted, directly or indirectly, any function of a computer system, or
- (c) uses or causes to be used, directly or indirectly, a computer system with intent to commit an offence under paragraph (a) or (b) or an offence under section 430 in relation to data or a computer system

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or is guilty of an offence punishable on summary conviction.

**(2) In this section,**

“computer program” means data representing instructions or statements that, when executed in a computer system, causes the computer system to perform a function;  
 “computer service” includes data processing and the storage or retrieval of data;  
 “computer system” means a device that, or a group of interconnected or related devices one or more of which,

- (a) contains computer programs or other data, and
- (b) pursuant to computer programs,
  - (i) performs logic and control, and
  - (ii) may perform any other function;

“data” means representations of information or of concepts that are being prepared or have been prepared in a form suitable for use in a computer system;

“electro-magnetic, acoustic, mechanical or other device” means any device or apparatus that is used or is capable of being used to intercept any function of a computer system, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing;

“function” includes logic, control, arithmetic, deletion, storage and retrieval and communication or telecommunication to, from or within a computer system;

"intercept" includes listen to or record a function of a computer system, or acquire the substance, meaning or purport thereof. R.S.C. 1985, c. 27 (1st Supp.), s. 45.

#### CROSS-REFERENCES

The term "telecommunication" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. As to notes respecting the term "colour of right", see notes under s. 322.

Related offences: s. 184, unlawful interception of private communications; s. 326, theft of telecommunication service; s. 327, possession of device to unlawfully obtain telecommunication facility or service; s. 430(1.1), mischief in relation to data.

The accused may elect his mode of trial pursuant to s. 536(2) where the prosecution elects to proceed by way of indictment. Where the prosecution elects to proceed by way of summary conviction then the trial is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although note the maximum fine for a corporation is as set out in s. 719(b)] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section makes it a hybrid offence for a person *fraudulently* or *without colour of right* to obtain, directly or indirectly, any computer service, or to intercept or cause to be intercepted, directly or indirectly, any function of a computer service by means of any device. It further states that it is an offence to use or cause to be used, directly or indirectly, a computer system *with intent* to commit either of the offences described above or an offence under s. 430. Subsection (2) contains an extensive set of definitions of terms relevant to this offence. The maximum term of imprisonment upon conviction for the indictable offence described in this section is ten years.

## Robbery and Extortion

### ROBBERY.

#### 343. Every one commits robbery who

- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;
- (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person;
- (c) assaults any person with intent to steal from him; or
- (d) steals from any person while armed with an offensive weapon or imitation thereof. R.S., c. C-34, s. 302.

#### CROSS-REFERENCES

The terms "offensive weapon" and "property" are defined in s. 2. The term "steal" is defined in s. 2 as committing theft. Theft is defined in ss. 322 to 333, but principally in s. 322. Assault is defined in s. 265. The punishment for robbery is set out in s. 344.

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of "robbery". As to admission of photographic evidence of property, see s. 491.2. Under s. 583, an indictment, which otherwise complies with s. 581, is not insufficient by reason only that (a), it does not name the person injured or intended to be injured; (b), it does not name the person who owns or has a special property or interest in the property mentioned in the count, however, see s. 587 as to when particulars may be ordered. Also note s. 588 which deems certain persons to have a property

interest in property of which they have the management, control or custody. This offence has often posed problems respecting included offences. Thus, see notes under s. 662.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 for a warrant to conduct video surveillance by reason of s. 487.01(5). Robbery is an enterprise crime offence for the purposes of Part XII.2.

Where the offence, although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4):

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

Related offences: s. 85, using firearm during commission or attempted commission of indictable offence; s. 244, discharging firearm with intent to wound; s. 264.1, uttering threats; s. 266, assault; s. 267, assault with a weapon or causing bodily harm; s. 268, aggravated assault; s. 272, sexual assault with a weapon; s. 273, aggravated sexual assault; s. 279, kidnapping and unlawful confinement; s. 345, stopping mail with intent to rob; s. 346, extortion; s. 348, break and enter; s. 351(2), disguised with intent.

## SYNOPSIS

This section describes the offence of robbery. Every person who *steals* and uses violence or threats of violence to another person or property in order to overcome resistance to the stealing or to extort whatever is stolen, commits the form of robbery set out in para. (a). Everyone who *steals* from any person and, during the course of the stealing, or *immediately* before or after, wounds, beats or uses any personal violence to that person commits the form of robbery set out in para. (b). A person who assaults another person *with the intent to steal* from him commits the offence of robbery described in para. (c). Finally, everyone who *steals* from any person while armed, with an offensive weapon or an imitation thereof, commits the offence of robbery described in para. (d). It is to be noted that paras. (a), (b) and (d) require proof of the act of stealing as one of the elements of the offence. Paragraph (c) requires proof only of an intent to steal as an essential element.

## ANNOTATIONS

**Use of violence or threats of violence [para. (a)]** – Assault, for which only a general intent is required, may be a lesser and included offence in the charge of unlawfully and by violence stealing, which also requires proof of the specific intent to carry out that purpose: *R. v. George* (1960), 128 C.C.C. 289, 34 C.R. 1 (S.C.C.) (4:1).

The offence under this paragraph is not made out in a “purse snatching” case where the accused simply snatches the purse before the victim could offer any resistance and he uses no other violence to the victim: *R. v. Picard* (1976), 39 C.C.C. (2d) 57 (Que. Sess. Ct.).

However, where the victim’s arms are held to prevent resistance while the money is taken, then the offence is made out: *R. v. Trudel* (1984), 12 C.C.C. (3d) 342 (Que. C.A.).

In *R. v. Katrensky* (1975), 24 C.C.C. (2d) 350, [1975] 5 W.W.R. 732 (B.C. Prov. Ct.), the accused was convicted of robbery as defined in this section where he merely handed the bank teller a note stating “empty your till”. It was held that to constitute a threat of violence the Crown must prove that the victim felt threatened and that she had reasonable and probable grounds for her fear. In this case while there may not have been any immediate fear of violence, the implied threat of violence if the request was not carried out was sufficient to constitute the act of the accused robbery.

Threats of violence within the meaning of this paragraph would include any demonstration from which physical injury to the victim may be reasonably apprehended: *R. v. Sayers and McCoy* (1983), 8 C.C.C. (3d) 572 (Ont. C.A.).

A threat of violence is characterized by conduct which reflects an intent to have



recourse to violence in order to carry out the theft or to prevent resistance to the theft. A threat may be expressed or implicit and made by means of words, writings or actions. There is no requirement that the accused be armed or utter words such as "This is a hold up". The question is whether the actions and words of the accused, in light of the context and circumstances in which they took place, could reasonably create a feeling of apprehension on the part of the victims: *R. v. Pelletier* (1992), 71 C.C.C. (3d) 438, 44 Q.A.C. 168 (C.A.).

**Stealing and using violence [para. (b)]** – In order to avoid an interpretation repetitious to para. (a), this paragraph should be regarded as setting out what one might call constructive robbery occurring with theft and a proximate application of violence *R. v. Lieberman*, [1970] 5 C.C.C. 300, 11 C.R.N.S. 168 (Ont. C.A.) (2:1). It is not necessary that the violence be used to accomplish or further the theft. The purpose for which the personal violence is used is immaterial provided it accompanies the act of stealing or immediately precedes it or follows it: *R. v. Downer* (1978), 40 C.C.C. (2d) 532 (Ont. C.A.).

The "violence" contemplated by this paragraph requires proof of more than a mere assault. Thus the mere nudging of the victim to steal her purse is not sufficient: *R. v. Lew* (1978), 40 C.C.C. (2d) 140 (Ont. C.A.). Similarly: *R. v. Oakley* (1986), 24 C.C.C. (3d) 351 (Ont. C.A.).

**Assault with intent to steal [para. (c)]** – A charge that the accused "did commit robbery [of the victim] of approximately \$15" particularizes a completed stealing and where the Crown fails to prove that any money was stolen the Crown cannot rely on the definition of robbery in this paragraph to make out the offence. The accused may, however, be convicted of attempted robbery: *R. v. Bob* (1980), 54 C.C.C. (2d) 169 (B.C.C.A.).

**Stealing while armed [para. (d)]** – To be "armed" means to be equipped with or possessed of an instrument: *R. v. Sloan* (1974), 19 C.C.C. (2d) 190 (B.C.C.A.).

A charge of robbery was dismissed where the accused was charged that he "simulated with his fist that he was armed". It was held that this paragraph requires that the accused be armed with a weapon or an imitation thereof and no part of the body can resemble an offensive weapon: *R. v. Gouchie* (1976), 33 C.C.C. (2d) 120 (Que. Sess. Peace).

The offence under this paragraph does not require that the accused intended to use the weapon or that the victim be frightened or intimidated by its presence: *Tremblay v. A.-G. Que. et al.* (1984), 43 C.R. (3d) 92 (Que. C.A.).

**Mens rea generally** – An honest belief that a debt was due from the victim to himself will vitiate the element of theft in a robbery charge against the accused: *R. v. Carroll* (1975), 27 C.C.C. (2d) 276, 31 C.R.N.S. 398 (Ont. C.A.).

**Included offences** – This section creates only one offence, namely robbery, which may be committed in any of the different ways described. On a charge of stealing while armed, under subsec. (d) while theft is an included offence, assault is not as the mere fact of being armed does not necessarily involve an assault. Where the Crown alleges in the indictment the particular means by which the robbery was committed, as here, "did steal . . . while armed with an imitation of an offensive weapon" it is required to prove every essential averment of the charge and could not require the trial Judge instruct the jury to consider whether robbery was committed in one of the other ways described in the section: *R. v. Johnson* (1977), 35 C.C.C. (2d) 439, 2 B.C.L.R. 193 (C.A.).

The fact that robbery may be committed in ways which do not include an assault does not alter the fact that robbery as described in this section does include the offence of assault. It is sufficient that an offence such as assault is included in the enactment creating the principal offence, it need not be necessarily included. Thus common assault was an included offence although the indictment merely alleged that the accused "unlawfully did commit robbery of [the victim] of a quantity of cigarettes and approximately \$4.00 in

cash”: *Luckett v. The Queen* (1980), 50 C.C.C. (2d) 489, [1980] 1 S.C.R. 1140, 105 D.L.R. (3d) 577 (7:0).

The accused may be convicted of assault causing bodily harm on an indictment charging robbery *simpliciter*. The inclusion of the word “wounds” in the definition of robbery in para. (b) makes assault causing bodily harm an included offence: *R. v. Horsefall* (1990), 61 C.C.C. (3d) 245 (B.C.C.A.).

An indictment which charges robbery under para. (c) includes attempted theft so that the accused may be convicted of that offence where the evidence establishes a theft but no assault: *R. v. Boisvert* (1991), 68 C.C.C. (3d) 478 (Que. C.A.).

**Property which may be subject-matter of offence** – A narcotic may be the subject of a robbery notwithstanding it constitutes an offence for the victim to be in possession of it: *R. v. Janzic* (1982), 1 C.C.C. (3d) 246 (Ont. C.A.), leave to appeal to S.C.C. refused 46 N.R. 90n.

## ROBBERY.

- 344. Every person who commits robbery is guilty of an indictable offence and liable**  
 (a) **where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and**  
 (b) **in any other case, to imprisonment for life. R.S., c. C-34, s. 303; 1972, c. 13, s. 70; 1995, c. 39, s. 149.**

## CROSS-REFERENCES

Robbery is defined in s. 343.

As to admission of photographic evidence of property see, s. 491.2. Firearm is defined in s. 2.

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of “robbery”. Under s. 583, an indictment, which otherwise complies with s. 581, is not insufficient by reason only that (a), it does not name the person injured or intended to be injured; (b), it does not name the person who owns or has a special property or interest in the property mentioned in the count, however, see s. 587 as to when particulars may be ordered. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. This offence has often posed problems respecting included offences. Thus, see notes under s. 662.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance by reason of s. 487.01(5). Robbery is an enterprise crime offence for the purposes of Part XII.2.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section will be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

Related offences: s. 85, using firearm during commission or attempted commission of indictable offence; s. 244, discharging firearm with intent to wound; s. 264.1, uttering threats; s. 266, assault; s. 267, assault with a weapon or causing bodily harm; s. 268, aggravated assault; s. 272, sexual assault with a weapon; s. 273, aggravated sexual assault; s. 279, kidnapping and unlawful confinement; s. 345, stopping mail with intent to rob; s. 346, extortion; s. 348, break and enter; s. 351(2), disguised with intent.

## STOPPING MAIL WITH INTENT.

- 345. Every one who stops a mail conveyance with intent to rob or search it is guilty of an indictable offence and liable to imprisonment for life. R.S., c. C-34, s. 304.**

## CROSS-REFERENCES

Robbery is defined in s. 343. The term “mail conveyance” is defined in s. 2 of the Canada Post Cor-

poration Act, R.S.C. 1985, c. C-10 as meaning "any physical, electronic, optical or other means used to transmit the mail". That section also contains the definition of "mail".

Section 476(e) contains a special provision for territorial jurisdiction where an offence is committed in respect of a mail in the course of door-to-door delivery.

The related offence of theft from the mail is in s. 356. Using a firearm during commission or attempted commission of an indictable offence is an offence under s. 85. Disguised with intent is an offence under s. 351(2).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section may be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

## EXTORTION / Punishment / Saving.

**346. (1) Every one commits extortion who, without reasonable justification or excuse and with intent to obtain anything, by threats, accusations, menaces or violence induces or attempts to induce any person, whether or not he is the person threatened, accused or menaced or to whom violence is shown, to do anything or cause anything to be done.**

- (1.1) Every person who commits extortion is guilty of an indictable offence and liable**  
**(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and**  
**(b) in any other case, to imprisonment for life.**

**(2) A threat to institute civil proceedings is not a threat for the purposes of this section. R.S., c. C-34, s. 305; R.S.C. 1985, c. 27 (1st Supp.), s. 46; 1995, c. 39, s. 150.**

## CROSS-REFERENCES

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance by reason of s. 487.01(5). Extortion is an enterprise crime offence for the purposes of Part XII.2.

Where the offence, although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4). Firearm is defined in s. 2.

Related offences: s. 85, using firearm during commission or attempted commission of indictable offence; s. 244, discharging firearm with intent to wound; s. 264.1, uttering threats; s. 266, assault; s. 267, assault with a weapon or causing bodily harm; s. 268, aggravated assault; s. 279, kidnapping and unlawful confinement; s. 343, robbery; s. 347, criminal interest rate; s. 302, extortion by libel.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section may be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

## SYNOPSIS

This section describes the offence of extortion. Any person who, *without reasonable justification or excuse* and *with intent to obtain anything*, induces or attempts to induce another person by means of threats, accusations, menaces or violence, to do anything or cause anything to be done, commits the offence of extortion. The person threatened or menaced does not necessarily have to be the person from whom the accused is expecting action. This is an indictable offence with a maximum term of life imprisonment and a minimum term of four years where a firearm is used in the commission of the offence. Subsection (2) clarifies that a threat to institute civil proceedings is not a threat for the purposes of this section.

## ANNOTATIONS

**"Anything"** – The word "anything" is of a wide and unrestricted use and accordingly



the extorting of an act of sexual intercourse is an offence: *R. v. Bird*, [1970] 3 C.C.C. 340, 9 C.R.N.S. 1 (B.C.C.A.).

**Threats or menaces** – A “threat” to come within this section does not necessarily connote a menace of ill to be personally inflicted by the threatener. Thus a false statement by the accused that if the victim does not do a certain thing he will be dealt with by a third person of known violent propensities or associations will constitute this offence: *R. v. Swartz* (1977), 37 C.C.C. (2d) 409 (Ont. C.A.), *affd* without reference to the point 45 C.C.C. (2d) 1, 7 C.R. (3d) 185, *sub nom. R. v. Cotroni; Papalia v. The Queen* (S.C.C.).

There is no requirement that the threats or menaces be shown to be of such a nature as to deprive the victim of the free and voluntary exercise of his will: *R. v. Syrmalis and Syrmalis*; *R. v. Laurie* (1981), 63 C.C.C. (2d) 452 (Que. C.A.).

An approach by a lawyer to a lawyer acting for another party to have certain criminal charges dropped in exchange for a sum of money, if made without threats, accusations, menaces or violence does not constitute an offence under this section: *Rousseau v. The Queen* (1985), 21 C.C.C. (3d) 1, [1985] 2 S.C.R. 38 (S.C.C.).

**Reasonable justification of excuse** – In *R. v. Natarelli And Volpe*, [1968] 1 C.C.C. 154, 1 C.R.N.S. 302 (S.C.C.), it was held that in determining whether there could be reasonable justification or excuse for making the demand or using threats, the accused’s entire course of conduct, and not one isolated item thereof, must be considered; and once it is proved that the accused made threats to cause death or bodily injury with intent to obtain consideration, then they are guilty regardless of whether they honestly believed that they did have or whether they actually had a right to the consideration demanded.

On a charge contrary to this section, arising out of seizure of certain property, evidence was admissible as to what the accused had been told by a bailiff to whom he had spoken. This information was not admissible for its truth, but was admissible to show the accused’s state of mind and the honesty of his belief and whether he had reasonable justification or excuse for his actions: *R. v. Toth* (1989), 8 W.C.B. (2d) 147 (Ont. C.A.).

## Criminal Interest Rate

**CRIMINAL INTEREST RATE / Definitions / “credit advanced” / “criminal rate” / “insurance charge” / “interest” / “official fee” / “overdraft charge” / “required deposit balance” / Presumption / Proof of effective annual rate / Notice / Cross-examination with leave / Consent required for proceedings / Application.**

347. (1) Notwithstanding any Act of Parliament, every one who

- (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
- (b) receives a payment or partial payment of interest at a criminal rate, is guilty of
- (c) an indictable offence and liable to imprisonment for a term not exceeding five years, or
- (d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

(2) In this section,

“credit advanced” means the aggregate of the money and the monetary value of any goods, services or benefits actually advanced or to be advanced under an agreement or arrangement minus the aggregate of any required deposit balance and any fee, fine, penalty, commission and other similar charge or expense directly or indirectly incurred under the original or any collateral agreement or arrangement;

“criminal rate” means an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds sixty per cent on the credit advanced under an agreement or arrangement;

“insurance charge” means the cost of insuring the risk assumed by the person who advances or is to advance credit under an agreement or arrangement, where the face amount of the insurance does not exceed the credit advanced;

“interest” means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

“official fee” means a fee required by law to be paid to any governmental authority in connection with perfecting any security under an agreement or arrangement for the advancing of credit;

“overdraft charge” means a charge not exceeding five dollars for the creation of or increase in an overdraft, imposed by a credit union or caisse populaire the membership of which is wholly or substantially comprised of natural persons or a deposit taking institution the deposits in which are insured, in whole or in part, by the Canada Deposit Insurance Corporation or guaranteed, in whole or in part, by the Quebec Deposit Insurance Board;

“required deposit balance” means a fixed or an ascertainable amount of the money actually advanced or to be advanced under an agreement or arrangement that is required, as a condition of the agreement or arrangement, to be deposited or invested by or on behalf of the person to whom the advance is or is to be made and that may be available, in the event of his defaulting in any payment, to or for the benefit of the person who advances or is to advance the money.

(3) Where a person receives a payment or partial payment of interest at a criminal rate, he shall, in the absence of evidence to the contrary, be deemed to have knowledge of the nature of the payment and that it was received at a criminal rate.

(4) In any proceedings under this section, a certificate of a Fellow of the Canadian Institute of Actuaries stating that he has calculated the effective annual rate of interest on any credit advanced under an agreement or arrangement and setting out the calculations and the information on which they are based is, in the absence of evidence to the contrary, proof of the effective annual rate without proof of the signature or official character of the person appearing to have signed the certificate.

(5) A certificate referred to in subsection (4) shall not be received in evidence unless the party intending to produce it has given to the accused or defendant reasonable notice of that intention together with a copy of the certificate.

(6) An accused or a defendant against whom a certificate referred to in subsection (4) is produced may, with leave of the court, require the attendance of the actuary for the purposes of cross-examination.

(7) No proceedings shall be commenced under this section without the consent of the Attorney General.

(8) This section does not apply to any transaction to which the *Tax Rebate Discounting Act* applies. 1980-81-82-83, c. 43, s. 9.

## CROSS-REFERENCES

“Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.] This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and an enterprise crime offence within the meaning of s. 462.3.

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of extortion is found in s. 346.

## SYNOPSIS

This section describes the offence of charging a criminal interest rate. The offence is committed by anyone who enters into an agreement or arrangement to receive interest at a criminal rate, or who actually receives a payment or partial payment of interest at a criminal rate. The term “criminal rate” means an effective annual rate that exceeds 60 per cent on the credit advanced, calculated according to accepted actuarial principles and practices. The term “interest” means the aggregate of all charges and expenses, in any form, but with certain listed and defined exceptions, paid or payable for the advancing of credit. The offence may be tried by indictment, with a maximum penalty of five years, or by summary conviction, with a maximum penalty of a fine of \$25,000 and imprisonment for six months, but only with the consent of an Attorney General. Subsection (3) creates a presumption, in the absence of evidence to the contrary, that a person receiving payment or partial payment of interest at a criminal rate does so *knowingly*. Subsections (4) and (5) permit, for the purposes of this section, proof of a rate of interest by a certificate of a fellow of the Canadian Institute of Actuaries, provided that the accused is given reasonable notice and a copy of the certificate. Subsection (6) permits the court to require the attendance of the actuary for cross-examination. The section applies, notwithstanding any other federal enactment, but does not apply to transactions governed by the Tax Rebate Discounting Act.

## ANNOTATIONS

The term “interest” in this section is broadly defined and included a “facility fee” which the borrower agreed to pay to obtain the loan. The *mens rea* of this offence is proof that the accused voluntarily entered into a loan agreement providing for receipt by him of a criminal rate of interest. The Crown is not also required to prove that the accused knew that charging a rate above 60% was unlawful: *William E. Thomson Associates Inc. v. Carpenter* (1989), 61 D.L.R. (4th) 1, 69 O.R. (2d) 545, 34 O.A.C. 35 (C.A.). [Note: It was held in this case, a civil action, that the unlawfulness of the transaction did not render the entire loan agreement void and that the illegal part of the agreement could be severed and the borrower required to repay the principal.] *Fold: BCORP Fin. Inc. v. Baseline Resort Dev. Inc.*, [1990] 5 W.W.R. 275 (B.C.S.C.).

The stipulation that the borrower was to pay a share of the anticipated profit from a real estate deal was a condition of the borrower receiving the loan and fell within the all-inclusive definition of “interest”: *677950 Ontario Ltd. v. Artell Developments Ltd.* (1992), 75 C.C.C. (3d) 343, 93 D.L.R. (4th) 334, 57 O.A.C. 189 (C.A.), *affd* [1993] 2 S.C.R. 443, 82 C.C.C. (3d) 192n, 64 O.A.C. 161.

It is no defence that the borrowers were willing to participate in the agreement and that the accused was not engaged in swindling or other trickery. It would, however, be a defence if in certain circumstances the accused had made an honest mistake as to the



terms of the agreement: *R. v. McRobb* (1984), 20 C.C.C. (3d) 493 (Ont. Co. Ct.), affd 32 C.C.C. (3d) 479 (C.A.).

Although the Crown has proceeded by way of summary conviction, so that the six month limitation period applies, evidence of payments made by the victims of the offence prior to this period is relevant and admissible to establish the effective annual rate of interest: *R. v. Duzan* (1993), 79 C.C.C. (3d) 552, 105 Sask. R. 29 (C.A.).

This section is *intra vires* Parliament: 677950 *Ontario Ltd. v. Artell Developments Ltd.*, *supra*.

## Breaking and Entering

### BREAKING AND ENTERING WITH INTENT, COMMITTING OFFENCE OR BREAKING OUT / Presumptions / Definition of "place".

#### 348. (1) Every one who

- (a) breaks and enters a place with intent to commit an indictable offence therein,
- (b) breaks and enters a place and commits an indictable offence therein, or
- (c) breaks out of a place after
  - (i) committing an indictable offence therein, or
  - (ii) entering the place with intent to commit an indictable offence therein,

is guilty of an indictable offence and liable

- (d) to imprisonment for life, if the offence is committed in relation to a dwelling-house, or
- (e) to imprisonment for a term not exceeding fourteen years, if the offence is committed in relation to a place other than a dwelling-house.

#### (2) For the purposes of proceedings under this section, evidence that an accused

- (a) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; or
- (b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after
  - (i) committing an indictable offence therein, or
  - (ii) entering with intent to commit an indictable offence therein.

#### (3) For the purposes of this section and section 351, "place" means

- (a) a dwelling-house;
- (b) a building or structure or any part thereof, other than a dwelling-house;
- (c) a railway vehicle, a vessel, an aircraft or a trailer; or
- (d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes. R.S., c. C-34, s. 306; 1972, c. 13, s. 24; R.S.C. 1985, c. 27 (1st Supp.), s. 47.

### CROSS-REFERENCES

The term "dwelling house" is defined in s. 2. The term "break" is defined in s. 321. "Enter" is defined in s. 350(a) and s. 350(b) deems a person to have broken and entered in circumstances defined therein. An indictable offence includes a Crown-option offence, which may be prosecuted by indictment, by virtue of s. 34(1) of the Interpretation Act, R.S.C. 1985, c. I-21.

As to admission of photographic evidence of property, see s. 491.2. For proof by way of affidavit of ownership, lawful possession, value, and that the person was deprived of property by fraud or otherwise without the person's lawful consent, see s. 657.1.

Section 662(6) provides that a person, charged with the offence under subsec. (1)(b), may be convicted of the offence under subsec. (1)(a) where the evidence does not prove the former offence but

does prove the latter. Under s. 583, an indictment, which otherwise complies with s. 581, is not insufficient by reason only that (a) it does not name the person injured or intended to be injured; (b) it does not name the person who owns or has a special property or interest in the property mentioned in the count, however, see s. 587 as to when particulars may be ordered. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section may be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

The offence of forcible entry is in s. 72 and trespassing by night in s. 177. Being unlawfully in a dwelling house is an offence under s. 349. Possession of break-in instruments is an offence under s. 351(1). Defence of property is dealt with in ss. 38 to 42. Section 494 gives the owner of property or person in possession and persons authorized by them a power to arrest, without warrant, a person found committing a criminal offence on or in relation to that property. The offence which is most often alleged to be the indictable offence intended to be committed is theft under s. 334.

## SYNOPSIS

This section describes the offence of breaking and entering. The offence is committed by anyone: (a) who breaks and enters a place *with intent to commit an indictable offence* therein; (b) who breaks and enters a place and actually commits an indictable offence; or (c) breaks out of a place after committing an indictable offence, or after having entered intending to commit an indictable offence. The offence is indictable, with a maximum punishment of life imprisonment if the place is a dwelling house, and fourteen years otherwise. The meaning of “place”, for the purpose of this section, is defined by subsec. (3). Subsection (2) creates two presumptions. Where a person breaks and enters a place or attempts to do so, those acts are proof, in the absence of evidence to the contrary, that the person had the intent to commit an indictable offence therein. Similarly, where a person breaks out of a place, that act is proof that he committed, or entered with intent to commit, an indictable offence therein.

## ANNOTATIONS

**Intoxication defence** – In *R. v. Gaweł*, [1984] 6 W.W.R. 672n (Sask. C.A.), varying [1984] 5 W.W.R. 608, 40 C.R. (3d) 93 (Q.B.), on a charge of break and enter and committing assault, the accused was convicted of assault only, the evidence showing that the accused, who was in a highly intoxicated state, mistakenly believed he was in his own house when he assaulted the occupant.

**Presumption of intent [subsec. (2)]** – Once a *prima facie* case is made out using this presumption the accused need only raise a reasonable doubt, which he may do by adducing evidence of an explanation that may reasonably be true. However, an explanation that is disbelieved does not constitute “any evidence to the contrary” as it is no evidence. The evidence upon which the accused relies must at least raise a reasonable doubt as to his guilt, and if it does not meet this test then the *prima facie* case remains: *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, 91 D.L.R. (3d) 449 (S.C.C.). [Note: Since this decision the Criminal Code has been amended to delete the word “any” from the phrase “in the absence of any evidence to the contrary”. However, the majority judgment in *R. v. Proudlock* indicates that there is no basis for a distinction depending on the presence of the word “any”; the phrases “evidence to the contrary” and “any evidence to the contrary” both being the converse of “no evidence to the contrary”.]

When there is any evidence to the contrary, in the sense of evidence tending to negative the existence of the necessary intent, the onus is then upon the Crown to prove the existence of the necessary intent beyond a reasonable doubt. Evidence of the accused’s condition due to the consumption of alcohol and drugs which caused him to act in an

irrational manner was evidence to the contrary in that it tended to negative an intent to commit an indictable offence: *R. v. Campbell* (1974), 17 C.C.C. (2d) 320 (Ont. C.A.).

Evidence that the accused is of good character is not of itself "evidence to the contrary": *R. v. Khan* (1982), 66 C.C.C. (2d) 32, 36 O.R. (2d) 399 (C.A.).

The presumption in this subsection is not available where the indictment specifies the particular indictable offence such as theft or mischief: *R. v. Khan, supra*.

**Doctrine of recent possession [Also see notes under s. 354]** – Upon proof of unexplained possession of recently stolen goods the trier of fact may, but not must, draw an inference of guilt of not only the possession offence but an offence such as break and enter committed in obtaining the goods: *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1, 65 C.R. (3d) 97, [1988] 2 S.C.R. 59 (4:1).

**"Place"** – The definition of "place" in para. 4(b) contemplates a type of structure within which human beings function and not, for example, a glass show-case on the exterior wall of a building which gives no access to any part of the building: *R. v. Desjarnik* (1981), 64 C.C.C. (2d) 408 (Que. Ct. Sess. of Peace).

On the other hand a small boutique in a shopping mall which is a permanent structure closed in on all sides at night is a "place" notwithstanding it has no roof: *R. v. McKerness* (1983), 4 C.C.C. (3d) 233, 33 C.R. (3d) 71 (Que. Ct. Sess. Peace).

An oil bulk plant compound enclosed by a permanent fence in which are situated fuel storage tanks, an office and warehouse is a structure and hence a "place" within the meaning of this section: *R. v. Thibault* (1982), 66 C.C.C. (2d) 422, 51 N.S.R. (2d) 91 (C.A.).

Similarly, an area containing an office building surrounded by a 10 foot high fence is a place: *R. v. Fajil* (1986), 53 C.R. (3d) 396 (B.C.C.A.).

**Included offences** – Possession of stolen goods contrary to s. 322 is included in a charge of break, enter and theft: *R. v. L'Hirondelle* (1992), 72 C.C.C. (3d) 254 (Alta. C.A.). *Contra: R. v. Rivet* (1975), 29 C.R.N.S. 301 (Ont. C.A.).

**Constitutional considerations** – While subsec. (2)(b) infringes the presumption of innocence in s. 11(d) of the Charter, it constitutes a reasonable limit within the meaning of s. 1 of the Charter and is therefore valid: *R. v. Slavens* (1991), 64 C.C.C. (3d) 29, 5 C.R. (4th) 204 (B.C.C.A.).

## BEING UNLAWFULLY IN DWELLING-HOUSE / Presumption.

349. (1) Every one who without lawful excuse, the proof of which lies on him, enters or is in a dwelling-house with intent to commit an indictable offence therein is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein. R.S., c. C-34, s. 307.

## CROSS-REFERENCES

The term "dwelling house" is defined in s. 2. "Enter" is defined in s. 350(a). The offence which is most often alleged to be the indictable offence intended to be committed is theft under s. 334.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section may be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

The offence of forcible entry is in s. 72 and trespassing by night in s. 177. Being unlawfully in a dwelling house is an offence under s. 349. Possession of break-in instruments is an offence under



s. 351(1). Defence of property is dealt with in ss. 38 to 42. Section 494 gives the owner of property or person in possession and persons authorized by them a power to arrest, without warrant, a person found committing a criminal offence on or in relation to that property.

### SYNOPSIS

This section describes the offence of being unlawfully in a dwelling house. Anyone who enters or is in a dwelling house, with intent to commit an indictable offence therein, commits the offence. A person is not guilty if he has a lawful excuse for entering or being present in the dwelling house, but the onus is on that person to so establish, on a balance of probabilities. It is important to note that the accused need not have entered with the requisite intent, provided that he formulates that intent while present in the dwelling house. The offence is indictable with a maximum punishment of 10 years. Subsection (2) provides that evidence of entry or presence in a dwelling house without lawful excuse, in the absence of evidence to the contrary, is proof of the existence of the requisite intent.

### ANNOTATIONS

**“dwelling house”** – A motel unit is a dwelling-house: *R. v. Henderson*, [1975] 1 W.W.R. 360 (B.C. Prov. Ct.).

**Presumption of intent [subsec. (2)]** – Prior to the amendment of this subsection which replaced the words “*prima facie* evidence” with the words “in the absence of any evidence to the contrary, proof” it was held that even where the Crown could rely on the presumption because of proof of an unlawful entry there was no onus on the accused to provide a reasonable and logical explanation for his presence in the premises since the evidence, while not establishing a lawful excuse for the accused’s presence, might well create a reasonable doubt as to his intent to commit an indictable offence therein which is a vital element in the commission of the offence: *R. v. Austin*, [1969] 1 C.C.C. 97, 4 C.R.N.S. 388 (S.C.C.) (3:2). In *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 5 C.R. (3d) 21, 91 D.L.R. (3d) 449 (S.C.C.) Pigeon, J., whose judgment was concurred in by five members of the Court, was of the view that the change in the wording had not affected the meaning which should be attributed to the presumption. In particular an explanation which is not believed does not constitute “any evidence to the contrary”.

Evidence of drunkenness which discloses that the accused did not have the necessary specific intent is evidence to the contrary neutralizing the statutory presumption: *R. v. Johnnie and Namox* (1975), 23 C.C.C. (2d) 68, 30 C.R.N.S. 202 (B.C.C.A.).

Evidence to the contrary is evidence in either the prosecution or the defence case which is not disbelieved by the trier of fact and which gives rise to a reasonable doubt with respect to the existence of the intent to commit an indictable offence on the part of the accused: *R. v. Nagy* (1988), 45 C.C.C. (3d) 350, 30 O.A.C. 12 (C.A.).

**Included offences** – The offence of mischief as described in s. 430(1)(d) is an included offence: *R. v. E. (S.)* (1993), 80 C.C.C. (3d) 502, [1993] N.W.T.R. 97 (C.A.). *Contra*: *R. v. Drake* (1974), 16 C.C.C. (2d) 505, 8 N.S.R. (2d) 454 (C.A.).

**Constitutional considerations** – It was held in *R. v. Nagy* (1988), 45 C.C.C. (3d) 350, 30 O.A.C. 12 (C.A.), that this subsection creates a mandatory presumption so that if the prosecution proves entry or presence in a dwelling-house without lawful excuse the trier of fact must, not may, convict in the absence of any evidence to the contrary and therefore this subsection offends the presumption of innocence guarantee in s. 11(d) of the Charter of Rights and Freedoms. However, it constitutes a reasonable limit within the meaning of s. 1 of the Charter and therefore the subsection is valid.

### ENTRANCE.

**350. For the purposes of sections 348 and 349,**

- (a) a person enters as soon as any part of his body or any part of an instrument that he uses is within any thing that is being entered; and
- (b) a person shall be deemed to have broken and entered if
  - (i) he obtained entrance by a threat or artifice or by collusion with a person within, or
  - (ii) he entered without lawful justification or excuse, the proof of which lies upon him, by a permanent or temporary opening. R.S., c. C-34, s. 308.

## CROSS-REFERENCES

The term "break" is defined in s. 321.

## SYNOPSIS

For the purposes of s. 348 and 349, entry occurs as soon as any part of the body of, or an instrument used by, a person is within anything being entered. A person is deemed to have broken and entered if entry is obtained, by threat, artifice or collusion with a person inside, or through a permanent or temporary opening, without lawful justification. The onus is on the accused to establish that justification.

## ANNOTATIONS

**Entry by artifice, etc. [para. (b)(i)]** – By artifice is by a manoeuvre or stratagem such as sneaking into premises behind someone making a lawful entry: *R. v. Leger* (1976), 31 C.C.C. (2d) 413 (Ont. C.A.).

**Entry without lawful justification or excuse [para. (b)(ii)]** – The words "by a permanent or temporary opening" are clear and should be given their ordinary meaning and embrace an entry not only through the further opening of a temporary opening, but any entry through any temporary opening. Thus entry by the accused through a doorway in a partly constructed house which was open, as the door had not yet been installed, comes within this provision: *Johnson v. The Queen* (1977), 34 C.C.C. (2d) 12, 37 C.R.N.S. 370 (S.C.C.) (9:0).

In determining whether there was lawful justification or excuse, the time to be considered is the time of the entry. Thus, this paragraph did not apply to an accused who was licenced to enter a store as were other members of the public during normal business hours, notwithstanding he harboured an intent to remain in the store until after closing and then steal a quantity of goods: *R. v. Farbridge* (1984), 15 C.C.C. (3d) 521, [1985] 2 W.W.R. 56, 42 C.R. (3d) 385 (Alta. C.A.).

**Constitutional considerations** – The phrase "the proof of which lies upon him" in para. (b)(i) is unconstitutional as violating s. 11(d) of the Charter of Rights. However, with that phrase eliminated this paragraph is valid: *R. v. Singh* (1987), 41 C.C.C. (3d) 278, 61 C.R. (3d) 353 (Alta. C.A.).

## POSSESSION OF BREAK-IN INSTRUMENT / Disguise with intent.

351. (1) Every one who, without lawful excuse, the proof of which lies on him, has in his possession any instrument suitable for the purpose of breaking into any place, motor vehicle, vault or safe under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for any such purpose, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) Every one who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 309; 1972, c. 13, s. 25; R.S.C. 1985, c. 27 (1st Supp.), s. 48.

**CROSS-REFERENCES**

The term “motor vehicle” is defined in s. 2. The term “place” is defined in s. 351. Possession is defined in s. 4(3). An indictable offence include a Crown-option offence, which may be prosecuted by indictment, by virtue of s. 34(1) of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences: s. 85, using firearm during commission or attempted commission of indictable offence; s. 343, robbery; s. 348, break and enter; s. 349, unlawfully in dwelling house; s. 352, breaking into coin-operated device; s. 353, selling, etc., automobile master key.

**SYNOPSIS**

This section describes two indictable offences – that of being in possession of a break-in instrument and that of being disguised with intent to commit an indictable offence. Subsection (1) states that every person who possesses an instrument suitable for the purpose of breaking into any place, motor vehicle, vault or safe in circumstances which give rise to a *reasonable inference* that the instrument has been used, or is or was intended to be used for such a purpose, is guilty of an indictable offence and liable to a maximum term of imprisonment of 10 years. Subsection (1) makes it clear that the person accused of this offence may escape criminal liability, if he can establish a *lawful excuse* for possessing the instrument described above. Subsection (2) makes it an indictable offence, with a maximum term of imprisonment of 10 years, for a person to mask, colour or otherwise disguise his face with intent to commit an indictable offence.

**ANNOTATIONS**

**Meaning of instrument [subsec. (1)]** – Nitric acid, sulphuric acid, bicarbonate of soda and various implements, being proved sufficient to make nitroglycerine, were held to be an “instrument” within this section: *R. v. Benischek*, [1963] 3 C.C.C. 286, 39 C.R. 285 (Ont. C.A.).

**Liability of party** – In *Zanini v. The Queen*, [1968] 2 C.C.C. 1, 2 C.R.N.S. 219, (S.C.C.) (5:0), the accused and his companions were charged with breaking and entering and committing theft in a dwelling-house and possession of house-breaking instruments. The two companions pleaded guilty to the former charge and the latter charge was withdrawn as against them. The accused was acquitted of the former charge as the stolen money could not be identified by the owner, but by application of s. 21(2) of the Code was convicted of the latter charge. The accused’s appeal was dismissed, it being held that the fact that the possession charge was withdrawn against the two active principals did not affect the right of the Crown to proceed against the accused, as there is no requirement in s. 21(2) that the active participants must be convicted of possession; and it was open to the jury to find, as it did, that the accused knew or ought to have known that one of his confederates, for the purpose of effecting their common design of breaking and entering the dwelling-house at least would, of necessity, be in possession of house-breaking instruments.

**Reasonable inference of intended use of instrument [subsec. (1)]** – The phrase “a reasonable inference”, in a criminal statute, requires proof beyond a reasonable doubt. Accordingly, the burden on the Crown to prove every element of the offence beyond a reasonable doubt requires proof beyond a reasonable doubt of (a) possession by the accused of the instruments specified in the indictment; (b) the suitability of the instruments for the prohibited purpose; and (c) and intention to use the instruments for the prohibited purpose. In the result, the phrase “without lawful excuse, the proof of which lies on him” added to a predecessor to this subsection to make available to the accused the defence of innocent purpose is now superfluous and was presumably kept in the provision, with subsequent amendments, out of an abundance of caution. The phrase does not encompass excuses or justifications that would exist if those words were omitted



from the section and thus general common law excuses such as duress or authorization by law need not be proved by the accused on a balance of probabilities. In the result, this provision does not offend the guarantee to the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms: *R. v. Holmes* (1988), 41 C.C.C. (3d) 497, 64 C.R. (3d) 97, [1988] 1 S.C.R. 914 (5:0).

It was not necessary for the Crown to establish a nexus between the accused's possession of instruments and a "target" vehicle where it was alleged that the tools were used for breaking into and theft of automobiles. The absence of a nexus in time and place between the possession of instruments and a particular automobile is, however, a significant factor in determining whether it is appropriate to draw an inference of intent to use instruments for the prohibited purpose: *R. v. K.(S.)* (1995), 103 C.C.C. (3d) 572 (B.C.C.A.).

**Masked with intent [subsec. (2)]** – The Crown must prove the intention to commit one or more specific indictable offences: *R. v. Shay* (1976), 32 C.C.C. 13 (Ont. C.A.).

### POSSESSION OF INSTRUMENTS FOR BREAKING INTO COIN-OPERATED OR CURRENCY EXCHANGE DEVICES.

**352.** Every one who, without lawful excuse, the proof of which lies on him, has in his possession any instrument suitable for breaking into a coin-operated device or a currency exchange device, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for breaking into a coin-operated device or a currency exchange device, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 310; 1972, c. 13, s. 26; 1974-75-76, c. 93, s. 28.

#### CROSS-REFERENCES

Possession is defined in s. 4(3).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offence of possession of break-in instruments is in s. 351 and of selling, etc., automobile master key in s. 353.

#### SYNOPSIS

This section describes the offence of possession of any instrument for breaking into coin-operated or currency exchange devices in circumstances which give rise to a *reasonable inference* that the instrument has been used, or is or was intended to be used for such a purpose. This section, like s. 351, puts the onus of proof on the accused to establish that such possession was *with lawful excuse*. This is an indictable offence with a maximum term of two years' imprisonment.

#### ANNOTATIONS

An instrument is "suitable" within the meaning of this section provided any reasonable person would assume or believe that it was capable, adequate or suitable for the purpose notwithstanding there is evidence that in fact the instruments could not break into the device: *R. v. Garland And Clowe* (1978), 41 C.C.C. (2d) 346, 3 C.R. (3d) 206 (Nfld. Dist. Ct.).

Expert evidence merely to the effect that the instrument was suitable for picking locks is not evidence that it was within the specific category of instruments suitable for breaking into a coin-operated device: *Re Mackie and The Queen* (1978), 43 C.C.C. (2d) 269, 4 C.R. (3d) 263 (Ont. H.C.J.).

A conviction for theft of the coins from a coin-operated device is a bar to a conviction under this section arising out of the same circumstances in view of the rule in *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, [1975] 1 S.C.R. 729, 26 C.R.N.S. 1, where

there is no evidence that the key had been used prior to the theft and the accused was arrested immediately after the theft so that there was no evidence from which an inference could be drawn of any intended future use of it: *R. v. Stanziale* (1979), 47 C.C.C. (2d) 348, 9 C.R. (3d) 281 (Ont. C.A.).

**SELLING, ETC., AUTOMOBILE MASTER KEY / Terms and conditions of licence / Record to be kept / Failure to comply with subsection (3) / Definition of “automobile master key”.**

**353. (1) Every one who**

- (a) sells, offers for sale or advertises in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province, or
- (b) purchases or has in his possession in a province an automobile master key otherwise than under the authority of a licence issued by the Attorney General of that province,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) A licence issued by the Attorney General of a province as described in paragraph (1)(a) or (b) may contain such terms and conditions relating to the sale, offering for sale, advertising, purchasing or having in possession of an automobile master key as the Attorney General of that province may prescribe.

**(3) Every one who sells an automobile master key**

- (a) shall keep a record of the transaction showing the name and address of the purchaser and particulars of the licence issued to the purchaser as described in paragraph (1)(b); and
- (b) shall produce the record for inspection at the request of a peace officer.

(4) Every one who fails to comply with subsection (3) is guilty of an offence punishable on summary conviction.

(5) For the purposes of this section, “automobile master key” includes a key, pick, rocker key or other instrument designed or adapted to operate the ignition or other switches or locks of a series of motor vehicles. R.S., c. C-34, s. 311.

**CROSS-REFERENCES**

The terms “Attorney General” and “motor vehicle” are defined in s. 2. Possession is defined in s. 4(3). The accused may elect his mode of trial for the offence in subsec. (1), pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498. The offence under subsec. (4) is tried by a summary conviction court under Part XXVII. The punishment is as set out in s. 787 [although see s. 719(b) respecting maximum fine for corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences: s. 351, possession of break-in instruments; s. 352, possession of instruments for breaking into coin-operated devices; s. 334, theft; s. 335, joy-riding.

**SYNOPSIS**

This section creates several offences in relation to “automobile master key” (defined in subsec. (5)).

Subsection (1) describes the offence of selling, offering for sale, advertising in a province, purchasing, or possessing in a province an automobile master key *otherwise than under the authority of a licence* issued by the Attorney General of the province. That offence is indictable and carries a maximum term of two years’ imprisonment. Subsection (2) states that a licence issued by the Attorney General of a province may contain

such terms and conditions relating to the sale, offering for sale, advertising, purchasing or possession of an automobile master key as the Attorney General of that province may prescribe. Subsection (3) requires that any person who sells an automobile master key keep a record of the transaction, showing the name, address and particulars of the licence referred to in subsec. (1) of the purchaser. Subsection (3) further requires the vendor of the master key to produce the record at the request of a peace officer. A failure to comply with either of the requirements described in subsection (3) gives rise to a summary conviction offence.

#### ANNOTATIONS

This section contemplates a device which may be the subject of commerce, the sale and possession of which is lawful only under licence. A coat hanger although so fashioned as to be capable of lifting the latch on locked vehicles does not fall within the meaning of "automobile master key": *R. v. Young* (1983), 3 C.C.C. (3d) 395 (Ont. C.A.).

### *Having in Possession*

#### **POSSESSION OF PROPERTY OBTAINED BY CRIME / Obliterated vehicle identification number / Definition of "vehicle identification number".**

**354. (1) Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from**

- (a) the commission in Canada of an offence punishable by indictment; or**
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.**

**(2) In proceedings in respect of an offence under subsection (1), evidence that a person has in his possession a motor vehicle the vehicle identification number of which has been wholly or partially removed or obliterated or a part of a motor vehicle being a part bearing a vehicle identification number that has been wholly or partially removed or obliterated is, in the absence of any evidence to the contrary, proof that the motor vehicle or part, as the case may be, was obtained, and that such person had the motor vehicle or part, as the case may be, in his possession knowing that it was obtained,**

- (a) by the commission in Canada of an offence punishable by indictment; or**
- (b) by an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment.**

**(3) For the purposes of subsection (2), "vehicle identification number" means any number or other mark placed on a motor vehicle for the purpose of distinguishing the motor vehicle from other similar motor vehicles. R.S., c. C-34, s. 312; 1972, c. 13, s. 27; 1974-75-76, c. 93, s. 29.**

#### CROSS-REFERENCES

The terms "motor vehicle" and "property" are defined in s. 2. Possession is defined in s. 4(3), however, s. 358 defines circumstances in which possession is complete. An indictable offence includes Crown-option offences which may be prosecuted by indictment, by virtue of s. 34(1) of the Interpretation Act, R.S.C. 1985, c. I-21.

The punishment for this offence is set out in s. 355 and see notes under that section respecting mode of trial and release pending trial. The offence which is most often alleged to be the indictable offence by which the goods were obtained is theft under s. 334. Other related offences are: s. 342, theft, etc., of credit card; s. 343, robbery; s. 346, extortion; s. 348, break and enter; s. 349, unlaw-



fully in dwelling house; s. 351, possession of break-in instruments; s. 352, possession of instruments for breaking into coin-operated devices; s. 362, obtaining by false pretences; s. 380, fraud.

By virtue of s. 583(b), an indictment which otherwise complies with s. 581 is not insufficient by reason that it fails to name the person who owns or has a special property or interest in property mentioned in the count. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Sections 359 and 360 enact special evidentiary rules. Under s. 359, evidence that stolen property was found in the accused's possession in the previous 12 months is admissible to prove knowledge that the property which forms the subject-matter of the proceedings was stolen property. Under s. 360, evidence may be given that the accused was convicted in the previous 5 years of theft or an offence under this section, to prove that knowledge that the property which forms the subject-matter of the proceedings was unlawfully obtained. Note that, for both sections, notice must be given to the accused.

As to admission of photographic evidence of property, see s. 491.2. For proof by way of affidavit of ownership, lawful possession, value, and that the person was deprived of property by fraud or otherwise without the person's lawful consent, see s. 657.1.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance pursuant to s. 487.01(5). In some circumstances, the offence under this section will constitute an enterprise crime offence for the purposes of Part XII.2 [see s. 462.3, definition of enterprise crime offence para. (b)].

Bringing into Canada anything obtained outside Canada by an act that, if committed in Canada, would have been an offence under this section if committed in Canada is an offence under s. 357. Possession of mail, etc., obtained by theft is an offence under s. 356(1)(b).

## SYNOPSIS

This section describes the offence of possession of property obtained by crime. Subsection (1) states that if a person has in his possession any property or the proceeds of any property, knowing that such property or proceeds were obtained or derived directly or indirectly from the commission in Canada of an indictable offence or an act or omission in any location which would in Canada constitute an indictable offence, that person is guilty of an offence. Subsection (2) states that evidence that the vehicle identification number of a motor vehicle, or a part of a motor vehicle, has been wholly or partially obliterated or removed is, absent evidence to the contrary, proof that *the item was obtained* and that the person in possession of it *knew that it was obtained* by the commission of an indictable offence.

## ANNOTATIONS

**Doctrine of recent possession** – The most recent review of the elements of the “doctrine” of recent possession is found in *R. v. Kowlyk* (1988), 43 C.C.C. (3d) 1, 65 C.R. (3d) 97, [1988] 2 S.C.R. 59 (4:1). Those elements, as set out in that case and distilled from the various decisions as approved in *Kowlyk*, may be summarized as follows:

1. No adverse inference may be drawn against an accused from the fact of possession alone unless it were recent: *R. v. Graham* (1972), 7 C.C.C. (2d) 93, [1974] S.C.R. 59 (7:0);
2. if a pre-trial explanation of such possession were given by the accused, and if it possessed that degree of contemporaneity with the possession making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true: *R. v. Graham, supra*;
3. in the absence of such explanation, recent possession alone is quite sufficient to raise a factual inference of theft;
4. where the accused does not testify, a jury instruction as to the inference arising from unexplained possession does not constitute a “comment” within the meaning of s. 4(6): *R. v. Newton* (1976), 28 C.C.C. (2d) 286, 34 C.R.N.S. 161 (S.C.C.) (9:0);
5. where an explanation which could reasonably be true is given for the possession, then no inference of guilt on the basis of recent possession alone may be drawn, even if the

trier of fact is not satisfied as to the truth of the explanation and thus, to obtain a conviction in the face of such an explanation, it must establish by other evidence the guilt of the accused beyond a reasonable doubt;

6. the unexplained possession of stolen goods, standing alone, will also warrant an inference of guilt of breaking and entering and theft of those goods;

7. upon proof of the unexplained possession of recently stolen goods, the trier of fact may – but not must – draw an inference of guilt of theft or of offences incidental thereto;

8. where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact, upon a consideration of all the circumstances, to decide which, if either, inference should be drawn.

In the subsequent case of *R. v. Wiseman* (1989), 52 C.C.C. (3d) 160, 93 N.S.R. (2d) 306 (N.S.C.A.), the court interpreted *Kowlyk* as also standing for the proposition that, in charging the jury, the trial judge should avoid the use of the phrase “doctrine of recent possession”. The court stated that what is really involved is an inference from unexplained possession of recently stolen goods. The court seems to have been concerned that use of a term such as “doctrine” implies some mandatory rule of law, rather than application of a common sense inference.

Although the doctrine is stated in terms of the inference applying in the absence of any reasonable explanation, there is no burden on the Crown to prove that no explanation was given prior to trial or that such explanation, if given, could not reasonably be true: *R. v. Graham*, *supra*. It would seem, however, that where an explanation was given to the police, then defence counsel can adduce it through the police: *R. v. Newton*, *supra*, per Dickson J. The exact basis for its admissibility is unclear, although the suggestion from *R. v. Graham*, *supra*, is that if made contemporaneously with the finding in possession, it is admissible as part of the *res gestae*. In that case, it was held that a statement made a few hours later was not admissible at the instance of the defence. In *R. v. Graham* and other cases such as *Ungaro v. The King* (1950), 96 C.C.C. 245 (S.C.C.), it was pointed out that where the accused gives a statement to the police, but also testifies, it is the explanation under oath which, if reasonably true, negatives the inference of guilty knowledge.

The trier of fact need not *believe* the explanation, it is enough that it raises a reasonable doubt: *R. v. L'Heureux* (1985), 21 C.C.C. (3d) 574, 47 C.R. (3d) 221 (S.C.C.) (7:0). However, an explanation which is disbelieved cannot constitute a reasonable explanation: *R. v. Proudlock* (1978), 43 C.C.C. (2d) 321, 91 D.L.R. (3d) 449, 5 C.R. (3d) 21 (S.C.C.).

Since no adverse inference may be drawn from the accused's failure to give an explanation for his possession of stolen goods upon his arrest and after he has been informed of his right to remain silent, then it would seem that evidence of silence at that time is irrelevant and should not be admitted. Where evidence has been admitted of silence at the time of arrest and following the caution, it is clearly misdirection to tell the jury that, in assessing the accused's explanation given on the witness stand, they may consider that an explanation given at once is more convincing than one given at some later time. Rather, the jury should be told that, while an explanation given before arrest or not too long after the arrest is more convincing than one given at some later time, they must not take into account that the accused, upon being arrested and warned, said nothing and they should be directed that he had the right to say nothing and to consult a lawyer: *R. v. Machado* (1989), 50 C.C.C. (3d) 133, 71 C.R. (3d) 158 (B.C.C.A.).

Where it was the theory of the Crown that the accused was the actual thief and the Crown did not rely on the doctrine of recent possession the trial Judge is not in error in failing to direct the jury on the doctrine: *Hewson v. The Queen* (1978), 42 C.C.C. (2d) 507, 89 D.L.R. (3d) 573, [1978] 2 S.C.R. 111 (5:4).

In *Saieva v. The Queen* (1982), 68 C.C.C. (2d) 97, [1982] 1 S.C.R. 897 (7:0), the Court in considering whether possession was sufficiently “recent” to entitle reliance on the doctrine of recent possession approved the statement in *R. v. Killam* (1973), 12 C.C.C.

(2d) 114, [1973] 5 W.W.R. 3 (B.C.C.A.) that the criteria to be used are the nature of the object “its rareness, the readiness in which it can, and is likely to, pass from hand to hand, the ease of its identification and the likelihood of transferability”.

**Proof that goods obtained by crime** – An admission by the accused is admissible for its truth, even if the admission itself contains hearsay, provided that the accused indicates a belief in the acceptance of the truth of the hearsay statement. If, however, the accused merely reports a hearsay statement without either adopting it or indicating a belief in its truth then the statement is not admissible for the truth of its contents. Thus, out of court statements by an accused, charged with the offence under this section, that he did not know the origin of the goods but his friend had stolen the goods and he knew they were “hot”, made in circumstances indicating he believed the statements were true, were admissible not only to prove guilty knowledge but that, in fact, the goods were stolen: *Streu v. The Queen* (1989), 48 C.C.C. (3d) 321, [1989] 1 S.C.R. 1521, 70 C.R. (3d) 1 (5:0).

Where the indictable offence is specified in the indictment as “theft” it is misdirection to instruct the jury that the offence is proven if the goods were obtained by fraud: *R. v. Beaudet* (1977), 34 C.C.C. (2d) 150 (Ont. C.A.).

Although it is alleged that the goods were obtained by the commission “in Canada” of an indictable offence the Crown is not required to prove whether the crime was committed in Canada as long as it is, or would have been if committed in Canada, an indictable offence: *R. v. Elliott* (1984), 15 C.C.C. (3d) 195, [1985] 1 W.W.R. 97 (Alta. C.A.).

**Meaning of “obtained by”** – The words “obtained by”, apply only where the indictable offence was committed in respect of the thing obtained. Thus where the owner willingly parts with the goods as part of a scheme to defraud his own insurance company by falsely reporting that the goods were stolen the goods have not been obtained by the commission of an indictable offence. They have however been “indirectly derived” from the commission of a crime within the meaning of this subsection: *R. v. Geauvreau* (1979), 51 C.C.C. (2d) 75 (Ont. C.A.), affd 66 C.C.C. (2d) 375, 28 C.R. (3d) 1, [1982] 1 S.C.R. 485 (9:0).

Goods were not, however, obtained by or derived directly or indirectly from commission of the offence of fraud where the goods were sold to the accused by the owner even if, to the knowledge of the accused, the owner had attempted to defraud his insurance company by arranging for a fake break and enter in which these goods were “stolen”. In those circumstances the goods were not the proceeds of crime: *R. v. Epp* (1988), 42 C.C.C. (3d) 572, 68 Sask. R. 49 (C.A.).

Goods which the accused originally found were “obtained by” the commission of an indictable offence where she subsequently fraudulently converted them to her own use and then retained them in her possession: *R. v. Hayes* (1985), 20 C.C.C. (3d) 385, 46 C.R. (3d) 393 (Ont. C.A.).

**Charging offence** – Where a count named the property’s owner with some imprecision, but still furnished the accused with reasonable information to identify the alleged owner, there was no error fatal to conviction: *R. v. Emmons* (1970), 1 C.C.C. (2d) 468, 13 C.R.N.S. 310 (Alta.S.C.App.Div.).

A charge of possession of stolen clothes the property of a person or persons unknown was held to be valid on the ground that for either theft or possession the Crown need only prove ownership in some person or persons other than the accused: *R. v. McDowell*, [1970] 5 C.C.C. 374, 18 C.R.N.S. 193 (Ont.C.A.), affd [1971] 1 S.C.R. vi, 18 C.R.N.S. 195n.

A count alleging possession of property without alleging the owner or without even in the alternative alleging ownership in a person or persons unknown is valid: *R. v. Halliday* (1975), 25 C.C.C. (2d) 131, 12 N.S.R. (2d) 1 (S.C. App. Div.).

Where the indictment spells out the particulars of the actual commission of the offence punishable by indictment, from which the property originated, it is not neces-



sary for the Crown to prove knowledge of those particulars on the part of the accused: *R. v. Gowing and Johnson* (1970), 2 C.C.C. (2d) 105, 12 C.R.N.S. 139 (Alta. S.C. App. Div.).

**Rule precluding multiple convictions** – The majority theory (6:1) in *Cote v. The Queen* (1974), 18 C.C.C. (2d) 321, 26 C.R.N.S. 26 (S.C.C.) that in law there is no bar to a convicted thief, who is subsequently found with the very stolen articles, being convicted of unlawful possession should be carefully considered in view of the difficulty of establishing when the thief had consummated his theft and when the offence of his unlawful possession of the same property commenced. Although there is a division of opinion the weight of the previous authorities seems to be in favour of the proposition that where possession and theft are proximate the thief cannot also be convicted of illegal possession of the same articles: *Fergusson v. The Queen* (1961), 132 C.C.C. 112, 36 C.R. 271 (S.C.C.), *R. v. Siggins* (1960), 127 C.C.C. 409, 32 C.R. 306 (Ont. C.A.), *R. v. Varkonyi*, [1964] 1 C.C.C. 311, 42 W.W.R. 507 (Man. C.A.), *R. v. Pryce*, [1967] 3 C.C.C. 13, 50 C.R. 80 (B.C.C.A.), and *R. v. Hunt*, [1968] 4 C.C.C. 366, 4 C.R.N.S. 386 (N.S. Co. Ct.). *Contra R. v. MacQuarrie*, [1964] 3 C.C.C. 261, 43 C.R. 97 (P.E.I.S.C.), *per MacGuigan J.*, dissenting, and *R. v. McKay*, [1968] 4 C.C.C. 355, 4 C.R.N.S. 380 (N.W.T.T.C.).

**Presumption for removal of V.I.N. number [subsec. (2)]** – The presumption does not operate to provide proof of the type of indictable offence specified in the indictment by which the vehicle left the hands of its rightful possessor: *R. v. Leslie* (1975), 23 C.C.C. (2d) 343 (Ont. C.A.).

The presumption in this subsection may be rebutted by evidence that merely raises a reasonable doubt and is not rejected by the trier of fact: *Re Boyle and The Queen*, *infra*; *R. v. Hill* (1983), 4 C.C.C. (3d) 519 (Ont. C.A.).

The term “obliterate” in this subsection includes the destruction of the integrity of the original vehicle identification number by altering some of the numbers and letters comprising it to produce a new and spurious vehicle identification number: *R. v. Hodgkins* (1985), 19 C.C.C. (3d) 109 (Ont. C.A.).

**Constitutional considerations** – Application of the doctrine of recent possession does not offend the guarantees in para. 11 (c) and (d) of the Charter of Rights and Freedoms: *R. v. Russell* (1983), 4 C.C.C. (3d) 460, 32 C.R. (3d) 307 (N.S.S.C. App. Div.).

Subsection (2) creates two presumptions: that the vehicle was obtained by commission of an indictable offence and that the accused had guilty knowledge. However, only the first is constitutionally valid. The presumption of guilty knowledge is arbitrary and contravenes the guarantee to the presumption of innocence in s. 11 (d) of the Charter of Rights and Freedoms. Accordingly, while the Crown may rely on this subsection to prove that the vehicle was unlawfully obtained, guilty knowledge must be proved by inferences from other circumstances such as the unexplained possession of recently stolen goods: *Re Boyle and The Queen* (1983), 5 C.C.C. (3d) 193, 35 C.R. (3d) 34 (Ont. C.A.).

## PUNISHMENT.

### 355. Every one who commits an offence under section 354

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or
- (b) is guilty
  - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
  - (ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars. R.S., c. C-34, s. 313; 1972, c. 13, s. 28; 1974-75-76, c. 93, s. 30; R.S.C. 1985, c. 27 (1st Supp.), s. 49; 1994, c. 44, s. 21.

#### CROSS-REFERENCES

The offence in para. (a) is an indictable offence for which the accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515. Where the prosecution elects to proceed by indictment for the offence under para. (b) then, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). As well, under s. 555(2), where, in the course of the trial, evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds \$5,000 then the provincial court judge shall put the accused to his election under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). For the offence under para. (b), release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The value of a valuable security (defined in s. 2) is determined in accordance with s. 4(2) and of a postal card or stamp in accordance with s. 4(1). The term "testamentary instrument" is defined in s. 2.

#### ANNOTATIONS

An item's retail value *prima facie* establishes its value: *R. v. Belanger* (1972), 6 C.C.C. (2d) 210 (B.C.C.A.).

On a charge of possession of stolen property the value is not an essential ingredient of the offence but rather goes only to jurisdiction and sentence. Where the charge alleged the offence under para. (a) but there was no evidence to show that the value was in excess of that amount the court would be justified in entering a conviction under para. (b) provided there was evidence that the property was of some value: *R. v. Gillis* (1977), 35 C.C.C. (2d) 418 (N.S.S.C. App. Div.).

#### THEFT FROM MAIL / Allegation of value not necessary.

##### 356. (1) Every one who

###### (a) steals

(i) any thing sent by post, after it is deposited at a post office and before it is delivered,

(ii) a bag, sack or other container or covering in which mail is conveyed, whether or not it contains mail, or

(iii) a key suited to a lock adopted for use in the Canada Post Corporation, or

(b) has in his possession anything in respect of which he knows that an offence has been committed under paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) In proceedings for an offence under this section it is not necessary to allege in the indictment or to prove on the trial that anything in respect of which the offence was committed had any value. R.S., c. C-34, s. 314; 1980-81-82-83, c. 54, s. 56.

#### CROSS-REFERENCES

Possession is defined by s. 4(3), however, s. 358 defines circumstances in which possession is complete. The terms "mail", "post" and "post office" are defined in s. 2(1) of the Canada Post Corporation Act, R.S.C. 1985, c. C-10 and "delivery" in s. 2(2) of that Act.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 or a warrant to conduct video surveillance under s. 487.01(5).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Section 476(e) contains a special provision for territorial jurisdiction where an offence is committed, in respect of a mail, in the course of door-to-door delivery.

The related offence of stopping mail with intent to rob or search is in s. 345.

For the offence under subsec. (1)(b), ss. 359 and 360 enact special evidentiary rules.

Under s. 359, evidence that stolen property was found in the accused's possession in the previous 12 months is admissible to prove knowledge that the property that forms the subject-matter of the proceedings was stolen property. Under s. 360, evidence may be given that the accused was convicted in the previous 5 years, of theft or an offence under s. 354, that to prove that knowledge that the property which forms the subject-matter of the proceedings was unlawfully obtained. Note that, for both sections, notice must be given to the accused.

## SYNOPSIS

This section describes the offence of theft from the mail. Subsection (1)(a) states that any person who steals anything sent by post, after it has been deposited at a post office and before it is delivered, who steals a bag, sack, or other container used to convey mail, whether or not it contains mail, or who steals a key for a lock used by Canada Post, is guilty of an offence. Subsection (1)(b) makes it an offence for a person to have in his possession anything in respect of which he knows that an offence under subsec. (1)(a) has been committed. The offence is indictable and carries a maximum term of imprisonment of 10 years. Subsection (2) makes it clear that it is unnecessary for the prosecution to allege in the indictment or to prove at trial that anything in respect of which an offence under this section was committed had any value.

## ANNOTATIONS

By virtue of s. 588 a letter once it is deposited at the post office becomes the property of the Postmaster General: *R. v. Wendland* (1970), 1 C.C.C. (2d) 382 (Sask. C.A.).

By virtue of the definition of "delivery" in the Post Office Act, R.S.C. 1970, c. P-14 [now s. 2(2) of the Canada Post Corporation Act, R.S.C. 1985, c. C-10], mail in a lock box is already delivered: *R. v. Burgess* (1976), 33 C.C.C. (2d) 126 (B.C.C.A.).

Mail is not "delivered" until it is in a receptacle to which the addressee has access and may remove the mail: *R. v. Weaver, Warwick and Smurthwaite* (1980), 55 C.C.C. (2d) 564, 30 O.R. (2d) 361 (C.A.).

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## BRINGING INTO CANADA PROPERTY OBTAINED BY CRIME.

**357. Every one who brings into or has in Canada anything that he has obtained outside Canada by an act that, if it had been committed in Canada, would have been the offence of theft or an offence under section 342 or 354, is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years. R.S., c. C-34, s. 315; R.S.C. 1985, c. 27 (1st Supp.), s. 50.**

## CROSS-REFERENCES

The offence of theft is described in ss. 322 to 334 and 338. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

## SYNOPSIS

This section makes it an offence to import into Canada or to have possession of anything so imported that the accused obtained by an act that would have been the offence of theft or an offence under s. 342 (credit card offences) or 354 (possession of goods obtained by crime) if it had been committed in Canada. The offence is indictable and carries a maximum term of imprisonment of 10 years.



**HAVING IN POSSESSION WHEN COMPLETE.**

**358.** For the purposes of sections 342 and 354 and paragraph 356(1)(b), the offence of having in possession is complete when a person has, alone or jointly with another person, possession of or control over anything mentioned in those sections or when he aids in concealing or disposing of it, as the case may be. R.S., c. C-34, s. 316; R.S.C. 1985, c. 27 (1st Supp.), s. 50.

**CROSS-REFERENCES**

For the definition of possession generally, see s. 4(3).

**ANNOTATIONS**

It was held in *R. v. MacPherson*; *R. v. Resnick*, [1964] 3 C.C.C. 170, 43 C.R. 272 (Ont. C.A.), that a person aiding in concealing or disposing of stolen goods is held to be in possession of these goods.

It was found in *R. v. Hanson*; *R. v. Klepeck*, [1966] 4 C.C.C. 86 (B.C.C.A.), that the intention of the accused to possess only a part of the whole is inconsistent with an intention to possess the whole.

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**EVIDENCE / Notice to accused.**

**359. (1)** Where an accused is charged with an offence under section 342 or 354 or paragraph 356(1)(b), evidence is admissible at any stage of the proceedings to show that property other than the property that is the subject-matter of the proceedings

(a) was found in the possession of the accused, and

(b) was stolen within twelve months before the proceedings were commenced, and that evidence may be considered for the purpose of proving that the accused knew that the property that forms the subject-matter of the proceedings was stolen property.

**(2)** Subsection (1) does not apply unless

(a) at least three days notice in writing is given to the accused that in the proceedings it is intended to prove that property other than the property that is the subject-matter of the proceedings was found in his possession; and

(b) the notice sets out the nature or description of the property and describes the person from whom it is alleged to have been stolen. R.S., c. C-34, s. 317; R.S.C. 1985, c. 27 (1st Supp.), s. 51.

**CROSS-REFERENCES**

Possession is defined in s. 4(3). Under s. 27(1) of the Interpretation Act, R.S.C. 1985, c. I-21, in calculating "at least" a number of days between two events, the days on which the events happen are excluded.

**SYNOPSIS**

This section sets out evidentiary provisions which the prosecutor may rely upon in proceedings under ss. 342, 354 or 356(1)(b). Evidence that property, other than the property that is the subject-matter of the offence, was found in the possession of the accused and was stolen within the 12 months prior to the beginning of the proceedings, is admissible at any stage of the proceedings and may be considered for the purpose of proving that the accused knew that the property that forms the subject-matter of the offence was stolen property. Subsection (2) states that the prosecutor may only make use of subsec. (1) if written notice, at least three days prior to trial, is given to the accused. Subsection 2(b) further requires that the notice set out the nature or description of the property referred to in subsec. 2(a) and the person from whom the prosecutor alleges such property was stolen.

**ANNOTATIONS**

Compliance with subsec. (2) is not required where evidence of possession of another stolen article was offered only to identify the accused as the thief of both articles: *R. v. Boutilier* (1968), 4 C.R.N.S. 90 (N.S.Co.Ct.).

In *R. v. Hewitt* (1986), 32 C.C.C. (3d) 62, 55 C.R. (3d) 41 (Man. C.A.) the court considered the constitutionality of this section in view of s. 7 of the Canadian Charter of Rights and Freedoms and seems to have held that the section should be "read down" so as to apply only where the evidence of prior convictions would be relevant for a reason other than to show merely that the accused was of a bad disposition.

In *R. v. Guyett* (1989), 51 C.C.C. (3d) 368, 72 C.R. (3d) 383, 35 O.A.C. 135 (C.A.), the court also held that this section offends s. 7 of the Charter of Rights since, under it, evidence of bad character may be introduced, even if it shows nothing other than bad character. However, the court did not find it necessary to consider whether this section constitutes a reasonable limit within the meaning of s. 1 of the Charter, since the evidence, which had been admitted pursuant to this section, would have been admissible, in any event, under the common law rules of admissibility.

**EVIDENCE OF PREVIOUS CONVICTION / Notice to accused.**

**360. (1) Where an accused is charged with an offence under section 354 or paragraph 356(1)(b) and evidence is adduced that the subject-matter of the proceedings was found in his possession, evidence that the accused was, within five years before the proceedings were commenced, convicted of an offence involving theft or an offence under section 354 is admissible at any stage of the proceedings and may be taken into consideration for the purpose of proving that the accused knew that the property that forms the subject-matter of the proceedings was unlawfully obtained.**

**(2) Subsection (1) does not apply unless at least three days notice in writing is given to the accused that in the proceedings it is intended to prove the previous conviction. R.S., c. C-34, s. 318.**

**CROSS-REFERENCES**

Possession is defined in s. 4(3). Under s. 27(1) of the Interpretation Act, R.S.C. 1985, c. I-21, in calculating "at least" a number of days between two events, the days on which the events happen are excluded. Section 667 provides a means of proving prior convictions. Also note s. 666 which permits evidence of previous convictions to be introduced where the accused adduces evidence of his good character and s. 12 of the Canada Evidence Act which gives the judge a discretion to permit cross-examination of an accused on his prior criminal record.

**SYNOPSIS**

This section allows the prosecutor to introduce evidence, in proceedings under ss. 354 or 356(1)(b), that the accused has been convicted, within the five years prior to the commencement of these proceedings, of an offence involving theft or an offence under s. 354. Such evidence is admissible at any stage of the proceedings and may be considered for the purpose of proving that the accused knew that the property which forms the subject-matter of the offence in the proceedings was unlawfully obtained. Section 7 of the Charter may be raised in relation to this evidentiary provision. As in s. 359, the prosecutor must give the accused written notice, at least three days prior to the proceedings, that it is intended to prove the prior conviction.

**ANNOTATIONS**

The fact that the prior conviction was under appeal at the time of trial did not render it inadmissible pursuant to this section: *Hewson v. The Queen* (1978), 42 C.C.C. (2d) 507, 89 D.L.R. (3d) 573, [1978] 2 S.C.R. 111 (5:4).

Where additional charges of break and enter and possession of housebreaking instru-

ments are tried jointly with charges of possession and the Crown's emphasis is substantially on the break and enter aspect, evidence of previous convictions for theft or possession is not admissible: *R. v. Bowins, Doxtater And Stauffers* (1973), 24 C.R.N.S. 279 (Ont.Co.Ct.).

It would seem that to invoke this section the property which is the subject-matter of the proceedings must have been found in the accused's possession and it does not apply to the Crown's case that on some prior occasion the goods were in the accused's possession: *R. v. Alvey* (1971), 4 C.C.C. (2d) 174, [1971] 3 O.R. 527 (C.A.) referring to *R. v. Drage and Others* (1878), 14 Cox C.C. 85.

This provision offends s. 7 of the Charter of Rights and is of no force and effect: *R. v. Hudyma* (1988), 46 C.C.C. (3d) 88 (Ont. Dist. Ct.); *R. v. Wyatt* (1986), 32 C.R.R. 211 (Ont. Prov. Ct.). *Contra*: *R. v. Gallant* (1982), 70 C.C.C. (2d) 213, 38 O.R. (2d) 788, 2 C.R.R. 144 (Ont. Prov. Ct.).

## False Pretences

### FALSE PRETENCE / Exaggeration / Question of fact.

**361. (1)** A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

**(2)** Exaggerated commendation or depreciation of the quality of anything is not a false pretence unless it is carried to such an extent that it amounts to a fraudulent misrepresentation of fact.

**(3)** For the purposes of subsection (2) it is a question of fact whether commendation or depreciation amounts to a fraudulent misrepresentation of fact. R.S., c. C-34, s. 319.

### CROSS-REFERENCES

The offences relating to false pretences are found in ss. 362 and 363. See the cross-references under those sections for mode of trial, release pending trial and special evidentiary provisions. The related offence of theft is defined in ss. 322 to 334, theft, etc., of credit card in s. 342 and fraud in s. 380.

### SYNOPSIS

This section defines a false pretence as a representation of a matter of fact made in any fashion that is *known by the person who makes it* to be false *and* that is made with a *fraudulent intent* to induce the person to whom it is made to act on it. Both of the mental elements described above must be present in order to fall within the definition of a false pretence. Subsection (2) states that an exaggeration or depreciation of the quality of anything does not amount to a false pretence unless it amounts to a *fraudulent misrepresentation of fact*. Whether or not the exaggeration or depreciation described in subsec. (2) is a fraudulent misrepresentation is a question of fact.

### ANNOTATIONS

A false representation amounting to a mere promise or profession of intention is not a false pretence within this section unless such promise or profession of intention necessarily and irresistibly involves a representation of an existing fact. Thus a false promise to pay for goods in the future is not within this section: *R. v. Reid* (1940), 74 C.C.C. 156, [1940] 4 D.L.R. 25 (B.C.C.A.). [Note however that where the means of payment is a cheque, Parliament has enacted a special rule set out in s. 362(4).]



**FALSE PRETENCE OR FALSE STATEMENT / Punishment / Idem / Presumption from cheque issued without funds / Definition of "cheque".**

**362. (1) Every one commits an offence who**

- (a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be committed or causes it to be delivered to another person;
  - (b) obtains credit by a false pretence or by fraud;
  - (c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied on, with respect to the financial condition or means or ability to pay of himself or any person, firm or corporation that he is interested in or that he acts for, for the purpose of procuring, in any form whatever, whether for his benefit or the benefit of that person, firm or corporation,
    - (i) the delivery of personal property,
    - (ii) the payment of money,
    - (iii) the making of a loan,
    - (iv) the grant or extension of credit,
    - (v) the discount of an account receivable, or
    - (vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft, or promissory note; or
  - (d) knowing that a false statement in writing has been made with respect to the financial condition or means or ability to pay of himself or another person, firm or corporation that he is interested in or that he acts for, procures on the faith of that statement, whether for his benefit or for the benefit of that person, firm or corporation, anything mentioned in subparagraphs (c)(i) to (vi).
- (2) Every one who commits an offence under paragraph (1)(a)
- (a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the property obtained is a testamentary instrument or the value of what is obtained exceeds five thousand dollars; or
  - (b) is guilty
    - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
    - (ii) of an offence punishable on summary conviction, where the value of what is obtained does not exceed five thousand dollars.
- (3) Every one who commits an offence under paragraph (1)(b), (c) or (d) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
- (4) Where, in proceedings under paragraph (1)(a), it is shown that anything was obtained by the accused by means of a cheque that, when presented for payment within a reasonable time, was dishonoured on the ground that no funds or insufficient funds were on deposit to the credit of the accused in the bank or other institution on which the cheque was drawn, it shall be presumed to have been obtained by a false pretence, unless the court is satisfied by evidence that when the accused issued the cheque he believed on reasonable grounds that it would be honoured if presented for payment within a reasonable time after it was issued.
- (5) In this section, "cheque" includes, in addition to its ordinary meaning, a bill of exchange drawn on any institution that makes it a business practice to honour bills of exchange or any particular kind thereof drawn on it by depositors. R.S., c. C-34, s. 320; 1972, c. 13, s. 29; 1974-75-76, c. 93, s. 31; R.S.C. 1985, c. 27 (1st Supp.), s. 52; 1994, c. 44, s. 22.

**CROSS-REFERENCES**

A false pretence is defined in s. 361.

As to admission of photographic evidence of property, see s. 491.2. For proof by way of affidavit of ownership, lawful possession, value, and that the person was deprived of property by fraud or otherwise without the person's lawful consent, see s. 657.1. By virtue of s. 583(b), an indictment which otherwise complies with s. 581 is not insufficient by reason only that (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Under s. 586, no count alleging false pretences or fraud is insufficient by reason only that it does not set out in detail the nature of the false pretences or fraud. However, under s. 587(1)(b), the court may order particulars of any false pretence or fraud that is alleged.

For the meaning of "bill of exchange", see Bills of Exchange Act, R.S.C. 1985, c. B-4.

Where the offence under subsec. (1)(a), although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4).

The offence in para. (2)(a) is a pure indictable offence for which the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by indictment for the offence under para. 2(b) then, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). As well, under s. 555(2), where, in the course of the trial, evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds \$1000 then the provincial court judge shall put the accused to his election under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). For the offences under subsec. (2), release pending trial is determined by s. 515, although in case of the offence under subsec. (2)(b) the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The value of a valuable security (defined in s. 2) is determined in accordance with s. 4(2) and of a postal card or stamp in accordance with s. 4(1). The term "testamentary instrument" is defined in s. 2.

For the offences punished under subsec. (3), the accused may elect his mode of trial under s. 536(2) and release pending trial is governed by s. 515.

## SYNOPSIS

This section describes the offence of false pretences and the punishment for the offence. Subsection (1) states that any person who, by a false pretence or fraud, obtains credit, or who *knowingly makes a false statement in writing*, intending it to be relied upon, with respect to his own financial state, or that of any entity in which he has an interest, in order to procure any of the benefits listed in subsec. (1)(c), is guilty of an offence. Subsection (1) further states that every one commits an offence who *knows that a false written statement* about his own financial state or that of any entity in which he has an interest has been made and, on the basis of that statement, procures anything mentioned in subsec. (1)(c). Finally, an offence under this section is committed when a person, by false pretence, directly or indirectly as described in subsec. (1)(a), obtains anything for himself or another person in respect of which the offence of theft may be committed. The form of the offence described in subsec. (1)(a) is indictable, with a maximum term of 10 years' imprisonment when the property obtained is a testamentary instrument, or its value exceeds \$5,000. Where the value does not exceed \$5,000, the offence is hybrid with a maximum term of imprisonment of two years on indictment. The forms of the offence described in subsec. (1)(b), (c) and (d) are all punishable by indictment only, with a maximum term of 10 years' imprisonment. Subsection (4) enacts a presumption that in proceedings under subsec. (1)(a) where the goods have been obtained by an N.S.F. cheque, it shall be presumed that those goods have been obtained by false pre-

tences unless the court is satisfied that the accused *believed on reasonable grounds* that the cheque would be honoured when he wrote it. Subsection (5) gives a wide definition to the term "cheque" for the purposes of this section.

## ANNOTATIONS

**Whether property must pass** – The word "obtains" does not mean that the goods must wholly or entirely pass to the accused; the passing of their possession and a property interest, *e.g.*, an insurable interest, in them is sufficient for conviction: *R. v. Hemingway* (1955), 112 C.C.C. 321, 22 C.R. 275 (S.C.C.).

Subsequently the view was expressed (2:1) that the acquiring of mere possession would satisfy the requirements of the offence of obtaining anything by a false pretence: *R. v. Campbell*, [1968] 1 C.C.C. 104, 1 C.R.N.S. 325 (B.C.C.A.).

A very useful review of the conflicting authorities on the issue whether or not, for the establishment of this offence, in addition to bare possession some aspect of ownership must also pass is found in *R. v. Vallillee* (1974), 15 C.C.C. (2d) 409, 24 C.R.N.S. 319 (Ont. C.A.).

**Proof of offence of obtaining by false pretences [subsec. (1)(a)]** – Where on appeal the Court finds that a lesser amount than that set out in the indictment was proved to have been obtained it may amend the conviction accordingly and dismiss the appeal: *Lake v. The Queen*, [1969] 2 C.C.C. 224, [1969] S.C.R. 49 (5:0).

Where the victim made his own thorough investigation, not relying on the representations by the accused, a conviction under this section cannot be sustained: *R. v. Thornton* (1926), 46 C.C.C. 249, 37 B.C.L.R. 344 (C.A.).

**Obtaining credit by fraud or false pretences [subsec. (1)(b)]** – The credit obtained does not have to be that of the accused; it is sufficient for conviction if he obtained goods by falsely charging them to his employer's account. Furthermore, it is no defence for the accused to argue successfully that he could have been convicted under subsec. (1)(a) of obtaining by a false pretence: *R. v. Dvornek* (1962), 132 C.C.C. 231, 37 C.R. 344 (B.C.C.A.).

A loan of money secured by a property mortgage amounts to the obtaining of credit. Furthermore, there is a presumption that where money was obtained by a false pretence, *prima facie*, there is an intent to defraud. Even where the victim makes its own investigation, if the false representation by the accused is the operative inducement in the obtaining of the credit the offence is made out: *R. v. Dyke And Dyke* (1976), 33 C.C.C. (2d) 556, 37 C.R.N.S. 379 (Nfld. Dist. Ct.).

**False statement respecting financial condition [subsec. (1)(c)]** – It was held prior to the recent amendment to subpara. (iv), which added the word "grant", that the phrase "extension of credit" means granting or according credit and therefore does not include conduct by the accused which merely serves to keep open an existing line of credit: *R. v. Cohen* (1984), 15 C.C.C. (3d) 231 (Que. C.A.).

**Presumption from N.S.F. cheque [subsec. (4)]** – Where the case against the accused was that he obtained goods by a cheque drawn against a non-existent bank account it is not necessary, once the Crown has satisfactorily proven the non-existence of the account, to prove the presentment and dishonouring of the cheque: *R. v. Morphett* (1970), 1 C.C.C. (2d) 98, 13 C.R.N.S. 270 (B.C.C.A.).

More than a reasonable doubt is required to rebut the presumption which may be satisfied by evidence whether or not it flows from the accused: *R. v. Druckman* (1974), 31 C.R.N.S. 177 (Ont. Co. Ct.).

The accused's explanation is to be judged using a subjective test and a real belief that funds would be available even though considered objectively the belief was unreasonable will lead to an acquittal: *R. v. Lane* (1978), 42 C.C.C. (2d) 375 (Ont. Prov. Ct.).

This subsection is of no force and effect by reason of its violation of the guarantee to



the presumption of innocence in s. 11(d) of the Charter of Rights and Freedoms: *R. v. Driscoll* (1987), 38 C.C.C. (3d) 28, 60 C.R. (3d) 88, [1987] 6 W.W.R. 748 (Alta. C.A.); *R. v. Ferguson* (1992), 70 C.C.C. (3d) 30, 12 C.R. (4th) 198 (P.E.I.S.C.). *Contra*: *R. v. Bunka* (1984), 12 C.C.C. (3d) 437, [1984] 4 W.W.R. 252, 32 Sask. R. 271 (Q.B.).

### OBTAINING EXECUTION OF VALUABLE SECURITY BY FRAUD.

**363.** Every one who, with intent to defraud or injure another person, by a false pretence causes or induces any person

- (a) to execute, make, accept, endorse or destroy the whole or any part of a valuable security, or
- (b) to write, impress or affix a name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 321.

### CROSS-REFERENCES

The term “valuable security” is defined in s. 2 and its value determined in accordance with s. 4(2).

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Under s. 586, no count alleging false pretences or fraud is insufficient by reason only that it does not set out in detail the nature of the false pretences or fraud. However, under s. 587(1)(b), the court may order particulars of any false pretence or fraud that is alleged.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

### SYNOPSIS

This section describes the indictable offence of obtaining the execution of a valuable security by means of a false pretence. The accused must have *the intent to defraud or injure* another person. The maximum term of imprisonment upon conviction for this offence is five years.

### FRAUDULENTLY OBTAINING FOOD, BEVERAGE OR ACCOMMODATION / Presumption / Definition of “cheque”.

**364.** (1) Every one who fraudulently obtains food, a beverage or accommodation at any place that is in the business of providing those things is guilty of an offence punishable on summary conviction

(2) In proceedings under this section, evidence that the accused obtained food, a beverage or accommodation at a place that is in the business of providing those things and did not pay for it and

- (a) made a false or fictitious show or pretence of having baggage,
- (b) had any false or pretended baggage,
- (c) surreptitiously removed or attempted to remove his baggage or any material part of it,
- (d) absconded or surreptitiously left the premises,
- (e) knowingly made a false statement to obtain credit or time for payment, or
- (f) offered a worthless cheque, draft or security in payment for the food, beverage or accommodation,

is, in the absence of any evidence to the contrary, proof of fraud.

(3) In this section, "cheque" includes, in addition to its ordinary meaning, a bill of exchange drawn on any institution that makes it a business practice to honour bills of exchange or any particular kind thereof drawn on it by depositors. R.S., c. C-34, s. 322; 1994, c. 44, s. 23.

#### CROSS-REFERENCES

The terms "food", "beverage" and "accommodation" are not defined in this section. However, reference might be made to the definition of "food" in the Food and Drugs Act, s. 2. While there is no definition of "fraudulently" which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.).

This offence resembles the offence of obtaining by false pretences and thus, see notes under s. 361 respecting related offences. Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer if charge under s. 498.

#### SYNOPSIS

This section describes the summary conviction offence of fraudulently obtaining food, beverage or accommodation at a place that is in the business of providing those things. Subsection (2) sets out a number of fact situations which, in conjunction with evidence that an accused obtained any of the accommodations described in subsec. (1) without paying, will constitute proof of the fraud, in the absence of evidence to the contrary.

#### PRETENDING TO PRACTISE WITCHCRAFT, ETC.

##### 365. Every one who fraudulently

- (a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration,
- (b) undertakes, for a consideration, to tell fortunes, or
- (c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found,

is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 323.

#### CROSS-REFERENCES

While there is no definition of "fraudulently" which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.).

This offence resembles the offence of obtaining by false pretences and thus, see notes under s. 361 respecting related offences. Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer ifn charge under s. 498.

#### ANNOTATIONS

The mere telling of a fortune is not *per se* illegal, as the Crown must also prove an intent to delude or defraud: *R. v. Dazenbrook* (1975), 23 C.C.C. (2d) 252 (Ont. Prov. Ct.).

The trial Judge could properly find the offence under para. (b) was made out upon evidence that the accused, who was given \$10, represented she could predict events from reading lines on the customer's hands and that she was an expert and had taken special courses in Europe: *R. v. Corbeil* (1981), 65 C.C.C. (2d) 570 (Que. C.A.).

The offence under para. (b) of this section does not require proof that in fact the predictions were false, or that the accused expressly stated that she had a power to predict the future: *R. v. Labrosse* (1984), 17 C.C.C. (3d) 283 (Que. C.A.). Note: On further appeal to the Supreme Court of Canada, 33 C.C.C. (3d) 220, [1987] 1 S.C.R. 310, 39

D.L.R. (4th) 639, the court left open the question whether it was a defence that the accused honestly believed that she could predict the future, in view of the trial judge's express finding that he disbelieved the accused when she made that assertion.

## ***Forgery and Offences Resembling Forgery***

**FORGERY / Making false document / When forgery complete / Forgery complete though document incomplete.**

**366. (1) Every one commits forgery who makes a false document, knowing it to be false, with intent**

- (a) that it should in any way be used or acted on as genuine, to the prejudice of any one whether within Canada or not; or
- (b) that a person should be induced, by the belief that it is genuine, to do or to refrain from doing anything, whether within Canada or not.

**(2) Making a false document includes**

- (a) altering a genuine document in any material part;
- (b) making a material addition to a genuine document or adding to it a false date, attestation, seal or other thing that is material; or
- (c) making a material alteration in a genuine document by erasure, obliteration, removal or in any other way.

**(3) Forgery is complete as soon as a document is made with the knowledge and intent referred to in subsection (1), notwithstanding that the person who makes it does not intend that any particular person should use or act on it as genuine or be induced, by the belief that it is genuine, to do or refrain from doing anything.**

**(4) Forgery is complete notwithstanding that the false document is incomplete or does not purport to be a document that is binding in law, if it is such as to indicate that it was intended to be acted on as genuine. R.S., c. C-34, s. 324.**

### **CROSS-REFERENCES**

The terms "document" and "false document" are defined in s. 321.

The punishment for forgery is set out in s. 367 and for uttering a forged document in s. 368. For either offence, the accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Forgery and uttering offences may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant to conduct video surveillance under s. 487.01(5), and are enterprise crime offences for the purposes of Part XII.2. Offences resembling forgery and uttering, but referring to specific types of documents, are in the following sections: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; ss. 371, 372, false telegram, etc.; s. 374, drawing document without authority; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.

### **SYNOPSIS**

This section describes the offence of forgery. Every person who makes a false document, *knowing it to be false, with the intent* that it should be used as genuine to the prejudice of another person, or that another person should be induced, believing the document to be genuine, to do or refrain from doing anything, commits the offence of forgery. The action contemplated or the person to be induced may be inside or outside Canada. Sub-



section (2) defines the term "making a false document" in the context of altering a genuine document. Subsection (3) states that a forgery is complete as soon as the document is made with the intent and knowledge referred to in subsection (1), whether or not the accused intends a specific person to act on it. Subsection (4) further states that the offence of forgery is complete even if the false document is incomplete or of no binding legal effect so long as it can be demonstrated that it was intended to be acted upon as genuine.

## ANNOTATIONS

**Meaning of false document** – The provisions of this subsection do not exclude the definition of "false document" in s. 321. Thus an accused may be convicted of forgery where he makes a "false document" as that phrase is defined in s. 321. Specifically, the accused makes a "false document" where he prepares a document which is false in some material particular. A document which is false in reference to the very purpose for which it was created is clearly one which is false in a material particular. Thus the act of the accused in preparing inventory sheets which contained false information as to the very matter which they purported to certify and so were false in a number of material particulars comes within this section: *Gaysek v. The Queen* (1971), 2 C.C.C. (2d) 545, 18 D.L.R. (3d) 306 (S.C.C.) (3:2).

It is not necessarily the case that a document which merely contains a lie falls within the definition of a false document. However, a document which is false in reference to the very purpose for which it was created is one that is false in a material particular within the meaning of s. 321 and therefore capable of founding a conviction under this section: *R. v. Ogilvie* (1993), 81 C.C.C. (3d) 125, [1993] R.J.Q. 453 (C.A.).

It is open to the trier of fact to find a document to be a false document where it is a photocopy which purports to be a true copy of the state of a particular instrument at the time of its reproduction. In this case the accused photocopied parts of two documents so that it appeared that what had been copied was a certified cheque: *R. v. Sebo* (1988), 42 C.C.C. (3d) 536, 64 C.R. (3d) 388, 87 A.R. 141 (C.A.), leave to appeal to S.C.C. refused 93 A.R. 240n. Similarly: *R. v. Nuosci* (1991), 69 C.C.C. (3d) 64, 10 C.R. (3d) 332, 6 O.R. (3d) 316 (C.A.), leave to appeal to S.C.C. refused May 7, 1992.

In *R. v. Paquette* (1979), 45 C.C.C. (2d) 575, [1975] 2 S.C.R. 168 (S.C.C.) (7:0) the Court in reversing the accused notary's acquittal on a charge of uttering approved the dissenting reasons of Montgomery, J.A., in the Quebec Court of Appeal, 42 C.C.C. (2d) 57, who had held that in adding a false attestation to an affidavit the accused made a false document within the meaning of this subsection notwithstanding he was unaware that the entire document was a forgery. The accused had attested to the signature of one of the purported witnesses although he had not seen the "witness" sign the document.

Authorized signings are excluded from the ambit of this offence, even where the document fails on its face to specifically indicate that the actual signatory is acting as a proxy of another. Such documents may be misleading as a result, but they do not have the property of falsity inherent in forgery: *R. v. Foley* (1994), 90 C.C.C. (3d) 390, 30 C.R. (4th) 238, 120 Nfld. & P.E.I.R. 24 (Nfld. C.A.).

**Offences involving cheques** – The accused was convicted of forgery where he endorsed the signature of the payee of a cheque. As the cheque was made out to the payee the payee could be the only endorser. When the accused signed the payee's name as endorser he did it to the prejudice of the payee and the offence was made out. Moreover, it was no defence that the payor had authorized the accused to deal with the cheque in that manner since such authorization could not come from the payor: *Cowan v. The Queen* (1962), 132 C.C.C. 352, 37 C.R. 151 (S.C.C.) (3:2).

A forged endorsement on an otherwise valid cheque converts the cheque into a false document: *R. v. Elkin* (1978), 42 C.C.C. (2d) 185, [1978] 5 W.W.R. 547 (B.C.C.A.); *R. v. Jones*, [1970] 4 C.C.C. 284, 11 C.R.N.S. 219 (Ont. C.A.); *R. v. Keshane* (1974), 20 C.C.C. (2d) 542, 27 C.R.N.S. 331 (Sask. C.A.).

The figures on a cheque are a material part: *R. v. O'Hearn*, [1964] 3 C.C.C. 296, 44 C.R. 48 (B.C.C.A.).

### **PUNISHMENT FOR FORGERY / Corroboration.**

**367. (1) Every one who commits forgery is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S.C. c. C-34, s. 325; 1994, c. 44, s. 24.**

**(2) [Repealed. 1994, c. 44, s. 24.]**

### **CROSS-REFERENCES**

Forgery is defined in s. 366. This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Forgery is an enterprise crime offence for the purposes of Part XII.2.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. For related offences, see cross-references under s. 366. The offence of uttering is defined in s. 368.

### **UTTERING FORGED DOCUMENT / Wherever forged.**

**368. (1) Every one who, knowing that a document is forged,**

**(a) uses, deals with or acts on it, or**

**(b) causes or attempts to cause any person to use, deal with, or act on it, as if the document were genuine, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.**

**(2) For the purposes of proceedings under this section, the place where a document was forged is not material. R.S., c. C-34, s. 326.**

### **CROSS-REFERENCES**

The term "document" is defined in s. 321. The offence of forgery is defined in s. 366 and punished under s. 367.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183. Uttering a forged document is an enterprise crime offence for the purposes of Part XII.2. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Offences resembling forgery and uttering but referring to specific types of documents are in the following sections: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; ss. 371, 372, false telegram, etc.; s. 374, drawing document without authority; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.

### **SYNOPSIS**

This section describes the indictable offence of uttering a forged document. Any person who, with knowledge that a document is forged, uses or acts upon it as though it were genuine is guilty of the offence of uttering. A person who causes, or attempts to cause, another person to use or act upon a forged document is also guilty of this offence. The maximum term of imprisonment for this offence is 14 years. In proceedings under this section, the place where the forgery occurred is not material.

## ANNOTATIONS

The requirement of corroboration only applies to the offence of forgery, not to the offence of uttering: *R. v. Susimaki*, [1968] 3 C.C.C. 381, 3 C.R.N.S. 281 (B.C.C.A.).

A forgery within the meaning of s. 366 must exist before an offence under this section can be committed. It is not sufficient that the document was a "false document" as defined by s. 321 if the document was not made with one of the intents specified in s. 366(1): *R. v. Hawrish* (1986), 32 C.C.C. (3d) 446, 52 Sask. R. 248 (C.A.). *Contra: R. v. Lapointe* (1984), 12 C.C.C. (3d) 238 (Que. C.A.) where it was held, relying in part on *R. v. Keshane* (1974), 20 C.C.C. (2d) 542, [1975] 1 W.W.R. 294, 27 C.R.N.S. 331 (Sask. C.A.) leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, [1974] S.C.R. ix, now overruled on this point, that while on a charge under para. (1)(b) the Crown must establish that the accused intended that the other person use the document as genuine or that he was reckless in that respect, what need not be shown is the intent described in s. 366 with which the document was forged. And it was held in *R. v. Sebo* (1988), 42 C.C.C. (3d) 536, 64 C.R. (3d) 388, 87 A.R. 141 (C.A.), that an intention to defraud is not an element of the offence under this section. Rather, the intent required is the intent to deceive, such an interpretation is consistent with the forgery offence defined by s. 366(1)(b) which as well does not require proof of an intent to defraud.

The fact that the accused ought to have known that certain facts existed does not by itself form a basis for the application of the doctrine of wilful blindness: *R. v. Currie* (1975), 24 C.C.C. (2d) 292 (Ont. C.A.) (2:1).

Acts of the accused in preparing fictitious bills for fees which were to be used if necessary to cover the payment of a benefit to a bank manager, did not constitute uttering where the bills were never used and never seen either by the bank or the revenue authorities: *R. v. Valois* (1986), 25 C.C.C. (3d) 97, 51 C.R. (3d) 243, [1986] 1 S.C.R. 278 (7:0).

## EXCHEQUER BILL PAPER, PUBLIC SEALS, ETC.

**369.** Every one who, without lawful authority or excuse, the proof of which lies on him,

(a) makes, uses or knowingly has in his possession

(i) any exchequer bill paper, revenue paper, or paper that is used to make bank notes, or

(ii) any paper that is intended to resemble paper mentioned in subparagraph (i),

(b) makes, offers or disposes of or knowingly has in his possession any plate, die, machinery, instrument or other writing or material that is adapted and intended to be used to commit forgery, or

(c) makes, reproduces or uses a public seal of Canada or of a province, or the seal of a public body or authority in Canada, or of a court of law,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. **R.S., c. C-34, s. 327.**

## CROSS-REFERENCES

The terms "exchequer bill" and "exchequer bill paper", "revenue paper" are defined in s. 321. The terms "bank-note" and "writing" are defined in s. 2. "Writing" is also defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Forgery is defined in s. 366.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 370, counterfeit government proclamation; ss. 371, 372, false telegram, etc.; s. 374, drawing document without authority; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.



## SYNOPSIS

This section describes the indictable offence of unlawfully making use of or possessing exchequer bill paper, revenue bill paper, paper used to make bank notes, or any paper that is intended to look like those papers. It further describes the offence of making, disposing of, or knowingly possessing any item that is intended to be used to commit forgery, and the offence of making or using a public seal of Canada, a province, a public body or a court of law. The section requires that the accused demonstrate that any of the actions described above were done *with lawful authority or excuse*. The maximum term of imprisonment for this offence is 14 years.

## ANNOTATIONS

The word “other” in para. (b) relates back only to the word “instrument”, which is used as meaning a written document. Thus there is no common category into which “plate, die, machinery and instrument” fall to warrant the *ejusdem generis* interpretation rule, so cheques and an unemployment insurance card found on the accused were held to be unlawful items: *R. v. Evans* (1962), 132 C.C.C. 271, 37 C.R. 341 (B.C.C.A.).

In *Griffiths v. The Queen* (1969), 7 C.R.N.S. 196 (Que. Q.B., App. Side), it was held that proof of mere possession of an unendorsed forged cheque, in the absence of proof that the cheque was intended to be used to commit forgery, is not an offence. Furthermore Rivard, J., refused to follow *R. v. Evans*, *supra*.

Having regard to the definition of revenue paper in s. 321 as paper used to make stamps, licences or permits, the offence is not made out where the accused is in possession of a false birth certificate. The definition contemplates present possession of paper for the future purpose of making or manufacturing certain government documents. It was not intended to apply to completed documents: *R. v. Hagerman* (1988), 46 C.C.C. (3d) 432 (B.C. Co. Ct.).

## COUNTERFEIT PROCLAMATION, ETC.

## 370. Every one who knowingly

- (a) prints a proclamation, order, regulation or appointment, or notice thereof, and causes it falsely to purport to have been printed by the Queen’s Printer for Canada or the Queen’s Printer for a province, or
- (b) tenders in evidence a copy of any proclamation, order, regulation or appointment that falsely purports to have been printed by the Queen’s Printer for Canada or the Queen’s Printer for a province,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 328.

## CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; ss. 371, 372, false telegram, etc.; s. 374, drawing document without authority; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc. With respect to the offence in para. (b), also see s. 131, perjury and s. 237, fabricating evidence.

## SYNOPSIS

This section describes two offences relating to the counterfeiting of official documents. Everyone who *knowingly* prints a proclamation, order, regulation, or appointment, or a notice of such document, and causes it falsely to purport to have been printed by a fed-

eral or provincial Queen's Printer, commits the offence, as does anyone knowingly tendering a copy of such a document (with the exception of notices) in evidence. The offence is indictable, and is punishable by imprisonment for up to five years.

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**TELEGRAM, ETC., IN FALSE NAME.**

**371.** Every one who, with intent to defraud, causes or procures a telegram, cablegram or radio message to be sent or delivered as being sent by the authority of another person, knowing that it is not sent by his authority and with intent that the message should be acted on as being sent by his authority, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 329.

**CROSS-REFERENCES**

The term "radio" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; s. 374, drawing document without authority; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc. With respect to the offence in para. (b), also see s. 131, perjury and s. 237, fabricating evidence.

Also see related offences: s. 181, publishing false news; s. 372, conveying false information, indecent and harassing telephone calls.

**SYNOPSIS**

This section describes the offence of sending messages in a false name. Everyone causing a telegram, cablegram or radio message to be sent or delivered purportedly by the authority of a person *known* not to have authorized it, intending that it be acted upon as if authorized by that person, and *intending to defraud*, commits the offence. The offence is indictable with a maximum punishment of five years' imprisonment.

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**FALSE MESSAGES / Indecent telephone calls / Harassing telephone calls.**

**372. (1)** Every one who, with intent to injure or alarm any person, conveys or causes or procures to be conveyed by letter, telegram, telephone, cable, radio, or otherwise information that he knows is false is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

**(2)** Every one who, with intent to alarm or annoy any person, makes any indecent telephone call to that person is guilty of an offence punishable on summary conviction.

**(3)** Every one who, without lawful excuse and with intent to harass any person, makes or causes to be made repeated telephone calls to that person is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 330.

**CROSS-REFERENCES**

The term "radio" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

The accused may elect his mode of trial pursuant to s. 536(2) for the offence described in subsec. (1) and release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498. It may be that, in some circumstances, the accused found guilty

of this offence would be liable to the discretionary order prohibiting possession of firearms, ammunition or explosives.

Trial of the offences described by subsecs. (2) and (3) is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

An alternative to this offence is the procedure for requiring the offender to enter into a recognizance to keep the peace either at common law or pursuant to s. 810. Other related offences: s. 175, causing disturbance; s. 264, criminal harassment; s. 264.1, uttering threats; s. 346, extortion; s. 423, intimidation and watching and besetting; s. 424, threat to commit offence against internationally protected person; s. 371, sending false telegram, etc., with intent to defraud.

## SYNOPSIS

This section describes the offences of sending false messages, and making indecent and harassing telephone calls. Subsection (1) provides that anyone who conveys, or causes the conveying by a variety of means, of information *known* to be false with the intention of injuring or alarming someone, commits an indictable offence. The maximum punishment is two years' imprisonment. Subsection (2) provides that anyone making an indecent telephone call to someone, intending to alarm or annoy them, commits a summary conviction offence. Subsection (3) provides that anyone making or causing to be made repeated telephone calls to someone, without lawful excuse, and intending to harass them, commits a summary conviction offence.

## ANNOTATIONS

**Subsec. (2)** – This subsection applies, although the calls were made to an answering machine. The accused was aware that the calls were being recorded and would be heard by the victim at a later time: *R. v. Manicke* (1993), 81 C.C.C. (3d) 255, 109 Sask. R. 126 (C.A.).

**Subsec. (3)** – The victim of an offence under this subsection must be the recipient of the harassing telephone calls. Thus, the accused was acquitted where he made repeated calls intending to harass his wife, but the calls were intercepted by a friend: *R. v. Wood* (1983), 8 C.C.C. (3d) 217 (Ont. Prov. Ct.).

The term “harass” in this subsection is synonymous with annoy and could include conduct of the accused in repeatedly telephoning a person and simply hanging up when the call was answered: *R. v. Sabine* (1990), 57 C.C.C. (3d) 209, 78 C.R. (3d) 34 (N.B.Q.B.).

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373. [*Repealed*. R.S.C. 1985, c. 27 (1st Supp.), s. 53.]

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## DRAWING DOCUMENT WITHOUT AUTHORITY, ETC.

### 374. Every one who

- (a) with intent to defraud and without lawful authority makes, executes, draws, signs, accepts or endorses a document in the name or on the account of another person by procuration or otherwise, or
- (b) makes use of or utters a document knowing that it has been made, executed, signed, accepted or endorsed with intent to defraud and without lawful authority, in the name or on the account of another person, by procuration or otherwise,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 332.

## CROSS-REFERENCES

The term “document” is defined in s. 321.



The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; ss. 371, 372, false telegram, etc.; s. 375, obtaining by forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.

### SYNOPSIS

This section describes the offence of drawing or using a document without authority. Anyone who makes, executes, draws, signs, accepts or endorses a document in the name of or on behalf of another person without lawful authority, and with an intention to defraud, or who knowingly makes use of, or utters such a document, commits an indictable offence. The maximum term of punishment is 14 years' imprisonment.

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### OBTAINING, ETC., BY INSTRUMENT BASED ON FORGED DOCUMENT.

**375. Every one who demands, receives or obtains anything, or causes or procures anything to be delivered or paid to any person under, on, or by virtue of any instrument issued under the authority of law, knowing that it is based on a forged document, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 333.**

### CROSS-REFERENCES

The term "document" is defined in s. 321.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; ss. 371, 372, false telegram, etc.; s. 374, drawing document without authority; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents; s. 378, offences in relation to registers; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.

### SYNOPSIS

This section creates the offence of using an instrument based on a forged document. Anyone who demands, receives or obtains anything, or causes anything to be delivered or paid, by virtue of an instrument issued under legal authority, but knowing that it is based on a forged document, commits an indictable offence. The maximum term or punishment is 14 years.

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### COUNTERFEITING STAMP, ETC. / Counterfeiting mark / Definitions / "mark" / "stamp".

#### **376. (1) Every one who**

- (a) fraudulently uses, mutilates, affixes, removes or counterfeits a stamp or part thereof,**
- (b) knowingly and without lawful excuse, the proof of which lies on him, has in his possession**
  - (i) a counterfeit stamp or a stamp that has been fraudulently mutilated, or**
  - (ii) anything bearing a stamp of which a part has been fraudulently erased, removed or concealed, or**

(c) without lawful excuse, the proof of which lies on him, makes or knowingly has in his possession a die or instrument that is capable of making the impression of a stamp or part thereof,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) Every one who, without lawful authority,

(a) makes a mark,

(b) sells, or exposes for sale, or has in his possession a counterfeit mark,

(c) affixes a mark to anything that is required by law to be marked, branded, sealed or wrapped other than the thing to which the mark was originally affixed or was intended to be affixed, or

(d) affixes a counterfeit mark to anything that is required by law to be marked, branded, sealed or wrapped,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(3) In this section

“mark” means a mark, brand, seal, wrapper or design used by or on behalf of

(a) the government of Canada or of a province,

(b) the government of a state other than Canada, or

(c) a department, board, commission or agent established by a government mentioned in paragraph (a) or (b) in connection with the service or business of that government;

“stamp” means an impressed or adhesive stamp used for the purpose of revenue by the government of Canada or a province or by the government of a state other than Canada. R.S., c. C-34, s. 334.

#### CROSS-REFERENCES

Possession is defined in s. 4(3). While there is no definition of “fraudulently” which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; s. 374, drawing document without authority; ss. 397 to 402, falsification of books and documents in relation to contracts and trade; ss. 406 to 414, forgery of trade-marks and trade descriptions; ss. 416 to 421, offences in relation to public stores; Part XII, offences in relation to currency, counterfeiting, etc.

#### SYNOPSIS

This section describes the offences of counterfeiting a stamp or a mark. *Stamp* and *mark* are both defined in subsec. (3), and are limited to government uses. Subsection (1) provides that an indictable offence is committed where anyone counterfeits a stamp or part of a stamp, fraudulently deals with a stamp or part of a stamp in a variety of ways, possesses a counterfeit or fraudulently mutilated stamp, or something bearing a stamp of which part has been fraudulently erased, removed or concealed, or makes or knowingly possesses a die or instrument capable of making the impression of a stamp or part thereof. In the case of the possession offences and the offence of making a die or instrument, the accused will not be convicted if he can establish that the act in question was done with a lawful excuse. Subsection (2) provides that an indictable offence is committed where anyone, without lawful authority, makes a mark, sells or exposes for sale a counterfeit mark, affixes a mark originally affixed, or intended to be affixed, to one

thing to something else legally requiring a mark, or affixes a counterfeit mark to something requiring a mark. The maximum term of punishment for both offences is 14 years' imprisonment.

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**DAMAGING DOCUMENTS / Definition of "election document".****377. (1) Every one who unlawfully**

- (a) destroys, defaces or injures a register, or any part of a register, of births, baptisms, marriages, deaths or burials that is required or authorized by law to be kept in Canada, or a copy or any part of a copy of such a register that is required by law to be transmitted to a registrar or other officer,
- (b) inserts or causes to be inserted in a register or copy referred to in paragraph (a) an entry, that he knows is false, of any matter relating to a birth, baptism, marriage, death or burial, or erases any material part from that register or copy,
- (c) destroys, damages or obliterates an election document or causes an election document to be destroyed, damaged or obliterated, or
- (d) makes or causes to be made an erasure, alteration or interlineation in or on an election document,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, "election document" means any document or writing issued under the authority of an Act of Parliament or the legislature of a province with respect to an election held pursuant to the authority of that Act. R.S., c. C-34, s. 335.

**CROSS-REFERENCES**

The term "document" is defined in s. 321.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; s. 374, drawing document without authority; s. 375, obtaining by instrument issued under authority of law knowing it is based on a forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents.

**SYNOPSIS**

This section describes the offence of damaging or interfering with certain registers and election documents. Paragraph 1(a) prohibits a person from destroying, defacing or injuring a register or part of a register of births, baptisms, marriages, deaths or burials lawfully required or authorized to be kept, or a copy or partial copy lawfully required to be transmitted. Subsection 1(b) prohibits false insertions or erasures in such a register or copy. Subsection 1(c) prohibits a person from damaging or obliterating an election document, or causing such an act to be done. Paragraph 1(d) proscribes erasures, alterations or interlineations in election documents. An election document is defined in subsec. (2), and relates only to elections authorized by federal or provincial enactments. This offence is indictable and carries a maximum term of five years' imprisonment.

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**OFFENCES IN RELATION TO REGISTERS.****378. Every one who**

- (a) being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, knowingly makes or issues a false certified copy, extract or certificate,
- (b) not being authorized or required by law to make or issue a certified copy of, extract from or certificate in respect of a register, record or document, fraudu-



lently makes or issues a copy, extract or certificate that purports to be certified as authorized or required by law, or

(c) being authorized or required by law to make a certificate or declaration concerning any particular required for the purpose of making entries in a register, record or document, knowingly and falsely makes the certificate or declaration, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 336.

#### CROSS-REFERENCES

The term “document” is defined in s. 321. The term “register” is not defined but probably refers to the registers described in s. 377.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge under s. 498.

This offence resembles the offences of forgery and uttering under ss. 367 and 368. Other related offences are as follows: s. 369, exchequer bill paper, public seals, etc.; s. 370, counterfeit government proclamation; s. 374, drawing document without authority; s. 375, obtaining by instrument issued under authority of law knowing it is based on a forged document; s. 376, counterfeiting stamp, mark, etc.; s. 377, defacing official documents.

#### SYNOPSIS

This section describes the offence of issuing false or unauthorized certifications. Paragraph (a) prohibits persons legally required or authorized to issue certified copies of, extracts from, or certificates in respect of a register, record or document, from knowingly doing so falsely. Paragraph (b) prohibits other persons from *fraudulently issuing* such documents if they purport to be certified as legally required or authorized. Paragraph (c) prohibits persons legally authorized or required to make certificates or declarations concerning any particular required for making entries in such register, record or document from *knowingly* doing so falsely. In each case, the offence is indictable, with a maximum term of punishment of five years’ imprisonment.

## Part X / FRAUDULENT TRANSACTIONS RELATING TO CONTRACTS AND TRADE

### Interpretation

#### DEFINITIONS / “goods” / “trading stamps”.

379. In this Part,

“goods” means anything that is the subject of trade or commerce;

“trading stamps” includes any form of cash receipt, receipt, coupon, premium ticket or other device, designed or intended to be given to the purchaser of goods by the vendor thereof or on his behalf, and to represent a discount on the price of the goods or a premium to the purchaser thereof

(a) that may be redeemed

(i) by any person other than the vendor, the person from whom the vendor purchased the goods or the manufacturer of the goods,

(ii) by the vendor, the person from whom the vendor purchased the goods or the manufacturer of the goods in cash or in goods that are not his property in whole or in part, or

(iii) by the vendor elsewhere than in the premises where the goods are purchased, or

(b) that does not show on its face the place where it is delivered and the merchantable value thereof, or

(c) that may not be redeemed on demand at any time,

but an offer, endorsed by the manufacturer upon a wrapper or container in which goods are sold, of a premium or reward for the return of that wrapper or container to the manufacturer is not a trading stamp. R.S., c. C-34, s. 337.

#### CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section.

#### SYNOPSIS

This section provides a definition of the term *goods* and *trading stamps* for the purpose of Part X, which concerns fraudulent transactions relating to contracts and trade.

#### ANNOTATIONS

**"Trading stamps"** – The definition of "trading stamps" in this section is exhaustive notwithstanding the use of the word "includes": *R. v. Loblaw Groceterias Co. (Man.) Ltd.*; *R. v. Thomson (Niagara IGA Grocery)* (1960), 129 C.C.C. 223, [1961] S.C.R. 138 (5:0).

### Fraud

#### FRAUD / Affecting public market.

380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding ten years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or

(b) is guilty

(i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or

(ii) of an offence punishable on summary conviction,

where the value of the subject-matter of the offence does not exceed five thousand dollars.

(2) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, with intent to defraud, affects the public market price of stocks, shares, merchandise or anything that is offered for sale to the public is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 338; 1974-75-76, c. 93, s. 32; R.S.C. 1985, c. 27 (1st Supp.), s. 54; 1994, c. 44, s. 25.

#### CROSS-REFERENCES

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The terms "property" and "valuable security" are defined in s. 2.

As to admission of photographic evidence of property, see s. 491.2. For proof by way of affidavit of ownership, lawful possession, value, and that the person was deprived of property by fraud or otherwise without the person's lawful consent, see s. 657.1.

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or

describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b) the court may order particulars of any fraud that is alleged.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant to conduct video surveillance under s. 487.01(5). Fraud is an enterprise crime offence for the purposes of Part XII.2.

Where the offence, although committed outside Canada, is in relation to the use of nuclear material, see s. 7(3.4).

The offence in para. (1)(a) is an indictable offence for which the accused may elect the mode of trial under s. 536(2) and release pending trial is determined in accordance with s. 515. Where the prosecution elects to proceed by indictment for the offence under para. (1)(b) then, by virtue of s. 553, it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). As well, under s. 555(2), where, in the course of the trial, evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds \$1,000 then the provincial court judge shall put the accused to his election under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). For the offence under para. (b), release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The value of a valuable security is determined in accordance with s. 4(2) and of a postal card or stamp in accordance with s. 4(1). The term “testamentary instrument” is defined in s. 2.

For the offence under subsec. (2), the accused may elect his mode of trial under s. 536(2) and release pending trial is determined in accordance with s. 515.

The related offence of theft is generally described in s. 322 and false pretences in s. 362. Other offences relating to trading in securities, etc., are in ss. 382 to 384 and s. 400 [false prospectus].

## SYNOPSIS

This section describes the offences of defrauding the public, or any person, of property, money or valuable security, and of affecting the public market price of stocks, shares, merchandise or anything offered for sale to the public. The activities described above must be accomplished by *deceit, falsehood or other fraudulent means*, whether or not they constitute false pretences within the meaning of the Criminal Code. The accused must have the *intent to defraud* to attract criminal liability for affecting the market price of stocks, shares, or publicly offered merchandise and this form of the offence is punishable on indictment by a maximum term of 10 years' imprisonment. The more general offence of defrauding the public is indictable, with a maximum punishment of 10 years, when the subject-matter of the offence is a testamentary instrument or has a value greater than \$5,000. In other circumstances, this form of the offence is hybrid, with a maximum punishment on indictment of two years.

## ANNOTATIONS

**Meaning of defrauds generally** – The classic definition of fraud is found in the judgment of Buckley, J., in *London v. Globe Finance Corp. Ltd.*, [1903] 1 Ch. 728 at pp. 732-3: “To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.”

It was held, however, in *Scott v. Metropolitan Police Commissioner* (1974), 60 Cr. App. R. 124 (H.L.), that this definition is not exhaustive and that to “defraud” ordinarily



means: "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud, be entitled."

In *R. v. Renard* (1974), 17 C.C.C. (2d) 355 (Ont. C.A.), the Court held that, a victim may be defrauded by being deprived of something and he may be deprived of something either by being fraudulently induced to part with it or by having that to which he is entitled fraudulently diverted or withheld from him.

An accused's acts in procuring a third person to put him in a position to take money to which the complainant would be otherwise entitled constitutes fraud: *R. v. Kribbs*, [1968] 1 C.C.C. 345, [1967] 2 O.R. 539 (C.A.).

A charge of fraud is valid against the principle shareholder who fraudulently depletes the assets of his *alter ego*, a limited company: *R. v. Marquardt* (1972), 6 C.C.C. (2d) 372, 18 C.R.N.S. 162 (B.C.C.A.).

**Meaning of falsehood** – It is a falsehood for a person to promise to pay cash for the purchase of an item without any intention of honouring the promise: *R. v. Stanley* (1957), 119 C.C.C. 220, 26 C.R. 180 (B.C.C.A.).

**Meaning of "other fraudulent means" generally** – In *R. v. Cox and Paton*, [1963] 2 C.C.C. 148, [1963] S.C.R. 500 (5:0), although no exhaustive definition of "other fraudulent means" was given it was held that if all the directors of a company were to join together to purchase a worthless asset with company funds in order to enrich themselves then even "supposing it could be said that the directors being the 'mind of the company' and well knowing the true facts, the company was not deceived . . . it is clear that . . . the directors would have defrauded the company, if not by deceit or falsehood, by 'other fraudulent means'".

In *R. v. Olan, Hudson and Hartnett* (1978), 41 C.C.C. (2d) 145, 86 D.L.R. (3d) 212, [1978] 2 S.C.R. 1175 (9:0) the Court considered the application of *Cox and Paton v. The Queen*, *supra*, in a situation where the accused had caused a company over which they had control to divest its holdings in "blue chip" securities and to purchase shares in a company whose major asset was a debt owed to it by a company controlled by two of the accused. It was held that where it is alleged a corporation was defrauded by its directors' deception of the corporation is not an essential element of the offence, the words "other fraudulent means" include not only means which are in the nature of a falsehood or deceit but also all other means which can properly be stigmatized as dishonest. Further, while no exhaustive definition of "defraud" was attempted the Crown at least must prove dishonesty and deprivation. The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interest of the victims. The issue in this case was whether the use of the victim's assets in this manner was in furtherance of a *bona fide* business interest of the victim or was it expended in advancing the personal interests of the accused and whether the victim suffered deprivation as a result. The Court disagreed with the Ontario Court of Appeal view that there was no evidence of fraud and ordered a new trial. It was not necessary for the Crown to prove the new investment was worthless or negligible.

At least where the Crown relies on "other fraudulent means" rather than deceit or falsehood there need not be some form of relationship or nexus between the accused and the victim. Thus, the infringement of copyright by "counterfeiting" of video tapes may constitute fraud, whether or not it would also amount to theft, notwithstanding there is no relationship between the accused and the victim, the holder of the copyright or distribution rights to the tapes: *R. v. Kirkwood* (1983), 5 C.C.C. (3d) 393, 35 C.R. (3d) 97 (Ont. C.A.), relying on *Scott v. Metropolitan Police Commissioner*, *supra*. Followed: *R. v. Fitzpatrick* (1984), 11 C.C.C. (3d) 46 (B.C.C.A.).

**Risk of deprivation** – Where the "owner" of certain confidential information had no intention of dealing with it in a commercial way it could not be said that a person who obtains that information has committed fraud, since there was no risk of economic loss

amounting to deprivation: *R. v. Stewart* (1988), 41 C.C.C. (3d) 481, 63 C.R. (3d) 305, [1988] 1 S.C.R. 963 (6:0).

While there need not be actual economic loss there must be an actual risk of prejudice and where the victim named in the indictment merely acted as a conduit in the transactions so that there was no actual risk of prejudice to her economic interests the charge was not made out: *R. v. Campbell and Kotler* (1986), 29 C.C.C. (3d) 97, [1986] 2 S.C.R. 376, 32 D.L.R. (4th) 363 (5:0).

In *R. v. Knowles* (1979), 51 C.C.C. (2d) 237 (Ont. C.A.) the Court found the requisite dishonest deprivation where the victim was induced to make a loan which it would not have made had it known the true state of affairs, namely that the true borrower was an officer of a company which was a subsidiary of the victim. The deceit practised by the accused placed the accused in a conflict of interest and thus imperilled the victim's economic interests notwithstanding the loan was secured and used for the purpose for which it was advanced.

Economic loss does not have to be proven by the Crown and fraud is complete when money is paid for corporate shares to which the accused falsely ascribed certain attributes: *R. v. Knelson And Baran* (1962), 133 C.C.C. 210, 38 C.R. 181 (B.C.C.A.).

In considering whether the acts of the accused can properly be stigmatized as dishonest, the standard to be applied is that of a reasonable person. It connotes an underhanded design which has the effect, or which engenders the risk, of depriving others of what is theirs. The dishonesty lies in the wrongful use of something in which another person has an interest, in such a manner that this other's interest is extinguished or put at risk. The use is wrongful in this sense if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous: *R. v. Zlatic* (1993), 79 C.C.C. (3d) 466, 19 C.R. (4th) 230, [1993] 2 S.C.R. 29.

**Mens rea** – The *mens rea* of fraud is established by proof of subjective knowledge of the prohibited act, and subjective knowledge that the act could have as a consequence deprivation, in the sense of causing another to lose their pecuniary interest in certain property or in placing that interest at risk. There is no requirement that the accused subjectively appreciate the dishonesty of his acts: *R. v. Thérault* (1993), 79 C.C.C. (3d) 449, 19 C.R. (4th) 194, [1993] 2 S.C.R. 5; *R. v. Zlatic*, *supra*.

**Expectation of subsequent validation** – Where pursuant to the suggestion of his superior, who approved but would not authorize a salary increase, the accused submitted fictitious expense accounts to the Quebec government, it was held (4:3) that such a direction was not a valid defence to a charge of defrauding the public in general and the Government of the Province of Quebec in particular, and that the accused's expectation that such a practice would ultimately be validated was also not a proper defence in law: *R. v. Lemire*, [1965] 4 C.C.C. 11, 45 C.R. 16 (S.C.C.).

**Proof of charge as particularized** – Proprietorships are not in and of themselves persons capable of being defrauded but are merely the registered names under which persons capable of being defrauded do business. Where the prosecution alleges in an indictment that the victim is a proprietorship then it in effect has particularized as the victim the person who used the proprietorship to carry on business and that it was in the operation of that proprietorship that he was defrauded and not otherwise: *R. v. Campbell and Kotler* (1986), 29 C.C.C. (3d) 97, [1986] 2 S.C.R. 376, 32 D.L.R. (4th) 363 (5:0).

On a charge under this section it is not necessary for the Crown to prove the accused actually obtained the property which was the subject of the charge, only that the victim was deprived of the property as a result of the accused's dishonest acts: *R. v. Huggett* (1978), 42 C.C.C. (2d) 198 (Ont. C.A.).

A charge of conspiracy or attempt to commit fraud may be made out although the victim is unascertained. Further, the victim need not be particularized in the indictment: *R. v. Vezina*; *R. v. Cote* (1986), 23 C.C.C. (3d) 481, 25 D.L.R. (4th) 82 (S.C.C.) (7:0).

An indictment alleging that certain individuals were defrauded of "\$2,500.00", rather

than a sum of money, is sufficient to support a conviction although the evidence showed the individuals were induced by deceit, falsehood or other fraudulent means merely to part with a cheque in that amount drawn, moreover, on the bank accounts of corporations of which they were principal owners or co-owners: *R. v. Scheel* (1978), 42 C.C.C. (2d) 31, 3 C.R. (3d) 359 (Ont. C.A.).

**Meaning of "property"** [Also see "Risk of deprivation", *supra*] – The word "property" does not mean ownership, but is only descriptive of the thing of which one is defrauded and the offence is completed once there is a passing over of possession under deceitful circumstances: *R. v. Vallillee* (1974), 15 C.C.C. (2d) 409, 24 C.R.N.S.319 (Ont.C.A.).

It was held in *R. v. Falconi* (1976), 31 C.C.C. (2d) 144 (Ont. Co. Ct.) that, considering the definition of "prescription" in the Pharmacy Act, R.S.O. 1970, c. 348 as simply a "direction", a prescription was not property within the meaning of this section.

**Other notes** – Although the acts of the accused may also constitute a breach of provincial welfare legislation it is open to the Crown to proceed under this section: *R. v. Gladu* (1986), 29 C.C.C. (3d) 186 (Ont. C.A.); *R. v. Gallant* (1987), 34 C.C.C. (3d) 190, 64 Nfld. & P.E.I.R. 89 (P.E.I. C.A.). *R. v. Rouse* (1988), 39 C.C.C. (3d) 115, 85 A.R. 60 (C.A.).

**Affecting public market [subsec. (2)]** – In one of the few cases decided under this subsection a conviction was upheld where the accused was one of several persons involved in operating a "box". While ostensibly set up to maintain orderly marketing in shares the two companies involved in the "box" were in fact used to give the illusion of arms length transactions in the trading of the shares and gave the impression that the shares were continually rising in value: *R. v. McNaughton* (1976), 43 C.C.C. (2d) 293, 33 C.R.N.S. 279 (Que. C.A.).

## USING MAILS TO DEFRAUD.

**381. Every one who makes use of the mails for the purpose of transmitting or delivering letters or circulars concerning schemes devised or intended to deceive or defraud the public, or for the purpose of obtaining money under false pretences, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 339.**

## CROSS-REFERENCES

The term "mail" is defined in s. 2 of the Canada Post Corporation Act, R.S.C. 1985, c. C-10. By virtue of s. 583, an indictment, which otherwise complies with s. 581, is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging false pretences or fraud is insufficient by reason only that it does not set out in detail the nature of the false pretences or fraud. However, under s. 587(1)(b), the court may order particulars of any false pretence or fraud that is alleged.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant to conduct video surveillance under s. 487.01(5).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offence of fraud is described in s. 380 and of circulating a false prospectus in s. 400.

## SYNOPSIS

This section makes it an offence to use the mails to deliver letters or circulars that either describe schemes intended to deceive the public, or that are to be used for the purpose of obtaining money under false pretences. This is an indictable offence with a maximum term of two years' imprisonment.



## FRAUDULENT MANIPULATION OF STOCK EXCHANGE TRANSACTIONS.

382. Every one who, through the facility of a stock exchange, curb market or other market, with intent to create a false or misleading appearance of active public trading in a security or with intent to create a false or misleading appearance with respect to the market price of a security,

- (a) effects a transaction in the security that involves no change in the beneficial ownership thereof,
- (b) enters an order for the purchase of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the security has been or will be entered by or for the same or different persons, or
- (c) enters an order for the sale of the security, knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the security has been or will be entered by or for the same or different persons,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 340.

## CROSS-REFERENCES

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and is an enterprise crime offence for the purposes of Part XII.2. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offence of fraud is described in s. 380, of a broker reducing stock by selling for his own account in s. 384 and of circulating a false prospectus in s. 400.

## SYNOPSIS

This section sets out the offence of manipulation of transactions on a stock exchange, curb market or other market and is colloquially known as “wash-trading”. Every person who uses one of these institutions with *intent to create a false or misleading appearance* with respect to the market price, or activity of a security, and who engages in any of the activities specified in paras. (a), (b) or (c), commits an indictable offence and is liable to a maximum term of five years’ imprisonment. Paragraph (a) describes a transaction in a security that involves no change in the *beneficial ownership*. Paragraphs (b) and (c) describe the entering of an order for the sale or purchase of a security, *knowing* that a substantially matching or counter balancing purchase or sale order has been, or will be entered on behalf of the same or different persons.

## ANNOTATIONS

The section requires an “intent to create a false or misleading appearance of active public interest”, and if the purpose is merely to stabilize the market price in the accused’s own interest, an offence has not been committed: *R. v. Jay*, [1966] 1 C.C.C.70, [1965] 2 O.R.471 (C.A.).

For the offence of knowingly entering a cross-order the Crown need not prove that the cross-trade involved either fictitious persons or persons involved with the accused in a fraudulent conspiracy, since the purpose of this section is to prevent fraudulent misuse of the facilities of a market for profit: *R. v. MacMillan*, [1969] 2 C.C.C.289, 66 D.L.R. (2d) 680 (Ont. C.A.).

The words “or other market” in this section include an “over-the-counter” market: *Re Bluestein and The Queen* (1982), 70 C.C.C. (2d) 336, 36 C.R. (3d) 46, 142 D.L.R. (3d) 71 (Que. C.A.).

**GAMING IN STOCKS OR MERCHANDISE / Onus.**

383. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, with intent to make gain or profit by the rise or fall in price of the stock of an incorporated or unincorporated company or undertaking, whether in or outside Canada, or of any goods, wares or merchandise,

- (a) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the purchase or sale of shares of stock or goods, wares or merchandise, without the *bona fide* intention of acquiring the shares, goods, wares or merchandise or of selling them, as the case may be, or
- (b) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of shares of stock or goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention of making or receiving delivery thereof, as the case may be,

but this section does not apply where a broker, on behalf of a purchaser, receives delivery, notwithstanding that the broker retains or pledges what is delivered as security for the advance of the purchase money or any part thereof.

(2) Where, in proceedings under this section, it is established that the accused made or signed a contract or agreement for the sale or purchase of shares of stock or goods, wares or merchandise, or acted, aided or abetted in the making or signing thereof, the burden of proof of a *bona fide* intention to acquire or to sell the shares, goods, wares or merchandise or to deliver or to receive delivery thereof, as the case may be, lies on the accused. R.S., C. C-34, s. 341.

**CROSS-REFERENCES**

The term "goods" is defined in s. 379.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offence of fraud is described in s. 380, of wash-trading in s. 382, of a broker reducing stock by selling for his own account in s. 384 and of circulating a false prospectus in s. 400.

**SYNOPSIS**

This section describes the indictable offence of dealing in stocks or merchandise *with the intention of profiting* by the variation in the price of those goods but *without the bona fide intention of acquiring, selling, or making or receiving delivery* of the goods. Subsection (1) exempts brokers from this offence in certain circumstances. Subsection (2) states that when it has been established that the accused has made or signed an agreement for the sale or purchase of stocks or merchandise, or acted, aided and abetted in such a transaction, the burden of proof to establish the *bona fide* intention described in subsec. (1), lies on the accused. The maximum term of imprisonment upon conviction is five years.

**BROKER REDUCING STOCK BY SELLING FOR HIS OWN ACCOUNT.**

384. Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who, being an individual, or a member or an employee of a partnership, or a director, an officer or an employee of a corporation, where he or the partnership or corporation is employed as a broker by any customer to buy and carry on margin any shares of an incorporated or unincorporated company or undertaking, whether in or out of Canada, thereafter sells or causes to be sold shares of the company or undertaking for any account in which

- (a) he or his firm or a partner thereof, or
- (b) the corporation or a director thereof,

has a direct or indirect interest, if the effect of the sale is, otherwise than unintentionally, to reduce the amount of those shares in the hands of the broker or under his

control in the ordinary course of business below the amount of those shares that the broker should be carrying for all customers. R.S., c. C-34, s. 342.

#### CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

The related offence of fraud is described in s. 380, of wash-trading in s. 382, of gaming in stocks or merchandise in s. 383 and of circulating a false prospectus in s. 400.

#### SYNOPSIS

This section describes an indictable offence in which a broker sells shares that have been bought and carried on margin for any account in which the broker, his firm, partner, corporation or corporate director has direct or indirect interest. The effect of the sale must be to reduce *intentionally* the amount of those shares in the hands or under the control of the broker below the amount of those shares that the broker should be carrying for all customers. The maximum term of imprisonment for this offence is five years.

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#### FRAUDULENT CONCEALMENT OF TITLE DOCUMENTS / Consent required.

385. (1) Every one who, being a vendor or mortgagor of property or of a chose in action or being a solicitor for or agent of a vendor or mortgagor of property or a chose in action, is served with a written demand for an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage, and who

(a) with intent to defraud and for the purpose of inducing the purchaser or mortgagee to accept the title offered or produced to him, conceals from him any settlement, deed, will or other instrument material to the title, or any encumbrance on the title, or

(b) falsifies any pedigree on which the title depends,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) No proceedings shall be instituted under this section without the consent of the Attorney General. R.S., c. C-34, s. 343.

#### CROSS-REFERENCES

“Property” and “Attorney General” are defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

Other offences relating to registers are found ss. 377 and 378 and the offence of fraudulent registration of title is in s. 386 and of fraudulent sale of real property in s. 387. By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

#### SYNOPSIS

This section describes the indictable offence of concealing any settlement, deed, will or other instrument material to title, concealing any encumbrance on the title (para. (1)(a)), or falsifying any pedigree on which the title depends (para. (1)(b)). The accused must be



a vendor or mortgagor of property or a chose in action or a solicitor or agent for the vendor or mortgagor, and must have been served with a written demand for an abstract of title by or on behalf of the purchaser or mortgagee prior to the completion of the purchase or mortgage. In proceedings under paragraph (1)(a), the accused must both intend to defraud and to induce the purchaser or mortgagee to accept the title offered. Subsection (2) requires the consent of the Attorney General for the institution of proceedings under this section. The maximum term of imprisonment for this offence is two years.

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#### FRAUDULENT REGISTRATION OF TITLE.

**386. Every one who, as principal or agent, in a proceeding to register title to real property, or in a transaction relating to real property that is or is proposed to be registered, knowingly and with intent to deceive,**

**(a) makes a material false statement or representation,**

**(b) suppresses or conceals from a judge or registrar, or any person employed by or assisting the registrar, any material document, fact, matter or information, or**

**(c) is privy to anything mentioned in paragraph (a) or (b),**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 344.**

#### CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Related offences: s. 380, fraud; s. 385, fraudulent concealment of title document; s. 387, fraudulent sale of real property.

#### SYNOPSIS

This section describes the indictable offence of knowingly, and with intent to deceive, making a *material false* statement or representation, of suppressing or concealing from a judge, a registrar, or any person assisting the registrar, any *material* document, fact, matter or information, or of being privy to any of these activities, in a proceeding to register title to real property. The accused must be either the principal or agent in the real estate transaction. The maximum term of imprisonment upon conviction is five years.

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#### FRAUDULENT SALE OF REAL PROPERTY.

**387. Every one who, knowing of an unregistered prior sale or of an existing unregistered grant, mortgage, hypothec, privilege or encumbrance of or on real property, fraudulently sells the property or any part thereof is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 345.**

#### CROSS-REFERENCES

While there is no definition of "fraudulently" which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Related offences: s. 380, fraud; s. 385, fraudulent concealment of title documents; s. 386, fraudulent registration of title.

#### SYNOPSIS

This section describes the fraudulent sale of real estate. Any person who fraudulently sells property, either in whole or in part, knowing of the existence of an unregistered prior sale or an existing unregistered grant, mortgage or other encumbrance on real

property, is guilty of an indictable offence and liable to a maximum term of two years' imprisonment.

### MISLEADING RECEIPT.

#### 388. Every one who wilfully

- (a) with intent to mislead, injure or defraud any person, whether or not that person is known to him, gives to a person anything in writing that purports to be a receipt for or an acknowledgment of property that has been delivered to or received by him, before the property referred to in the purported receipt or acknowledgment has been delivered to or received by him, or
  - (b) accepts, transmits or uses a purported receipt or acknowledgment to which paragraph (a) applies,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 346.

### CROSS-REFERENCES

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The term "property" is defined in s. 2.

Note that s. 391 provides that where an offence is committed under this section by a person who acts in the name of a corporation, firm or partnership, no person other than the person who does the act by means of which the offence is committed or who is secretly privy to it is guilty of the offence.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

### SYNOPSIS

This section describes the offence of dealing with a misleading receipt. Every person who *wilfully*, with *intent to mislead, injure, or defraud* another person, gives to any person anything in writing that purports to be a receipt for property prior to the delivery of that property is guilty of an offence. Any person who *wilfully* accepts, transmits or uses a receipt as described above is also guilty of an offence. The offence is indictable and carries a maximum term of two years' imprisonment.

### FRAUDULENT DISPOSAL OF GOODS ON WHICH MONEY ADVANCED / Saving.

#### 389. (1) Every one who

- (a) having shipped or delivered to the keeper of a warehouse or to a factor, an agent or a carrier, anything on which the consignee thereof has advanced money or has given valuable security, thereafter, with intent to deceive, defraud or injure the consignee, disposes of it in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, or
- (b) knowingly and wilfully aids or assists any person to make a disposition of anything to which paragraph (a) applies for the purpose of deceiving, defrauding or injuring the consignee,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) No person is guilty of an offence under this section where, before disposing of anything in a manner that is different from and inconsistent with any agreement that has been made in that behalf between him and the consignee, he pays or tenders to the consignee the full amount of money or valuable security that the consignee has advanced. R.S., c. C-34, s. 347.

### CROSS-REFERENCES

The term "valuable security" is defined in s. 2.

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

Note that s. 391 provides that where an offence is committed under this section by a person who acts in the name of a corporation, firm or partnership, no person other than the person who does the act by means of which the offence is committed or who is secretly privy to it is guilty of the offence.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

## SYNOPSIS

This section describes the offence of fraudulently disposing of goods that have been shipped or delivered to the keeper of a warehouse or to a factor, an agent or a carrier. Every person who has shipped to one of the above-named individuals goods upon which the consignee has advanced money, and who, *with intent to defraud or injure* the consignee, disposes of the goods in a fashion that is inconsistent with any agreement made between himself and the consignee, is guilty of an indictable offence and liable to a maximum term of two years' imprisonment. A person who *knowingly and wilfully* aids or assists another person to commit the offence described above *for the purpose of deceiving, defrauding or injuring* the consignee, is also guilty of the offence and subject to the same punishment. Subsection (2) provides a defence to the charge where a person pays back the full amount of money advanced by the consignee *prior* to disposing of anything in a fashion that contravenes their agreement.

## FRAUDULENT RECEIPTS UNDER BANK ACT.

**390. Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years who**

- (a) wilfully makes a false statement in any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*; or
- (b) wilfully,
  - (i) after giving to another person,
  - (ii) after a person employed by him has, to his knowledge, given to another person, or
  - (iii) after obtaining and endorsing or assigning to another person,
 any receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*, without the consent in writing of the holder or endorsee or the production and delivery of the receipt, certificate or acknowledgment, alienates or parts with, or does not deliver to the holder or owner the property mentioned in the receipt, certificate or acknowledgment. R.S., c. C-34, s. 348.

## CROSS-REFERENCES

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The term "property" is defined in s. 2.

Note that s. 391 provides that where an offence is committed under this section by a person who acts in the name of a corporation, firm or partnership, no person other than the person who does the act by means of which the offence is committed or who is secretly privy to it is guilty of the offence.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.



## SYNOPSIS

This section describes the offence of *fraudulently* dealing in receipts made for a purpose mentioned in the *Bank Act*. Paragraph (a) states that any person who *wilfully* makes a false statement in a receipt or other similar document that may be used for a purpose mentioned in the *Bank Act* commits an indictable offence and is liable to a maximum term of imprisonment of two years. Paragraph (b) also makes it an offence punishable on the same terms for a person to *wilfully* dispose of or fail to deliver the relevant property to a person to whom the accused has given or endorsed over a *Bank Act* receipt mentioning that property. The accused can raise the defence of written consent by the holder or endorsee of the receipt, or produce and deliver the receipt.

## ANNOTATIONS

The words “receipt, certificate or acknowledgment for anything that may be used for a purpose mentioned in the *Bank Act*” have the same meaning in both paras. (a) and (b) and refer to documents which are evidence of title to property and which may be transferred by endorsement or delivery: *R. v. Dubois* (1979), 45 C.C.C. (2d) 531 (Ont. C.A.).

## SAVING.

**391.** Where an offence is committed under section 388, 389 or 390 by a person who acts in the name of a corporation, firm or partnership, no person other than the person who does the act by means of which the offence is committed or who is secretly privy to the doing of that act is guilty of the offence. R.S., c. C-34, s. 349.

## SYNOPSIS

This section makes it clear that in proceedings under ss. 388, 389 or 390, only the person who actually commits an offence, or who is secretly privy to the commission of the offence, can be convicted, even if that person is acting in the name of a corporation, firm or partnership.

## DISPOSAL OF PROPERTY TO DEFRAUD CREDITORS.

**392.** Every one who,

(a) with intent to defraud his creditors,

(i) makes or causes to be made a gift, conveyance, assignment, sale, transfer or delivery of his property, or

(ii) removes, conceals or disposes of any of his property, or

(b) with intent that any one should defraud his creditors, receives any property by means of or in relation to which an offence has been committed under paragraph (a),

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 350.

## CROSS-REFERENCES

The term “property” is defined in s. 2.

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Also note s. 588 which deems certain persons to have a property interest in property of which they have the management, control or custody.

Reference should also be made to the offences created by the Bankruptcy Act, R.S.C. 1985, c. B-2.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

## SYNOPSIS

This section describes the offence of disposing of property in order to defraud creditors. Every person who makes a gift, assignment or transfer of his property, or who conceals or disposes of it *with the intent to defraud his creditors* commits an indictable offence under para. (a). Similarly, a person who receives any property that has been dealt with in a fashion described in para. (a) *with the intent that anyone should defraud his creditors* is guilty of an indictable offence and liable to the same punishment of a maximum term of two years' imprisonment.

## ANNOTATIONS

The giving of a third mortgage comes within the meaning of the words "makes an assignment" in this section: *R. v. Ehresman* (1980), 58 C.C.C. (2d) 574, 121 D.L.R. (3d) 505 (B.C.C.A.).

The word "conceals" in para. (a)(ii) is used in its primary sense of a positive act of secreting. Thus, the mere failure of a bankrupt to disclose the existence of property to the trustee and Official Receiver, as required by the Bankruptcy Act, R.S.C. 1970, c. B-3, does not constitute an offence under para. (a)(ii): *R. v. Goulis* (1981), 60 C.C.C. (2d) 347, 20 C.R. (3d) 360 (Ont. C.A.).

FRAUD IN RELATION TO FARES, ETC. / *Idem* / Fraudulently obtaining transportation.

**393. (1) Every one whose duty it is to collect a fare, toll, ticket or admission who wilfully**

**(a) fails to collect it,**

**(b) collects less than the proper amount payable in respect thereof, or**

**(c) accepts any valuable consideration for failing to collect it or for collecting less than the proper amount payable in respect thereof,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

**(2) Every one who gives or offers to a person whose duty it is to collect a fare, toll, ticket or admission fee any valuable consideration**

**(a) for failing to collect it, or**

**(b) for collecting an amount less than the amount payable in respect thereof,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

**(3) Every one who, by any false pretence or fraud, unlawfully obtains transportation by land, water or air is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 351.**

## CROSS-REFERENCES

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not sufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging false pretences or fraud is insufficient by reason only that it does not set out in detail the nature of the false pretences or fraud. However, under s. 587(1)(b), the court may order particulars of any false pretence or fraud that is alleged.

The offences in subssecs. (1) and (2) are indictable offences, but, by virtue of s. 553(c)(viii), are offences over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). The trial of the offence in subsec. (3) is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence in subsec. (3) is as set out in s. 787 and

the limitation period is set out in s. 786(2). For all offences under this section, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Also see s. 454 which creates the offence of producing, etc., or possession of slugs to be fraudulently used in substitution for coins or tokens of value.

## SYNOPSIS

This section describes the offence of fraud in relation to fares. Subsection (1) states that any person who *has a duty to collect* a fare, toll, ticket or admission and who *wilfully* fails to collect it, collects less than the full amount, or accepts valuable consideration for failing to collect, or collecting less than the proper amount, is guilty of an indictable offence and liable to a term of imprisonment not exceeding two years. Subsection (2) makes it an offence to give or offer to a person whose duty it is to collect a fare, toll, ticket or admission any valuable consideration for failing to collect the amount payable. This offence is indictable and carries a maximum term of imprisonment of two years. Subsection (3) describes the summary conviction offence of unlawfully obtaining transportation by any false pretence or fraud.

## FRAUD IN RELATION TO MINERALS / Seizure and forfeiture.

**394. (1) Every one is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years who**

- (a) being the holder of a lease or licence issued**
  - (i) under an Act relating to the mining of precious metals, or**
  - (ii) by the owner of land that is supposed to contain precious metals,**  
by a fraudulent device or contrivance defrauds or attempts to defraud any person of any precious metals or money payable or reserved by the lease or licence, or fraudulently conceals or makes a false statement with respect to the amount of precious metals procured by him;
- (b) sells or purchases any rock, mineral or other substance that contains precious metals or unsmelted, untreated, unmanufactured or partly smelted, partly treated or partly manufactured precious metals, unless he establishes that he is the owner or agent of the owner or is acting under lawful authority; or**
- (c) has in his possession or knowingly has on his premises**
  - (i) any rock or mineral of a value of fifty-five cents per kilogram or more,**
  - (ii) any mica of a value of fifteen cents per kilogram or more, or**
  - (iii) any precious metals,**  
that there are reasonable grounds to believe have been stolen or have been dealt with contrary to this section, unless he establishes that he is lawfully in possession thereof.

**(2) Where a person is convicted of an offence under this section, the court may order anything by means of or in relation to which the offence was committed, on such conviction, to be forfeited to Her Majesty in right of the province in which the proceedings take place. R.S., c. C-34, s. 352; R.S.C. 1985, c. 27, (1st Supp.), s. 186.**

## CROSS-REFERENCES

While there is no definition of “fraudulently” which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.). By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (b), it fails to name the person who owns or has a special property or interest in property mentioned in the count or para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.



The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Other offences relating to mines are found in s. 396.

Section 395 provides for the issuance of a search warrant to search for precious metals or rock alleged to be unlawfully deposited or held contrary to law.

### SYNOPSIS

This section describes the offence of fraud in relation to minerals. Subsection (1)(a) states that any person who holds a lease or a licence issued either under an Act relating to the mining of precious metals or by the owner of the land, and who defrauds or attempts to defraud any person of precious metals or money payable under the lease or licence, or who fraudulently conceals or makes a false statement with respect to the amount of precious metals procured by him, commits an indictable offence. The criminal activity described in subsec. (1)(a) must be accomplished by means of a *fraudulent device or contrivance*. Subsection (1)(b) makes it an indictable offence for a person to sell or purchase any rock, mineral or other substance containing precious metals in the state described therein unless that person establishes that he is either the owner or an authorized agent with respect to that substance. Subsection (1)(c) states that any person who is in possession of any of the precious metals or other items described therein that there are *reasonable grounds to believe* have been stolen, or dealt with in a fashion contrary to this section, is guilty of an indictable offence. The accused may escape criminal liability under subsec. (1)(c) if he can establish lawful entitlement to the possession of the items described therein. The maximum term of imprisonment upon conviction for each of the above three offences is five years. Subsection (2) allows the court to order that anything by means of, or in relation to which, an offence under this section was committed be forfeited to Her Majesty in right of the province in which the proceedings took place.

### ANNOTATIONS

The reverse onus in subsec. (1)(b) infringes s. 11(d) of the Charter. However, rather than strike down the reverse onus entirely, it is appropriate to read down the provision to impose an evidentiary burden on the accused. Accordingly, the words "he establishes that" should be replaced with the words "in the absence of evidence which raises a reasonable doubt that": *R. v. Laba*, [1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360.

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### SEARCH FOR PRECIOUS METALS / Power to seize / Appeal.

**395. (1) Where an information in writing is laid under oath before a justice by any person having an interest in a mining claim, that any precious metals or rock, mineral or other substance containing precious metals is unlawfully deposited in any place or held by any person contrary to law, the justice may issue a warrant to search any of the places or persons mentioned in the information.**

**(2) Where, on search, anything mentioned in subsection (1) is found, it shall be seized and carried before the justice who shall order**

**(a) that it be detained for the purposes of an inquiry or a trial; or**

**(b) if it is not detained for the purposes of an inquiry or a trial,**

**(i) that it be restored to the owner, or**

**(ii) that it be forfeited to Her Majesty in right of the province in which the proceedings take place if the owner cannot be ascertained.**

**(3) An appeal lies from an order made under paragraph (2)(b) in the manner in which an appeal lies in summary conviction proceedings under Part XXVII and the provisions of that Part relating to appeals apply to appeals under this subsection. R.S., c. C-34, s. 353.**

## CROSS-REFERENCES

The term “justice” is defined in s. 2.

It is highly doubtful whether this section comports with the minimum constitutional requirements in s. 8 of the Charter as explained in *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97 (S.C.C.). In particular, there is no requirement that there be reasonable and probable grounds to believe that either an offence has been committed or that evidence or contraband would be found in the place sought to be searched. See *Re Vella and The Queen* (1984), 14 C.C.C. (3d) 513 (Ont. H.C.J.), considering a similar provision [s. 199] in relation to disorderly houses. It is suggested that, in the circumstances, a warrant should be sought under s. 487 or 487.1 where there are grounds to believe an offence under s. 394 or 396 has been committed.

## SYNOPSIS

This section sets out a scheme for obtaining a warrant to search for precious metals. Subsection (1) requires that an information in writing and under oath be laid before a justice by a person having an interest in a mining claim. The information must state that the precious metals, or other specified substances are unlawfully held by a person or in a place. The justice may issue a warrant to search any of the places or persons in the information. Subsection (2) provides that anything found as a result of a search conducted under subsec. (1) must be seized and carried before the justice who shall order that it be detained for inquiry or trial, or that it be restored to the owner, or forfeited to Her Majesty in right of the province in which the proceedings took place if the owner cannot be ascertained. Subsection (3) provides a right of appeal from any order that the items seized be given to the owner or Her Majesty.

## OFFENCES IN RELATION TO MINES / Presumption.

## 396. (1) Every one who

- (a) adds anything to or removes anything from any existing or prospective mine, mining claim or oil well with a fraudulent intent to affect the result of an assay, a test or a valuation that has been made or is to be made with respect to the mine, mining claim or oil well, or
- (b) adds anything to, removes anything from or tampers with a sample or material that has been taken or is being or is about to be taken from any existing or prospective mine, mining claim or oil well for the purpose of being assayed, tested or otherwise valued, with a fraudulent intent to affect the result of the assay, test or valuation,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

## (2) For the purposes of proceedings under subsection (1), evidence that

- (a) something has been added to or removed from anything to which subsection (1) applies, or
  - (b) anything to which subsection (1) applies has been tampered with,
- is, in the absence of any evidence to the contrary, proof of a fraudulent intent to affect the result of an assay, a test or a valuation. R.S., c. C-34, s. 354.

## CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Other offences relating to mines are found in s. 394.

Section 395 provides for the issuance of a search warrant to search for precious metals or rock alleged to be unlawfully deposited or held contrary to law.

## SYNOPSIS

This section describes two offences in relation to mines. Both offences relate to specified

activities that would affect the result of a test or valuation of a mine, a mining claim or an oil well. Both offences also require that the accused have the *fraudulent intent* to affect the results of the test. These offences are indictable and carry a maximum term of 10 years' imprisonment. Subsection (2) creates a presumption that the prosecution may rely on to prove, in the absence of evidence to the contrary, the fraudulent intent required under subsec. (1). Evidence of the addition to, the removal from, or the tampering with anything to which subsec. (1) applies proves the criminal intent required for conviction under this section.

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## ***Falsification of Books and Documents***

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### **BOOKS AND DOCUMENTS / Privy.**

**397. (1) Every one who, with intent to defraud,**

- (a) destroys, mutilates, alters, falsifies, or makes a false entry in, or**
  - (b) omits a material particular from, or alters a material particular in,**
- a book, paper, writing, valuable security or document is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(2) Every one who, with intent to defraud his creditors, is privy to the commission of an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 355.**

### **CROSS-REFERENCES**

The terms "valuable security" and "writing" are defined in s. 2. The term "document" is not defined for this Part but reference might be made to the definition in s. 321 for Part IX. By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

This offence resembles the forgery and uttering offences and therefore see cross-references under ss. 266 to 268. Also see s. 392, disposal of property with intent to defraud creditors.

### **SYNOPSIS**

This section describes the offence of destroying, mutilating, altering, falsifying, or omitting or altering a material particular in a book, paper, writing, valuable security or document. The accused must engage in the above-described activity with the *intent to defraud*. This is an indictable offence with a maximum term of five years' imprisonment. Subsection (2) states that every person who, *with the intent to defraud* his creditors, is privy to the offence described above is also guilty of an indictable offence which carries a maximum term of five years' imprisonment.

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### **FALSIFYING EMPLOYMENT RECORD.**

**398. Every one who, with intent to deceive, falsifies an employment record by any means, including the punching of a time clock, is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 356.**

### **CROSS-REFERENCES**

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2).



Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

### SYNOPSIS

This section describes the offence of falsifying an employment record. It states that every person who, *with the intent to deceive*, falsifies an employment record *by any means*, including the punching of a time clock, is guilty of a summary conviction offence.

### FALSE RETURN BY PUBLIC OFFICER.

**399.** Every one who, being entrusted with the receipt, custody or management of any part of the public revenues, knowingly furnishes a false statement or return of

(a) any sum of money collected by him or entrusted to his care, or

(b) any balance of money in his hands or under his control,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 357.

### CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Related offences: s. 122, breach of trust by public officer; s. 336, criminal breach of trust; s. 337, public servant refusing to deliver property.

### SYNOPSIS

This section describes the offence of making a false return by a public officer. The offence is committed where a person entrusted with public revenues *knowingly* furnishes a false statement of any sum or balance of money entrusted to or controlled by him. The offence is indictable, with a maximum punishment of five years' imprisonment.

### FALSE PROSPECTUS, ETC. / Definition of "company".

**400.** (1) Every one who makes, circulates or publishes a prospectus, a statement or an account, whether written or oral, that he knows is false in a material particular, with intent

(a) to induce persons, whether ascertained or not, to become shareholders or partners in a company,

(b) to deceive or defraud the members, shareholders or creditors, whether ascertained or not, of a company, or

(c) to induce any person to

(i) entrust or advance anything to a company, or

(ii) enter into any security for the benefit of a company,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(2) In this section, "company" means a syndicate, body corporate or company, whether existing or proposed to be created. R.S., c. C-34, s. 358; 1994, c. 44, s. 26.

### CROSS-REFERENCES

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

Other offences relating to trading in securities, etc., are in ss. 380(2) and 382 to 384.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

## SYNOPSIS

This section describes offences in relation to a false prospectus. Anyone who makes, circulates or publishes a prospectus, statement or account, whether written or oral, which he knows is false in a material particular, commits an indictable offence, if his purpose in so doing is one of those listed in subsec. (1)(a) to (d). Those purposes are: to induce anyone to become a shareholder or partner in a company; to deceive or defraud members, shareholders or creditors of a company; to induce anyone to entrust or advance anything to a company; or to enter into any security for the benefit of a company. The maximum punishment for this offence is imprisonment for 10 years.

## ANNOTATIONS

The falsity, which need not amount to a false pretence, may be found in a statement of purposes, which the author never had any intention of carrying out. Furthermore, for a para. (c) offence, a count is not duplicitious merely because it expresses the alternative modes of carrying out the offence by making, circulating or publishing a false prospectus, and the phrase "any person" includes all unascertained persons of the class of people to whom it was intended to give the prospectus at the time of its preparation: *Cox and Paton v. The Queen*, [1963] 2 C.C.C. 148, 40 C.R. 52 (S.C.C.) (5:0).

A material omission may render a statement false: *R. v. Colucci*, [1965] 4 C.C.C. 56, 46 C.R. 256 (Ont. C.A.).

Where the defence is that the false material particular was a mistaken belief as to the correctness of that particular the jury must determine whether the belief was an honest one which negated the guilty knowledge required to be proven by the Crown: *R. v. Davidson* (1971), 3 C.C.C. (2d) 509, [1971] 4 W.W.R. 731, *sub nom. Davidson v. The Queen* (B.C.C.A.) (2:1).

The intent to defraud is not an element of the para. (a) offence which only requires falsity in a material particular, the accused's knowledge of it, and an overt act with the intent to induce members of the public to become shareholders: *R. v. Scallen* (1974), 15 C.C.C. (2d) 441 (B.C.C.A.).

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## OBTAINING CARRIAGE BY FALSE BILLING / Forfeiture.

**401. (1)** Every one who, by means of a false or misleading representation, knowingly obtains or attempts to obtain the carriage of anything by any person into a country, province, district or other place, whether or not within Canada, where the importation or transportation of it is, in the circumstances of the case, unlawful is guilty of an offence punishable on summary conviction.

**(2)** Where a person is convicted of an offence under subsection (1), anything by means of or in relation to which the offence was committed, on such conviction, in addition to any punishment that is imposed, is forfeited to Her Majesty and shall be disposed of as the court may direct. R.S., c. C-34, s. 359.

## CROSS-REFERENCES

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2).

Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Section 414 provides for a presumption as to the port of shipment where an offence relates to imported goods.

The similar offence of fraudulently obtaining food and lodging is in s. 364 and fraud in relation to fares, etc., is in s. 393.

**SYNOPSIS**

This section describes the offence of obtaining carriage by false billing. Anyone *knowingly* obtaining or attempting to obtain the unlawful carriage or importation of anything to any place within or outside Canada by means of a false or misleading representation, commits a summary conviction offence. Upon conviction, anything by means of, or in relation to which the offence is committed is forfeited to the Crown, to be disposed of as the court directs.

**TRADER FAILING TO KEEP ACCOUNTS / Saving.**

- 402. (1) Every one who, being a trader or in business,**
- (a) is indebted in an amount exceeding one thousand dollars,**
  - (b) is unable to pay his creditors in full, and**
  - (c) has not kept books of account that, in the ordinary course of the trade or business in which he is engaged, are necessary to exhibit or explain his transactions,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.**

- (2) No person shall be convicted of an offence under this section**

- (a) where, to the satisfaction of the court or judge, he**
  - (i) accounts for his losses, and**
  - (ii) shows that his failure to keep books was not intended to defraud his creditors; or**
- (b) where his failure to keep books occurred at a time more than five years prior to the day on which he was unable to pay his creditors in full. R.S., c. C-34, s. 360.**

**CROSS-REFERENCES**

Related offences respecting defrauding creditors and keeping books of account are found in ss. 392 and 397. The general offence of fraud is defined in s. 380. Also see the offence of theft by failing to account defined in s. 330.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

**SYNOPSIS**

This section describes the offence of failing to keep accounts. Any trader or person in business who owes more than \$1,000, cannot pay his creditors in full, and has not kept ordinary books of account, commits an indictable offence, with a maximum punishment of two years' imprisonment. Subsection (2) creates a defence where the accused can account for his losses and show that his failure to keep books was not fraudulent, or where his failure occurred more than five years prior to his inability to pay his creditors.

**Personation****PERSONATION WITH INTENT.**

- 403. Every one who fraudulently personates any person, living or dead,**
- (a) with intent to gain advantage for himself or another person,**
  - (b) with intent to obtain any property or an interest in any property, or**
  - (c) with intent to cause disadvantage to the person whom he personates or another person,**
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding**



**ten years or an offence punishable on summary conviction. R.S., c. C-34, s. 361; 1994, c. 44, s. 27.**

#### CROSS-REFERENCES

The term "property" is defined in s. 2.

While there is no definition of "fraudulently" which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong. *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.).

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences: s. 130, personating a peace officer; s. 140, public mischief; s. 380, fraud; s. 404, personation at examination; s. 405, acknowledging instrument, including recognizance of bail, in false name.

#### SYNOPSIS

This section describes the offence of personation. The offence is committed where a person *fraudulently* personates any person, whether living or dead, *with the intention*: to gain an advantage for anyone; to obtain property; or to cause a disadvantage to anyone, including the person personated. The offence is a Crown option offence, and has a maximum punishment of 10 years' imprisonment when Crown proceeds by indictment. Where the Crown proceeds by way of summary conviction, then the punishment is prescribed by s. 787 and the limitation period is as set out in s. 786(2).

#### ANNOTATIONS

The word "advantage" in para. (a) is to be given its ordinary meaning and includes that which advances or serves or which gives profit and is thus not restricted to a pecuniary or economic advantage. Thus a personation to avoid arrest comes within this section: *Rozon v. The Queen* (1974), 28 C.R.N.S. 232 (Que. C.A.).

An impersonation in Canada to United States immigration authorities in order to obtain clearance to board an aircraft bound for the United States comes within this section. The offence is completely committed in Canada. Further, "advantage" is not confined to an economic or proprietary advantage and would include such a clearance. It does not matter that the ultimate effect of commission of the offence would be breach of the laws of a friendly country: *R. v. Hetsberger* (1980), 51 C.C.C. (2d) 257 (Ont. C.A.).

The word "person" in this section refers to a human being and does not include a fictitious person: *R. v. Northrup* (1982), 1 C.C.C. (3d) 210, 41 N.B.R. (2d) 610 (C.A.).

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#### PERSONATION AT EXAMINATION.

**404. Every one who falsely, with intent to gain advantage for himself or some other person, personates a candidate at a competitive or qualifying examination held under the authority of law or in connection with a university, college or school or who knowingly avails himself of the results of such personation is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 362.**

#### CROSS-REFERENCES

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2).

Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences: s. 130, personating a peace officer; s. 140, public mischief; s. 403, personation with intent; s. 405, acknowledging instrument, including recognizance of bail, in false name.

As to meaning of "advantage", consider cases noted under s. 403.

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## SYNOPSIS

This section describes the offence of personation at an examination. Anyone who falsely personates a candidate at an examination held under the authority of law or in connection with a school in order to gain an advantage for anyone, or who makes use of the results of such personation, commits a summary conviction offence.

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## ACKNOWLEDGING INSTRUMENT IN FALSE NAME.

**405.** Every one who, without lawful authority or excuse, the proof of which lies on him, acknowledges, in the name of another person before a court or a judge or other person authorized to receive the acknowledgment, a recognizance of bail, a confession of judgment, a consent to judgment or a judgment, deed or other instrument, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. **R.S., c. C-34, s. 363.**

## CROSS-REFERENCES

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498.

Related offences: s. 130, personating a peace officer; s. 403, personation with intent; s. 404, personation at examination.

## SYNOPSIS

This section describes the offence of acknowledging an instrument in a false name. The offence is committed where a person acknowledges before a court or other authorized person any of a variety of legal documents in the name of another person. A defence is available where the accused can establish that he committed the act with lawful authority or excuse. The offence is indictable, and punishable by a maximum term of five years' imprisonment.

## ANNOTATIONS

To make out the offence under this section where the recognizance purports to be issued by an officer in charge pursuant to s. 503(2), other than the officer for the time being in command of the police force responsible for the lock-up or other place where the accused is taken after arrest, the Crown must prove that the accused acknowledged the recognizance in a name other than his own, that he acknowledged it before a person who is an officer in charge of the lock-up or place at the time the accused was taken to that place to be detained in custody and that the officer in charge is a peace officer who has been designated for the purpose of Part XVI by the officer for the time being in command of the police force responsible for the lock-up or other place to which the accused was taken after arrest: *R. v. Gendron* (1985), 22 C.C.C. (3d) 312 (Ont. C.A.).

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## *Forgery of Trade-marks and Trade Descriptions*

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### FORGING TRADE-MARK.

**406.** For the purposes of this Part, every one forges a trade-mark who

- (a) without the consent of the proprietor of the trade-mark, makes or reproduces in any manner that trade-mark or a mark so nearly resembling it as to be calculated to deceive; or
- (b) falsifies, in any manner, a genuine trade-mark. **R.S., c. C-34, s. 364.**

## CROSS-REFERENCES

The term trade-mark is defined in s. 2 of the Trade-marks Act, R.S.C. 1985, c. T-13. The offences created in this Part relating to trade-marks and trade-names are found in ss. 407 to 411 and pun-

ished pursuant to s. 412. Some of those offences resemble the general fraud offence which is defined in s. 380 and forgery as defined in ss. 366 to 368.

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## **OFFENCE.**

**407. Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not, forges a trade-mark. R.S., c. C-34, s. 365.**

## **CROSS-REFERENCES**

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The term trade-mark is defined in s. 2 of the Trade-marks Act, R.S.C. 1985, c. T-13.

Forging a trade-mark is defined in s. 406. By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

The punishment for this offence is set out in s. 412 and therefore see notes under that section with respect to mode of trial and release pending trial. Section 412(2) also provides for forfeiture of anything by means of or in relation to which a person commits an offence under this section.

This offence resembles the general forgery offence and therefore see ss. 366 to 368.

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## **PASSING OFF.**

**408. Every one commits an offence who, with intent to deceive or defraud the public or any person, whether ascertained or not,**

- (a) passes off other wares or services as and for those ordered or required; or**
- (b) makes use, in association with wares or services, of any description that is false in a material respect regarding**
  - (i) the kind, quality, quantity or composition,**
  - (ii) the geographical origin, or**
  - (iii) the mode of the manufacture, production or performance**

**of those wares or services. R.S., c. C-34, s. 366.**

## **CROSS-REFERENCES**

The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

The punishment for this offence is set out in s. 412 and therefore see notes under that section with respect to mode of trial and release pending trial. Section 412(2) also provides for forfeiture of anything by means of or in relation to which a person commits an offence under this section.

Reference should also be made to the Trade-marks Act, R.S.C. 1985, c. T-13.

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## **SYNOPSIS**

This section describes the offence of "passing off". This offence is committed where a person, with the intention of deceiving any person or the public, passes off wares or services as being those actually ordered or required, or uses a description which is false in any of the material particulars enumerated in para. (b) in association with those wares or services.

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## **INSTRUMENTS FOR FORGING TRADE-MARK / Saving.**

**409. (1) Every one commits an offence who makes, has in his possession or disposes**



of a die, block, machine or other instrument, designed or intended to be used in forging a trade-mark.

(2) No person shall be convicted of an offence under this section where he proves that he acted in good faith in the ordinary course of his business or employment. R.S., c. C-34, s. 367.

#### CROSS-REFERENCES

The term trade-mark is defined in the Trade-marks Act, R.S.C. 1985, c. T-13. Forging a trade-mark is defined in s. 406. Possession is defined in s. 4(3). The punishment for this offence is set out in s. 412 and therefore see notes under that section with respect to mode of trial and release pending trial. Section 412(2) also provides for forfeiture of anything by means of or in relation to which a person commits an offence under this section.

#### SYNOPSIS

This section creates the offence of dealing with instruments for forging a trade mark. The offence is committed where any person makes, possesses or disposes of an instrument designed or intended to be used in forging a trade mark. A defence exists where the accused establishes that he acted in *good faith* in the ordinary course of his business or employment.

#### ANNOTATIONS

While the Crown need not show that the trade-mark was or is registered it must prove it to be a trade-mark as defined by the Trade Marks Act: *R. v. Strong Cobb Arner of Canada Ltd.* (1973), 15 C.C.C. (2d) 288, 2 O.R. (2d) 220 (H.C.J.), affd 16 C.C.C. (2d) 150, 2 O.R. (2d) 692 (C.A.).

#### OTHER OFFENCES IN RELATION TO TRADE-MARKS.

- 410. Every one commits an offence who, with intent to deceive or defraud,**
- (a) defaces, conceals or removes a trade-mark or the name of another person from anything without the consent of that other person; or
  - (b) being a manufacturer, dealer, trader or bottler, fills any bottle or siphon that bears the trade-mark or name of another person, without the consent of that other person, with a beverage, milk, by-product of milk or other liquid commodity for the purpose of sale or traffic. R.S., c. C-34, s. 368.

#### CROSS-REFERENCES

The term trade-mark is defined in s. 2 of the Trade-marks Act, R.S.C. 1985, c. T-13. The term “person” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud. Under s. 586, no count alleging fraud is insufficient by reason only that it does not set out in detail the nature of the fraud. However, under s. 587(1)(b), the court may order particulars of any fraud that is alleged.

The punishment for this offence is set out in s. 412 and therefore see notes under that section with respect to mode of trial and release pending trial. Section 412(2) also provides for forfeiture of anything by means of or in relation to which a person commits an offence under this section.

#### SYNOPSIS

This section creates additional offences in relation to trade marks. Paragraph (a) provides that an offence is committed where any person defaces, conceals or removes a trade mark or the name of another person from anything without consent, and with the intention to deceive or defraud. Paragraph (b) provides that an offence is committed where a manufacturer, dealer, trader or bottler for the purpose of sale or traffic, fills a bottle or

siphon bearing a trade mark, or the name of a person, with any liquid commodity without consent, and with the intention to deceive or defraud.

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**USED GOODS SOLD WITHOUT DISCLOSURE.**

**411. Every one commits an offence who sells, exposes or has in his possession for sale, or advertises for sale, goods that have been used, reconditioned or remade and that bear the trade-mark or the trade-name of another person, without making full disclosure that the goods have been reconditioned, rebuilt or remade for sale and that they are not then in the condition in which they were originally made or produced. R.S., c. C-34, s. 369.**

**CROSS-REFERENCES**

The terms "trade-mark" and "trade-name" are defined in s. 2 of the Trade-marks Act, R.S.C. 1985, c. T-13. The term "goods" is defined in s. 379. Possession is defined in s. 4(3). The term "person" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

The punishment for this offence is set out in s. 412 and therefore see notes under that section with respect to mode of trial and release pending trial. Section 412(2) also provides for forfeiture of anything by means of or in relation to which a person commits an offence under this section.

**SYNOPSIS**

This section describes the offence of selling used goods without appropriate disclosure. The offence is committed where a person sells, exposes for sale, possesses for sale or advertises goods bearing a trade mark or trade name of another person without disclosing that the goods were used, reconditioned or remade for sale.

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**PUNISHMENT / Forfeiture.**

**412. (1) Every one who commits an offence under section 407, 408, 409, 410 or 411 is guilty of**

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or**
- (b) an offence punishable on summary conviction.**

**(2) Anything by means of or in relation to which a person commits an offence under section 407, 408, 409, 410 or 411 is, unless the court otherwise orders, forfeited on the conviction of that person for that offence. R.S., c. C-34, s. 370.**

**CROSS-REFERENCES**

Where the prosecution elects to proceed by indictment for these offences then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2).

Release pending trial for the offences is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

**SYNOPSIS**

This section provides that the offences described in ss. 407 to 411 may be prosecuted by indictment, with a maximum punishment of imprisonment for two years, or by summary conviction. Anything by means of or in relation to which any of these offences is committed is forfeited upon conviction, unless the court orders otherwise.

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**FALSELY CLAIMING ROYAL WARRANT.**

**413. Every one who falsely represents that goods are made by a person holding a**

royal warrant, or for the service of Her Majesty, a member of the Royal Family or a public department is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 371.

#### CROSS-REFERENCES

“Her Majesty” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The term “public department” is defined in s. 2. The term “goods” is defined in s. 379.

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII.

The punishment is as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2).

Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

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#### PRESUMPTION FROM PORT OF SHIPMENT.

**414.** Where, in proceedings under this Part, the alleged offence relates to imported goods, evidence that the goods were shipped to Canada from a place outside Canada is, in the absence of any evidence to the contrary, proof that the goods were made or produced in the country from which they were shipped. R.S., c. C-34, s. 372.

#### CROSS-REFERENCES

The term “goods” is defined in s. 379.

#### SYNOPSIS

This section creates a presumption concerning the origin of goods in proceedings under Part X. Evidence that goods were shipped into Canada from another country is proof that the goods were produced in that country, in the absence of evidence to the contrary.

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## *Wreck*

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#### OFFENCES IN RELATION TO WRECK.

##### **415. Every one who**

- (a) secretes wreck, defaces or obliterates the marks on wreck or uses any means to disguise or conceal the fact that anything is wreck, or in any manner conceals the character of wreck, from a person who is entitled to inquire into the wreck,
- (b) receives wreck, knowing that it is wreck, from a person other than the owner thereof or a receiver of wreck, and does not within forty-eight hours thereafter inform the receiver of wreck thereof,
- (c) offers wreck for sale or otherwise deals with it, knowing that it is wreck, and not having a lawful authority to sell or deal with it,
- (d) keeps wreck in his possession knowing that it is wreck, without lawful authority to keep it, for any time longer than the time reasonably necessary to deliver it to the receiver of wreck, or
- (e) boards, against the will of the master, a vessel that is wrecked, stranded or in distress unless he is a receiver of wreck or a person acting under orders of a receiver of wreck,

is guilty of

- (f) an indictable offence and liable to imprisonment for a term not exceeding two years, or
- (g) an offence punishable on summary conviction. R.S., c. C-34, s. 373.

#### CROSS-REFERENCES

The term “wreck” is defined in s. 2. The term “master” is defined in s. 2 of the Canada Shipping



Act, R.S.C. 1985, c. S-9. The term "receiver of wreck" refers to a person appointed under s. 423 of the Canada Shipping Act, R.S.C. 1985, c. S-9 or a person acting under s. 424 of that Act. The Canada Shipping Act contains additional offences respecting wreck. In addition, s. 439(2) of that Act enacts a presumption applicable in "any indictment or prosecution of an accused for receiving, secreting or disguising any wreck, for having the possession thereof, for selling or dealing therewith or for defacing or obliterating marks thereon" and s. 439(3) permits evidence to be adduced of a prior conviction "on any indictment or prosecution of an accused for receiving, secreting, defacing, possessing, selling, dealing with or concealing the character of any wreck." The wide terms in which these provisions are cast would appear to make them applicable (assuming their constitutionality) to a prosecution under this section.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Also see s. 438 which makes it an offence to interfere with the saving of a wrecked vessel.

## SYNOPSIS

This section describes a series of offences in relation to wreck. "Wreck" is defined in s. 2 and includes the cargo, stores and parts of a vessel which are separated from it, and the property of persons who belong to, are on board or have left a wrecked vessel. An offence is committed where anyone secretes, disguises or conceals the character of wreck, *knowingly* receives wreck from a person other than the owner or a receiver of wreck without informing the receiver within 48 hours, *knowingly* deals with wreck without lawful authority, *knowingly* keeps wreck in possession without lawful authority longer than the time reasonably necessary to deliver it to the receiver; or, not being a receiver of wreck or a person acting under a receiver's orders, boards a wrecked, stranded or distressed vessel against the will of the master. The offence may be prosecuted by indictment or summarily. The maximum term of punishment on indictment is two years.

## Public Stores

### DISTINGUISHING MARK ON PUBLIC STORES.

416. The Governor in Council may, by notice to be published in the *Canada Gazette*, prescribe distinguishing marks that are appropriated for use on public stores to denote the property of Her Majesty therein, whether the stores belong to Her Majesty in right of Canada or to Her Majesty in any other right. R.S., c. C-34, s. 374.

### CROSS-REFERENCES

The term "Her Majesty" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The terms "property" and "public stores" are defined in s. 2.

### APPLYING OR REMOVING MARKS WITHOUT AUTHORITY / Unlawful transactions in public stores / Definition of "distinguishing mark".

417. (1) Every one who,
- (a) without lawful authority, the proof of which lies on him, applies a distinguishing mark to anything, or
  - (b) with intent to conceal the property of Her Majesty in public stores, removes, destroys or obliterates, in whole or in part, a distinguishing mark,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who, without lawful authority, the proof of which lies on him, receives, possesses, keeps, sells or delivers public stores that he knows bear a distinguishing mark is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(3) For the purposes of this section, “distinguishing mark” means a distinguishing mark that is appropriated for use on public stores pursuant to section 416. R.S., c. C-34, s. 375.

#### CROSS-REFERENCES

The term “Her Majesty” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The terms “property” and “public stores” are defined in s. 2. Possession is defined in s. 4(3). Under s. 421(1), evidence that a person was at any time performing duties in the Canadian Forces [defined in s. 2] is, in the absence of evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular. Under s. 421(2), an accused charged with the offence under subsec. (2) is presumed to have known that the stores bore a distinguishing mark if he was at the time of the offence in the service or employment of Her Majesty or was a dealer in marine stores or in old metals.

The accused may elect his mode of trial for the offence under subsec. (1) pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498. Where the prosecution elects to proceed by indictment for the offence under subsec. (2) then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial for the offence under subsec. (2) is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences concerning public stores are in ss. 418 and 420.

#### SYNOPSIS

This section describes offences with respect to distinguishing marks prescribed pursuant to s. 416. An offence is committed contrary to subsec. (1) where anyone applies a distinguishing mark *without lawful authority*, the onus of proof of which lies on him, or removes, destroys or obliterates a distinguishing mark in whole or in part, with intent to conceal Her Majesty’s ownership. The offence is indictable, with a maximum term of imprisonment of two years. An offence is committed contrary to subsec. (2) where anyone knowingly receives, possesses, keeps, sells, or delivers public stores bearing a distinguishing mark *without lawful authority*, the proof of which lies on the accused. This offence may be prosecuted by indictment, with a maximum term of two years’ imprisonment, or by summary conviction.

#### SELLING DEFECTIVE STORES TO HER MAJESTY / Offences by officers and employees of corporations.

**418. (1) Every one who knowingly sells or delivers defective stores to Her Majesty or commits fraud in connection with the sale, lease or delivery of stores to Her Majesty or the manufacture of stores for Her Majesty is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.**

(2) Every one who, being a director, an officer, an agent or an employee of a corporation that commits, by fraud, an offence under subsection (1),

(a) knowingly takes part in the fraud, or

(b) knows or has reason to suspect that the fraud is being committed or has been or is about to be committed and does not inform the responsible government, or a department thereof, of Her Majesty,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 376.

#### CROSS-REFERENCES

The term "Her Majesty" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

Under s. 421(1), evidence that a person was at any time performing duties in the Canadian Forces (defined in s. 2) is, in the absence of evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular.

The accused may elect his mode of trial for the offence under subsec. (1) pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences concerning public stores are in ss. 417 and 420.

#### SYNOPSIS

This section describes the offence of selling defective stores to Her Majesty. An indictable offence is committed where a person *knowingly* sells or delivers defective stores to Her Majesty, or commits fraud in connection with the sale, lease, or delivery of stores to, or manufacture of stores for Her Majesty. The maximum term of imprisonment is 14 years. Subsection (2) provides that an officer, director, employee or agent of a corporation committing this offence by fraud is also guilty of an indictable offence with a maximum term of imprisonment of 14 years if he *knowingly* participates in the fraud, or *knows or has reason to suspect* that the fraud has been, is being or is about to be committed and fails to inform the responsible government department.

#### UNLAWFUL USE OF MILITARY UNIFORMS OR CERTIFICATES.

**419.** Every one who without lawful authority, the proof of which lies on him,

(a) wears a uniform of the Canadian Forces or any other naval, army or air force or a uniform that is so similar to the uniform of any of those forces that it is likely to be mistaken therefor,

(b) wears a distinctive mark relating to wounds received or service performed in war, or a military medal, ribbon, badge, chevron or any decoration or order that is awarded for war services, or any imitation thereof, or any mark or device or thing that is likely to be mistaken for any such mark, medal, ribbon, badge, chevron, decoration or order,

(c) has in his possession a certificate of discharge, certificate of release, statement of service or identity card from the Canadian Forces or any other naval, army or air force that has not been issued to and does not belong to him, or

(d) has in his possession a commission or warrant or a certificate of discharge, certificate of release, statement of service or identity card, issued to an officer or person in or who has been in the Canadian Forces or any other naval, army or air force, that contains any alteration that is not verified by the initials of the officer who issued it, or by the initials of some officer thereto lawfully authorized,

is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 377.

#### CROSS-REFERENCES

Under s. 421(1), evidence that a person was at any time performing duties in the Canadian Forces (defined in s. 2) is, in the absence of evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular.



Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The offence of personation with intent is found in s. 403 and of personating a police officer in s. 130.

## SYNOPSIS

This section describes the offence of unlawful use of military uniforms or certificates or imitations thereof. The wearing or, in certain cases, possession of a wide variety of military apparel, marks, certificates, commissions and warrants without lawful authority, the proof of which lies on the accused, is a summary conviction offence.

## MILITARY STORES / Exception.

**420.** (1) Every one who buys, receives or detains from a member of the Canadian Forces or a deserter or an absentee without leave therefrom any military stores that are owned by Her Majesty or for which the member, deserter or absentee without leave is accountable to Her Majesty is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction.

(2) No person shall be convicted of an offence under this section where he establishes that he did not know and had no reason to suspect that the military stores in respect of which the offence was committed were owned by Her Majesty or were military stores for which the member, deserter or absentee without leave was accountable to Her Majesty. **R.S., c. C-34, s. 378.**

## CROSS-REFERENCES

The term “military” is defined in s. 2.

Under s. 421(1), evidence that a person was at any time performing duties in the Canadian Forces (defined in s. 2) is, in the absence of evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular.

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Related offences concerning public stores are in ss. 417 and 418.

Other offences relating to deserters are in ss. 54 and 62.

## SYNOPSIS

This section describes the offence of unauthorized use of military stores. An offence is committed where a person buys, receives or detains military stores of Her Majesty from a member of the Canadian Forces, a deserter or an absentee without leave of the forces. The offence may be prosecuted by indictment, with a maximum term of imprisonment of five years, or by summary conviction. Subsection (2) creates a defence where the accused establishes that he did not know and had no reason to suspect that the stores were owned by Her Majesty.

## EVIDENCE OF ENLISTMENT / Presumption when accused a dealer in stores.

**421.** (1) In proceedings under sections 417 to 420, evidence that a person was at any

time performing duties in the Canadian Forces is, in the absence of any evidence to the contrary, proof that his enrolment in the Canadian Forces prior to that time was regular.

(2) An accused who is charged with an offence under subsection 417(2) shall be presumed to have known that the stores in respect of which the offence is alleged to have been committed bore a distinguishing mark within the meaning of that subsection at the time the offence is alleged to have been committed if he was, at that time, in the service or employment of Her Majesty or was a dealer in marine stores or in old metals. R.S., c. C-34, s. 379.

#### CROSS-REFERENCES

The term "Canadian Forces" is defined in s. 2. The term "Her Majesty" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21.

#### SYNOPSIS

This section creates certain presumptions relating to ss. 417 to 420. By virtue of subsec. (1), in proceedings under ss. 417 to 420, evidence that a person performed duties in the armed forces is proof of his earlier regular enrolment in the absence of evidence to the contrary. By virtue of subsec. (2), if the accused was in the service or employment of Her Majesty, or was a dealer in marine stores or old metals at the time he is alleged to have committed an offence contrary to s. 417(2), he is presumed to know that the stores in question bore a distinguishing mark at the time.

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## *Breach of Contract, Intimidation and Discrimination Against Trade Unionists*

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### CRIMINAL BREACH OF CONTRACT / Saving / Consent required.

422. (1) Every one who wilfully breaks a contract, knowing or having reasonable cause to believe that the probable consequences of doing so, whether alone or in combination with others, will be

- (a) to endanger human life,
- (b) to cause serious bodily injury,
- (c) to expose valuable property, real or personal, to destruction or serious injury,
- (d) to deprive the inhabitants of a city or place, or part thereof, wholly or to a great extent, of their supply of light, power, gas or water, or
- (e) to delay or prevent the running of any locomotive engine, tender, freight or passenger train or car, on a railway that is a common carrier,

is guilty of

- (f) an indictable offence and liable to imprisonment for a term not exceeding five years, or
- (g) an offence punishable on summary conviction.

(2) No person wilfully breaks a contract within the meaning of subsection (1) by reason only that

- (a) being the employee of an employer, he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment, or
- (b) being a member of an organization of employees formed for the purpose of regulating relations between employers and employees, he stops work as a result of the failure of the employer and a bargaining agent acting on behalf of the organization to agree upon any matter relating to the employment of members of the organization,

if, before the stoppage of work occurs, all steps provided by law with respect to the

settlement of industrial disputes are taken and any provision for the final settlement of differences, without stoppage of work, contained in or by law deemed to be contained in a collective agreement is complied with and effect given thereto.

(3) No proceedings shall be instituted under this section without the consent of the Attorney General. R.S., c. C-34, s. 380.

#### CROSS-REFERENCES

“Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.]

Where the prosecution elects to proceed by indictment then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Also see s. 466 which creates the offence of conspiracy in restraint of trade.

#### SYNOPSIS

This section describes the offence of criminal breach of contract. The offence is committed where a person *wilfully* breaches a contract, *knowing* or *having reasonable cause to believe* that the consequences will endanger life, cause serious bodily injury, expose valuable property to destruction or serious injury, deprive people wholly or substantially of light, power, gas, or water, or delay or prevent the running of a common carrier railway. These consequences may flow from a breach by the accused or by the accused in combination with others. The offence may be prosecuted by indictment, with a maximum term of punishment of five years’ imprisonment, or by summary conviction. Subsection (2) provides that a contract is not broken within the meaning of this section where an employee lawfully stops work because matters relating to his employment are not agreed upon, or where he stops work as part of a lawful work stoppage by a union. Proceedings under this section may only be instituted with the consent of an Attorney General.

#### INTIMIDATION / Exception.

423. (1) Every one who, wrongfully and without lawful authority, for the purpose of compelling another person to abstain from doing anything that he has a lawful right to do, or to do anything that he has a lawful right to abstain from doing,

- (a) uses violence or threats of violence to that person or his spouse or children, or injures his property,
  - (b) intimidates or attempts to intimidate that person or a relative of that person by threats that, in Canada or elsewhere, violence or other injury will be done to or punishment inflicted on him or a relative of his, or that the property of any of them will be damaged,
  - (c) persistently follows that person about from place to place,
  - (d) hides any tools, clothes or other property owned or used by that person, or deprives him of them or hinders him in the use of them,
  - (e) with one or more other persons, follows that person, in a disorderly manner, on a highway,
  - (f) besets or watches the dwelling-house or place where that person resides, works, carries on business or happens to be, or
  - (g) blocks or obstructs a highway,
- is guilty of an offence punishable on summary conviction.

(2) A person who attends at or near or approaches a dwelling-house or place, for the



**purpose only of obtaining or communicating information, does not watch or beset within the meaning of this section. R.S., c. C-34, s. 381; 1980-81-82-83, c. 125, s. 22.**

#### CROSS-REFERENCES

Where the offence, although committed outside Canada, is in relation to a demand for nuclear material, see s. 7(3.4).

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. In some circumstances, the accused found guilty of this offence would be liable to the discretionary order prohibiting possession of firearms, ammunition or explosives.

An alternative to this offence is the procedure for requiring the offender to enter into a recognizance to keep the peace either at common law or pursuant to s. 810. Other related offences: s. 175, causing disturbance; s. 264, criminal harassment; s. 264.1, uttering threats; s. 346, extortion; s. 423, intimidation and watching and besetting; s. 424, threat to commit offence against internationally protected person; s. 371, sending false telegram, etc., with intent to defraud; s. 372, conveying false messages, harassing or indecent telephone calls.

#### SYNOPSIS

This section describes the offence of intimidation. The offence is committed where a person intending to compel someone to abstain from doing something he has a right to do, or to do something that he has the right to abstain from doing, *wrongfully* and *without authority*: uses violence or threats of violence against the person or his spouse or children; injures his property; intimidates or attempts to intimidate the person or a relative by threats of violence or injury to property; persistently follows the person; hides or deprives the person of the use of his property; with another or others follows the person in a disorderly manner on a highway; watches or besets the residence, work place or other place where the person happens to be; or blocks a highway. The offence may be prosecuted by summary conviction. By virtue of s. (2), where a person approaches a place for the sole purpose of obtaining or communicating information, he does not watch or beset within the meaning of this section.

#### ANNOTATIONS

A picket line, staffed by non-employees, advocating a collective bargaining agreement was held to be just as effective an interference with contractual relations as any other restraint might be and on the facts was held to involve the proposition that the defendants were in breach of subsec. (1)(f): *Smith Bros. Construction Co. Ltd. v. Jones et al.* (1955), 113 C.C.C. 16, [1955] O.R. 362 (H.C.J.).

This section is not confined to industrial disputes and trade-union activity: *Re Regina and Basaraba* (1975), 24 C.C.C. (2d) 296, [1975] 3 W.W.R. 233 (Man. C.A.).

A road in a company town owned by the company but which the public have a *de facto* right to use constitutes a "highway" for the purposes of subsec. (1)(g): *R. v. Stockley et al.* (1977), 36 C.C.C. (2d) 387, 38 C.R.N.S. 368 (Nfld. C.A.).

#### THREAT TO COMMIT OFFENCE AGAINST INTERNATIONALLY PROTECTED PERSON.

**424. Every one who threatens to commit an offence under section 235, 266, 279 or 279.1 against an internationally protected person or who threatens to commit an offence under section 431 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. 1974-75-76, c. 93, s. 33; R.S.C. 1985, c. 27 (1st Supp.), s. 55.**

## CROSS-REFERENCES

The term “internationally protected person” is defined in s. 2. Section 7(10) provides for admissibility of a certificate from the Secretary of State for External Affairs stating any fact relevant to the question of whether any person is a person who is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant to conduct video surveillance under s. 487.01(5).

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in s. 431 [official premises, etc.].

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498. In some circumstances, the accused found guilty of this offence would be liable to the discretionary order prohibiting possession of firearms, ammunition or explosives.

## SYNOPSIS

This section describes the offence of threatening to commit an offence against an internationally protected person. A person charged under this section must have threatened to commit the offences described in ss. 235, 266, 279 or 279.1, and the threats must be directed against an internationally protected person. A person who threatens to commit the offence under s. 431 of attacking the premises, residence or transport of an internationally protected person is also guilty of an offence under this section. This offence is indictable and carries a maximum term of five years' imprisonment.

## OFFENCE BY EMPLOYERS.

**425. Every one who, being an employer or the agent of an employer, wrongfully and without lawful authority**

- (a) refuses to employ or dismisses from his employment any person for the reason only that the person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing, in a lawful manner, their interests and organized for their protection in the regulation of wages and conditions of work,
- (b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to a trade union, association or combination to which they have a lawful right to belong, or
- (c) conspires, combines, agrees or arranges with any other employer or his agent to do anything mentioned in paragraph (a) or (b),

**is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 382.**

## CROSS-REFERENCES

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of intimidation is found in s. 423. With respect to the offence in para. (c), see the saving provisions with respect to refusing to work and trade combinations in s. 467.

## SYNOPSIS

This section describes several offences relating to labour disputes with which an employer can be charged. Any person who is either an employer or an agent of an employer and who *wrongfully and without lawful authority* refuses to hire or continue the employment of another person because he is a member of a *lawful* trade union or associa-

tion, or who, employing the methods described in para. (b), attempts to keep his employees from joining a union or association to which they have a lawful right to belong is guilty of a summary conviction offence. Paragraph (c) imposes liability to summary conviction upon any person who *conspires, combines, agrees or arranges* with the employer or his agent to do any of the things described above.

#### ANNOTATIONS

**Para. (a)** – The “reason only” means the primary reason, the *causa causans*, the reason behind the act in question, and may be inferred from the attitudes or decisions not expressly outlined in detail: *R. ex rel. Perreault v. Alex Pelletier And Sons Ltd.* (1960), 33 C.R. 84 (Que. Mag. Ct.).

A charge under this subsection was dismissed where police officers, called by the employer, removed employees from the employer’s premises but without instructions to do so from the employer. There was held to be no dismissal either directly or indirectly by the employer: *R. v. J. Alepin Freres Ltee.*, [1965] 3 C.C.C. 1, [1965] S.C.R. 359.

**Para. (b)** – The offence of seeking to compel workmen or employees to abstain from belonging to a trade union is the prohibited activity expressed in two methods which may both be incorporated into one charge: *R. v. Hickey, ex p. Hebb Motors Ltd. et al.*, [1965] 2 C.C.C. 170 (N.S.S.C.).

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### Secret Commissions

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SECRET COMMISSIONS / Privy to offence / Punishment / Definition of “agent” and “principal”.

**426. (1) Every one commits an offence who**

**(a) corruptly**

**(i) gives, offers or agrees to give or offer to an agent, or**

**(ii) being an agent, demands, accepts or offers or agrees to accept from any person,**

any reward, advantage or benefit of any kind as consideration for doing or forbearing to do, or for having done or forborne to do, any act relating to the affairs or business of his principal or for showing or forbearing to show favour or disfavour to any person with relation to the affairs or business of his principal; or

**(b) with intent to deceive a principal, gives to an agent of that principal, or, being an agent, uses with intent to deceive his principal, a receipt, an account, or other writing**

**(i) in which the principal has an interest,**

**(ii) that contains any statement that is false or erroneous or defective in any material particular, and**

**(iii) that is intended to mislead the principal.**

**(2) Every one commits an offence who is knowingly privy to the commission of an offence under subsection (1).**

**(3) A person who commits an offence under this section is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(4) In this section “agent” includes an employee, and “principal” includes an employer. R.S., c. C-34, s. 383; R.S.C. 1985, c. 27 (1st Supp.), s. 56.**

#### CROSS-REFERENCES

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and is an enterprise crime offence for the purposes of Part XII.2.



The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

This offence is often charged with the offence of fraud defined in s. 380. Other forms of breach of trust are as follows: s. 122, breach of trust by public officer; s. 330, theft by person required to account; s. 331, theft by person holding power of attorney; s. 332, theft of money held under direction; s. 336, criminal breach of trust; s. 384, broker selling for his own account.

## SYNOPSIS

This section describes the offence of giving secret commissions. Subsection (1)(a) states that a person who *corruptly* gives, offers or agrees to give or offer to an agent, or who, being an agent, *corruptly* demands, accepts or offers or agrees to accept any reward, advantage or benefit of any kind in return for doing or not doing an act, or for showing favour or disfavour to another person, in relation to the business of his principal, commits this indictable offence. Subsection (1)(b) describes another form of this offence which involves the giving to an agent or the using by an agent of a *receipt, account, or other writing* in which the principal has an interest and in which a false, erroneous or defective statement, intended to mislead the principal, is contained. In order to be convicted of an offence under subsec. (1)(b), the accused must have *the intent to deceive* a principal. Subsection (2) makes it an offence for a person to be *knowingly privy* to an offence under subsec. (1). The maximum term of imprisonment for offences under this section is 5 years.

## ANNOTATIONS

**Elements of offence** – Where the person charged with the offence under subsec. (1)(a)(ii) is the agent, then the Crown must establish as elements of the *actus reus* the existence of an agency relationship; the accepting by an agent of a benefit as consideration for doing or forbearing to do any act in relation to the affairs of the agent's principals; and the failure by the agent to make adequate and timely disclosure of the source, amount and nature of the benefit. The requisite *mens rea* is proof that the agent was aware of the agency relationship; that the agent knowingly accepted the benefit as consideration for an act to be undertaken in relation to the affairs of the principal; and that the agent was aware of the extent of the disclosure to the principal or lack thereof. If the accused was aware that some disclosure was made, then it will be for the court to determine whether in all the circumstances of the particular case it was in fact adequate and timely. The term “corruptly” means secretly or without requisite disclosure. There is no requirement of any corrupt bargain. Thus, it is possible to convict the agent who has accepted or taken a reward despite the innocence of the giver of the reward or benefit. The non-disclosure will be established if the Crown demonstrates that adequate and timely disclosure of the source, amount and nature of the benefit has not been made by the agent to the principal. A general and vague disclosure that the agent is receiving commissions will not meet the objective of the section. The agent must disclose the nature of the benefit which is being received, the amount of that benefit calculated to the best of the agent's ability and the source of the benefit. It may not be possible for the agent to be exact as to the amount of commission which will be received and it will, therefore, be sufficient if a reasonable effort is made to alert the principal as to the approximate amount and source of commission to be received. The disclosure must be timely in the sense that the principal must be aware of the benefit as soon as possible. The disclosure must be made at the point when the reward may influence the agent in relation to the principal's affairs and it is essential then that the agent clearly disclose to the principal as promptly as possible the source and amount or approximate amount of the benefit: *R. v. Kelly* (1992), 73 C.C.C. (3d) 385, 92 D.L.R. (4th) 643, [1992] 4 W.W.R. 640 (S.C.C.); *R. v. Arnold* (1992), 73 C.C.C. (3d) 31, 137 N.R. 360 (S.C.C.).

The evil to which this section is directed is secret transactions with an agent concern-

ing the affairs of his principal, and it is no defence that the accused believed that he had a right to have a certain thing done by the agent's principal: *R. v. Brown* (1956), 116 C.C.C. 287, 24 C.R. 404 (Ont. C.A.) (2:1).

**Meaning of "agent"** – While the offence, contrary to subsec. (1)(a)(i), requires proof that the person who was offered the secret commission was in fact an agent, the agent need not have a specific principal at the time of the prohibited offer, nor need the agent intend to carry out the purpose for which the offer was made: *R. v. Wile* (1990), 58 C.C.C. (3d) 85, 79 C.R. (3d) 32, 74 O.R. (2d) 289 (C.A.).

The mere giving of advice with respect to investments does not establish an agency relationship: *R. v. Arnold* (1994), 88 C.C.C. (3d) 92, 129 N.S.R. (2d) 356 (N.S.C.A.).

## Trading Stamps

### ISSUING TRADING STAMPS / Giving to purchaser of goods.

427. (1) Every one who, by himself or his employee or agent, directly or indirectly issues, gives, sells or otherwise disposes of, or offers to issue, give, sell or otherwise dispose of trading stamps to a merchant or dealer in goods for use in his business is guilty of an offence punishable on summary conviction.

(2) Every one who, being a merchant or dealer in goods, by himself or his employee or agent, directly or indirectly gives or in any way disposes of, or offers to give or in any way dispose of, trading stamps to a person who purchases goods from him is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 384.

### CROSS-REFERENCES

The terms "goods" and "trading stamps" are defined in s. 379.

Trial of these offences is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Also see lottery offences in s. 207.

### SYNOPSIS

This section makes it a summary conviction offence to give, sell or issue, or to offer to give, sell or issue trading stamps to a *merchant or dealer in goods* for use in his business. Subsection (2) further makes it an offence for a merchant or dealer in goods to distribute trading stamps to purchasers.

### ANNOTATIONS

The vendor's right to substitute an equal or better premium than the one claimed by the customer upon redemption of coupons did not make the arrangement a trading stamp scheme: *R. v. Kleckner*, [1963] 1 C.C.C. 64, 39 C.R. 77 (Sask.C.A.).

To be trading stamps the Crown must prove that the stamps were intended to represent a discount on the price of goods, and accordingly bonus coupons given only to cash as opposed to credit customers based on the amount paid are not trading stamps: *R. v. Lloyd H. Alford & Son Ltd.*, [1965] 3 C.C.C. 70, 45 C.R. 279 (Ont.H.C.J.).

## Part XI / WILFUL AND FORBIDDEN ACTS IN RESPECT OF CERTAIN PROPERTY

### *Interpretation*

#### DEFINITION OF “PROPERTY”

**428.** In this Part, “property” means real or personal corporeal property. R.S., c. C-34, s. 385.

#### CROSS-REFERENCES

In addition to the definition of this section, see s. 2 and notes to that section. For definition of “wilfully”, see s. 429.

#### SYNOPSIS

This section defines the term “property” for the purposes of Part XI of the Code. The definition is more restricted than the one found in s. 2 of the Code and encompasses real or personal corporeal property.

#### WILFULLY CAUSING EVENT TO OCCUR / Colour of right / Interest.

**429. (1)** Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

**(2)** No person shall be convicted of an offence under sections 430 to 446 where he proves that he acted with legal justification or excuse and with colour of right.

**(3)** Where it is an offence to destroy or to damage anything,

**(a)** the fact that a person has a partial interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage; and

**(b)** the fact that a person has a total interest in what is destroyed or damaged does not prevent him from being guilty of the offence if he caused the destruction or damage with intent to defraud. R.S., c. C-34, s. 386.

#### CROSS-REFERENCES

For other notes on the meaning of “colour of right”, see s. 322 and with respect to mistake generally, see s. 19. With respect to subsec. (3)(b), note that where the accused is charged with an offence under s. 433 or 434, then s. 435 enacts a presumption of intent to defraud where the accused is the holder of or is named as the beneficiary under a policy of fire insurance relating to the property, and where intent to defraud is material.

#### SYNOPSIS

This section contains three provisions relevant to Part XI of the Code. Subsection (1) states that any person who does something (or fails to do something which it is his or her duty to do) knowing that this action or inaction will *probably cause* the occurrence of an event and who is *reckless* as to the outcome of his action, is deemed, for the purposes of this Part of the Code, to have wilfully caused the occurrence of the event. Subsection (2) makes it clear that no person who proves that he acted with *legal justification or excuse* and *with colour of right* shall be convicted of an offence under ss. 430 to 446. Subsection (3)(a) provides that where it is an offence to destroy or damage anything, a person who causes damage or destruction can be found guilty, notwithstanding the fact that he has a



partial interest in that thing. Subsection (3)(a) states that a person who has a total interest in the damaged property can be found guilty of an offence if he caused the damage or destruction *with the intent to defraud*.

## ANNOTATIONS

**Application of definition of “wilfully” [subsec. (1)]** – In view of this extended definition of “wilfully” an information containing an allegation of unlawfully damaging property is valid: *R. v. Rese*, [1968] 1 C.C.C.363, 2 C.R.N.S.99 (Ont.C.A.).

**Legal justification or excuse and colour of right [subsec. (2)]** – To come within this exception the accused must show that he believed in a state of facts which, if it actually existed, would constitute a legal justification or excuse: *R. v. Ninos And Walker*, [1964] 1 C.C.C.326, 48 M.P.R.383 (N.S.S.C. *in Banco*).

Where the accused shot and killed a dog which he had accidentally wounded in an attempt to frighten it off his land which he had turned into a wildlife refuge it was held that the first shot was justified as it was not done with the intent to wound or kill the dog and that the second shot, which was done for humanitarian reasons to put the dog out of its misery, was also justified. The accused’s honest belief (proved to be wrong at trial) that the dog could not be saved provided him with a colour of right. The Court left open the question whether the intentional shooting of dogs to protect wildlife would itself constitute a lawful justification or excuse: *R. v. Comber* (1975), 28 C.C.C. (2d) 444 (Ont. Co. Ct.).

The word “and” in this subsection should be read as “or” so it is sufficient if the accused establishes that he acted either with legal justification or excuse, or with a colour of right. Colour of right means an honest belief in a state of fact which, if it existed, would be a legal justification or excuse: *R. v. Creaghan* (1982), 1 C.C.C. (3d) 449, 31 C.R. (3d) 277 (Ont. C.A.).

It would seem that placing the onus on the accused to prove the legal justification or excuse is unconstitutional as violating s. 11(d) of the Charter: *R. v. Gamey* (1993), 80 C.C.C. (3d) 117, 85 Man. R. (2d) 41 (C.A.).

**Destruction or damage to person’s own property [subsec. (3)]** – Where a trustee’s interest is only a bare legal title the trustee does not have any sufficient interest in the property to remove the application of this paragraph: *R. v. Griffith*, [1987] 2 W.W.R. 564 (Man. Q.B.).

## Mischief

**MISCHIEF / Mischief in relation to data / Punishment / Idem / Idem / Idem / Offence / Saving / Idem / Definition of “data”.**

### 430. (1) Every one commits mischief who wilfully

- (a) destroys or damages property;
- (b) renders property dangerous, useless, inoperative or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
- (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

### (1.1) Every one commits mischief who wilfully

- (a) destroys or alters data;
- (b) renders data meaningless, useless or ineffective;
- (c) obstructs, interrupts or interferes with the lawful use of data; or
- (d) obstructs, interrupts or interferes with any person in the lawful use of data or denies access to data to any person who is entitled to access thereto.

- (2) Every one who commits mischief that causes actual danger to life is guilty of an indictable offence and liable to imprisonment for life.
- (3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (4) Every one who commits mischief in relation to property, other than property described in subsection (3),
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (5) Everyone who commits mischief in relation to data
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (5.1) Every one who wilfully does an act or wilfully omits to do an act that it is his duty to do, if that act or omission is likely to constitute mischief causing actual danger to life, or to constitute mischief in relation to property or data,
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (6) No person commits mischief within the meaning of this section by reason only that
- (a) he stops work as a result of the failure of his employer and himself to agree on any matter relating to his employment; or
  - (b) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree on any matter relating to his employment; or
  - (c) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.
- (7) No person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.
- (8) In this section, “data” has the same meaning as in section 342.1. R.S., c. C-34, s. 387; 1972, c. 13, s. 30; R.S.C. 1985, c. 27 (1st Supp.), s. 57; 1994, c. 44, s. 28.

#### CROSS-REFERENCES

The term “property” is defined in s. 428. The term “wilfully” is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2). Where the accused has an interest in the thing destroyed, see s. 429(3).

The offence in subsec. (2) is an indictable offence for which the accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515. Where the prosecution elects to proceed by indictment for the offence under subsec. (3) then the accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). Where the prosecution elects to proceed by indictment for the offence under subsec. (4) then, by virtue of s. 553(a)(v), it is an offence over which a provincial court judge has absolute jurisdiction and does not depend on the consent of the accused. That is, the accused does not have an election as to mode of trial, although the provincial court

judge may, by virtue of s. 555(1), elect to continue the proceedings as a preliminary inquiry, in which case, the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a). As well, under s. 555(2), where, in the course of the trial, evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds \$5,000 then the provincial court judge shall put the accused to his election under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. The value of a valuable security is determined in accordance with s. 4(2) and of a postal card or stamp in accordance with s. 4(1). The term "testamentary instrument" is defined in s. 2. Where the prosecution elects to proceed by indictment for the offence under subsec. (5) or (5.1) then the accused may elect his mode of trial under s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial for the offences in subsec. (5) or (5.1) is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Using a computer facility with intent to commit an offence under this section is an offence under s. 342.1(1)(c). The offence of public mischief [*i.e.*, misleading a peace officer] is in s. 140.

## SYNOPSIS

This section describes the offence of mischief in its various forms. It also sets out the punishment that will be applied after a finding of guilt under this section. Every person who *wilfully* does any of the things listed in subsec. (1) or (1.1) commits the offence of mischief. The punishment for this offence, depending on the circumstances of the case, can be life imprisonment. Subsections (6) and (7) provide exemptions from the offence of mischief for the specific actions described therein. Subsection (6) would appear to apply to a situation involving a labour dispute.

## ANNOTATIONS

**Mischief to property [subsec. (1)]** – The gravamen of this offence is the commission of mischief and an information that sets out the alternative modes in para. (c) is not duplicious: *R. v. Hibbs* (1973), 10 C.C.C. (2d) 513, 22 C.R.N.S. 37 (Alta. S.C.).

This subsection defines one offence of mischief which has been classified for sentencing purposes by application of subsecs. (2), (3), or (4): *R. v. Lebrun* (1988), 65 C.R. (3d) 280 (Que. C.A.).

The offence under para. (a) of this subsection is a general intent offence for which intoxication as a result of voluntary consumption of alcohol or drugs is not a defence: *R. v. Schmidtke* (1985), 19 C.C.C. (3d) 390, 44 C.R. (3d) 392 (Ont. C.A.).

The offence in para. (a) requires proof that the property was rendered less suited for its intended purpose or that at least temporarily the usefulness or the value of the property was impaired. Putting a poster on a lamp-post did not impair the use or value of the property and could not amount to the offence: *R. v. Quickfall* (1993), 78 C.C.C. (3d) 563, [1993] R.J.Q. 468 (C.A.), leave to appeal to S.C.C. refused 83 C.C.C. (3d) vi.

A person who as part of a labour dispute forms part of a human barricade so as to block access to the premises, in violation of an injunction limiting the number of picketers, may be found guilty of the offence under para. (c) either as a principal or a party though he neither says nor does anything other than stand shoulder to shoulder with other persons: *R. v. Mammolita* (1983), 9 C.C.C. (3d) 85 (Ont. C.A.).

However, members of a trade union lawfully on strike may picket an employer's place of business with the purpose of bringing economic pressure to bear on that employer and subsec. (1)(c) should not be interpreted so as to make this lawful activity an offence. The offence requires proof of some physical act on the part of the accused which operates as,



or has the effect of causing, some sort of obstruction, interruption, or interference with the use or enjoyment or potential use or enjoyment of the property that goes beyond the mere communication of information through picketing. The fact that persons may be persuaded voluntarily not to do business with the owner or that the employer's attention is diverted from his business to deal with the actions of the accused is simply the inevitable consequence of the give and take of the economic pressures that are necessarily incidental to any labour dispute: *R. v. Dooling* (1994), 94 C.C.C. (3d) 525, 124 Nfld. & P.E.I.R. 149 (Nfld. S.C.).

The offence under subsec. (1)(c) is aimed at the act of or entitlement to possession of property. Conduct of the accused in playing music too loudly, thus interfering with his neighbour's ability to sleep, does not amount to interference with the possessory rights so as to amount to an offence under subsec. (1)(c): *R. v. Phoenix* (1991), 64 C.C.C. (3d) 252 (B.C. Prov. Ct.).

The term "any person" in para. (d) includes employees or invitees and is not limited to the owner or leaseholder: *R. v. Biggin* (1980), 55 C.C.C. (2d) 408, 30 O.R. (2d) 280 (C.A.).

Prior to the enactment of this subsection it had already been held that the gist of the offences created by paras. (c) and (d) of subsec. (1) is the interference with the enjoyment of the property rather than its physical alteration. Thus the unlawful encrypting of computer tapes so that the data stored on those tapes cannot be accessed by the owners could constitute an offence under subsec. (1): *R. v. Turner* (1984), 13 C.C.C. (3d) 430 (Ont. H.C.J.).

In *R. v. Drapeau* (1995), 96 C.C.C. (3d) 554, 37 C.R. (4th) 180, 66 Q.A.C. 280 (C.A.) a majority of the court held that the accused could not be convicted of the offence under subsec. (1)(d) based on his conduct in watching or staring at his neighbours and by making objectionable noises. Beauregard J.A. held that there was a doubt that the accused intended to interfere with the complainants' enjoyment of their land. Fish J.A. held that the term "enjoyment" must be restricted to the entitlement or exercise of a right in relation to property. It could not apply to conduct which merely diminishes the pleasure derived from a property by its owner. Chamberland J.A. dissenting would have upheld the accused's conviction on the basis that "enjoyment" should include the satisfaction which the property can provide to the owner.

**Actual danger to life [subsec. (2)]** – The actual danger to life must be the direct result of a deliberate act of mischief and not just merely incidental thereto: *R. v. Nairn* (1955), 112 C.C.C. 272, 36 M.P.R. 151 (Nfld. S.C.).

There is no requirement that the actual danger to life be caused by the damage as opposed to the act which caused the damage: *R. v. Humphrey* (1986), 21 O.A.C. 36 (C.A.).

**Punishment [subsecs. (3) and (4)]** – Other than a testamentary instrument it is the value of the property damaged not the amount of the damage which determines whether the charge lies under this subsection or subsec. (4). Accordingly the information should allege either the value of the property or make reference to subsec. (3) or (4): *R. v. Sargent and Hinds* (1986), 55 C.R. (3d) 78 (Ont. Prov. Ct.).

An information which merely fails to allege the value of the property still discloses an offence known to law and is capable of amendment to allege the value of the property: *R. v. Fediash* (1988), 44 C.C.C. (3d) 233, 70 Sask. R. 107 (Q.B.).

**Saving [subsec. (7)]** – This subsection does not provide a defence to a person who trespasses on private property in order to communicate his message: *R. v. Waters* (1990), 54 C.C.C. (3d) 40, 51 Sask. R. 126 (Q.B.).

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## ATTACK ON PREMISES, RESIDENCE OR TRANSPORT OF INTERNATIONALLY PROTECTED PERSON.

**431. Every one who commits an attack on the official premises, private accommodation or means of transport of an internationally protected person that is likely to endanger the life or liberty of such person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. 1974-75-76, c. 93, s. 34; R.S.C. 1985, c. 27 (1st Supp.), s. 58.**

#### CROSS-REFERENCES

The term "internationally protected person" is defined in s. 2. Section 7(10) provides for admissibility of a certificate from the Secretary of State for External Affairs stating any fact relevant to the question of whether any person is a person who is entitled, pursuant to international law, to special protection from any attack on his person, freedom or dignity.

While this offence may not be the basis for an application for an authorization to intercept private communications by reason of s. 183, an authorization can be obtained for the related offence under s. 424.

Section 7(3) enacts special jurisdictional rules for commission of this offence outside Canada when the offence is in relation to an internationally protected person or property referred to in this section. A threat to commit an offence under this section is an offence under s. 424.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515. A person convicted of the offence in this section may be liable to the mandatory prohibition order in s. 100(1) for possession of firearms, ammunition and explosives.

#### SYNOPSIS

This section describes the offence of attacking the official premises, private accommodation or means of transport of an internationally protected person. The attack must be likely to endanger the life or liberty of such a protected person. The offence is indictable and carries a maximum term of 14 years. This offence is relevant to s. 424.

**432. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 58.]**

## Arson and Other Fires

### ARSON / Disregard for human life.

**433. Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where**

- (a) the person knows that or is reckless with respect to whether the property is inhabited or occupied; or
- (b) the fire or explosion causes bodily harm to another person. R.S., c. C-34, s. 389; 1990, c. 15, s. 1.

#### CROSS-REFERENCES

The term "bodily harm" is not defined in this section. Some assistance may, however, be obtained from the definition of "bodily harm" in s. 267(2). The term "property" is defined in s. 428. The term "recklessly" is not defined, but reference might be made to *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223, 45 C.R. (3d) 193, [1985] 1 S.C.R. 570 where recklessness was defined as being found "in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance." The defence of legal justification or excuse and colour of right is set out in s. 429(2).

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and a warrant to conduct video surveillance under s. 487.01. Arson is an enterprise crime offence for the purposes of Part XII.2.

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of “arson”.

The accused may elect this mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences: s. 81, using explosives; s. 434, intentionally or recklessly causing damage by fire or explosion to property not wholly owned by accused; s. 434.1, intentionally or recklessly causing damage by fire or explosion to property wholly owned by accused; s. 435, causing damage by fire or explosion with intent to defraud; s. 436, causing fire or explosion through negligence; s. 436.1, possession of incendiary material.

## SYNOPSIS

The section creates the offence of *intentionally or recklessly causing damage to property* by fire or explosion. It must be shown either that: (1) the accused knew, or was reckless as to whether or not the property was inhabited or occupied; or (2) bodily harm to another person resulted from the fire or explosion. It is irrelevant whether or not the accused owns the property. This is an indictable offence carrying a maximum sentence of life imprisonment.

## ANNOTATIONS

The offence contrary to s. 434 is not included in the offence of arson as described in this section. The offence of mischief under s. 430 is, however, an included offence: *R. v. Pascal* (1994), 90 C.C.C. (3d) 575, 70 W.A.C. 279, 95 Man. R. (2d) 279 (C.A.).

## ARSON / Damage to property.

**434. Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 390; 1990 c. 15, s. 1.**

## CROSS-REFERENCES

The term “property” is defined in s. 428. The term “recklessly” is not defined but reference might be made to *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223, 45 C.R. (3d) 193, [1985] 1 S.C.R. 570 where recklessness was defined as being found “in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance.” The defence of legal justification or excuse and colour of right is set out in s. 429(2).

This offence may be the basis for a conviction for constructive murder under s. 230.

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of “arson”.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

Related offences: s. 81, using explosives; s. 433, intentionally or recklessly causing damage by fire or explosion to property where bodily harm is caused or where person knows property is occupied; s. 434.1, intentionally or recklessly causing damage by fire or explosion to property wholly owned by accused; s. 435, causing damage by fire or explosion with intent to defraud; s. 436, causing fire or explosion through negligence; s. 436.1, possession of incendiary material.

## SYNOPSIS

The section creates the offence of *willfully or recklessly causing damage by fire or explosion to property* that the accused does not wholly own. This is an indictable offence carrying a maximum sentence of 14 years.



**ARSON / Own property.**

**434.1. Every person who intentionally or recklessly causes damage by fire or explosion to property that is owned, in whole or in part, by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years, where the fire or explosion seriously threatens the health, safety or property of another person. 1990, c. 15, s. 1.**

**CROSS-REFERENCES**

The term "property" is defined in s. 428. The term "recklessly" is not defined but reference might be made to *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223, 45 C.R. (3d) 193, [1985] 1 S.C.R. 570 where recklessness was defined as being found "in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance." The defence of legal justification or excuse and colour of right is set out in s. 429(2).

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of "arson".

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

Related offences: s. 81, using explosives; s. 433, intentionally or recklessly causing damage by fire or explosion to property where bodily harm is caused or where person knows property is occupied; s. 434, intentionally or recklessly causing damage by fire or explosion to property not wholly owned by accused; s. 435, causing damage by fire or explosion with intent to defraud; s. 436, causing fire or explosion through negligence; s. 436.1, possession of incendiary material.

**SYNOPSIS**

The section creates the offence of willfully or recklessly causing damage by fire or explosion to property owned, in whole or in part, by the accused, where the fire or explosion *seriously threatens* the health, safety or property of *another person*. This is an indictable offence carrying a maximum sentence of 14 years.

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**ARSON FOR FRAUDULENT PURPOSE / Holder or beneficiary of fire insurance policy.**

**435. (1) Every person who, with intent to defraud any other person, causes damage by fire or explosion to property, whether or not that person owns, in whole or in part, the property, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.**

**(2) Where a person is charged with an offence under subsection (1), the fact that the person was the holder of or was named as a beneficiary under a policy of fire insurance relating to the property in respect of which the offence is alleged to have been committed is a fact from which intent to defraud may be inferred by the court. R.S., c. C-34, s. 391; 1990, c. 15, s. 1.**

**CROSS-REFERENCES**

The term "property" is defined in s. 428. Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of "arson". The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

Related offences: s. 81, using explosives; s. 433, intentionally or recklessly causing damage by fire or explosion to property where bodily harm is caused or where person knows property is occupied; s. 434, intentionally or recklessly causing damage by fire or explosion to property not wholly owned by accused; s. 434.1, intentionally or recklessly causing damage by fire or explosion to property wholly owned by accused; s. 436, causing fire or explosion through negligence; s. 436.1, possession of incendiary material.

## SYNOPSIS

The section creates the offence of causing damage to property by fire or explosion with the *intent to defraud* another person. It is irrelevant whether or not the accused owns the property, in whole or in part. By subsec. (2), a court may *infer intention* to defraud from the fact that the accused is the holder of, or named beneficiary under, a policy of fire insurance in respect of damaged property. This is an indictable offence carrying a maximum sentence of 10 years.

## ANNOTATIONS

**Application of inference** – It was held in relation to former s. 435 that the presumption did not apply where the accused were insured only in respect to loss of personal property within the burned premises: *R. v. Drouin and Drouin* (1972), 10 C.C.C. (2d) 381, 33 D.L.R. (3d) 615 (S.C.C.).

## ARSON BY NEGLIGENCE / Non-compliance with prevention laws.

**436. (1)** Every person who owns, in whole or in part, or controls property is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years where, as a result of a marked departure from the standard of care that a reasonably prudent person would use to prevent or control the spread of fires or to prevent explosions, that person is a cause of a fire or explosion in that property that causes bodily harm to another person or damage to property.

**(2)** Where a person is charged with an offence under subsection (1), the fact that the person has failed to comply with any law respecting the prevention or control of fires or explosions in the property is a fact from which a marked departure from the standard of care referred to in that subsection may be inferred by the court. R.S., c. C-34, s. 392; 1990, c. 15, s. 1.

## CROSS-REFERENCES

The term “bodily harm” is not defined in this section. Some assistance may, however, be obtained from the definition of “bodily harm” in s. 267(2). The term “property” is defined in s. 428. The defence of legal justification or excuse and colour of right is set out in s. 429(2). The standard of liability in this section resembles the test adopted for the criminal negligence offences in ss. 220 and 221. Thus, see notes under those sections and s. 219.

Section 17 limits the availability of the statutory defence of compulsion by threats to the offence of “arson”.

The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences; s. 81, using explosives; s. 434, intentionally or recklessly causing damage by fire or explosion to property not wholly owned by accused; s. 434.1, intentionally or recklessly causing damage by fire or explosion to property wholly owned by accused; s. 435, causing damage by fire or explosion with intent to defraud; s. 436.1, possession of incendiary material.

## SYNOPSIS

The section creates the offence of being a cause of any fire or explosion in a *property owned, in whole or in part, or controlled* by the accused where: (1) a marked departure from the standard of care that a reasonably prudent person would use, to prevent or control the spread of fires or to prevent explosions, is shown to be the cause of the fire or explosion; and (2) the fire or explosion resulted in bodily harm to another person, or damage to property. By subsec. (2), a court may *infer marked departure* from the subsec. (1) standard of care, from the fact that the accused has *failed to comply* with any law respecting the prevention or control of fires or explosions in the property. This is an indictable offence carrying a maximum sentence of five years.

**ANNOTATIONS**

This provision imposes a duty to prevent or control the spread of fires and thus an accused may be convicted under this section even if the fire may have originally been caused by an agency other than that of the accused. The section does, however, require proof of a causal connection between the accused's breach of duty, the resulting spread of the fire, and the injury or damage: *R. v. Harricharan* (1995), 98 C.C.C. (3d) 145, 23 O.R. (3d) 233, 82 O.A.C. 221 (C.A.).

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**POSSESSION OF INCENDIARY MATERIAL.**

**436.1 Every person who possesses any incendiary material, incendiary device or explosive substance for the purpose of committing an offence under any of sections 433 to 436 is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. 1990, c. 15, s. 1.**

**CROSS-REFERENCES**

Possession is defined in s. 4(3). For definition of "explosive substance", see s. 2. The accused may elect his mode of trial pursuant to s. 536(2). Release pending trial is determined by s. 515.

Related offences: s. 81, using explosives; s. 82, possession of explosive substance without lawful excuse; s. 434, intentionally or recklessly causing damage by fire or explosion to property not wholly owned by accused; s. 434.1, intentionally or recklessly causing damage by fire or explosion to property wholly owned by accused; s. 435, causing damage by fire or explosion with intent to defraud; s. 436, causing fire or explosion through negligence.

**SYNOPSIS**

The section creates the offence of *possessing* any incendiary material or device, or explosive substance for the purpose of committing a ss. 433 to 436 offence. This is an indictable offence carrying a maximum term of five years.

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## *Other Interference with Property*

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**FALSE ALARM OF FIRE.**

**437. Every one who wilfully, without reasonable cause, by outcry, ringing bells, using a fire alarm, telephone or telegraph, or in any other manner, makes or circulates or causes to be made or circulated an alarm of fire is guilty of**

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or**
- (b) an offence punishable on summary conviction. R.S., c. C-34, s. 393; 1972, c. 13, s. 31.**

**CROSS-REFERENCES**

The term "wilfully" is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

Where the prosecution elects to proceed by indictment on this offence then the accused may elect his mode of trial pursuant to s. 536(2). Where the prosecution elects to proceed by way of summary conviction then the trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

**SYNOPSIS**

This section describes the offence of raising a false alarm of fire. Every person who *wilfully* and *without reasonable cause* makes or circulates, or causes to be made or circu-



lated, an alarm of fire is guilty of an offence punishable on summary conviction or by indictment. A person convicted of the indictable offence is liable to a maximum term of two years' imprisonment.

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**INTERFERING WITH SAVING OF WRECKED VESSEL / Interfering with saving of wreck.**

**438. (1) Every one who wilfully prevents or impedes, or who wilfully endeavours to prevent or impede,**

**(a) the saving of a vessel that is wrecked, stranded, abandoned or in distress, or**

**(b) a person who attempts to save a vessel that is wrecked, stranded, abandoned or in distress,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**

**(2) Every one who wilfully prevents or impedes or wilfully endeavours to prevent or impede the saving of wreck is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 394.**

**CROSS-REFERENCES**

The term "wreck" is defined in s. 2. The term "wilfully" is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

For the offence under subsec. (1), the accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by the officer in charge under s. 498.

Trial of the offence under subsec. (2) is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498. Other offences in relation to wreck are in s. 415 and see cross-references under that section.

**SYNOPSIS**

This section describes the offence of interfering with the saving of a wrecked vessel. Any person who *wilfully* prevents or impedes, or who *wilfully* endeavours to prevent or impede the saving of a vessel that is wrecked, stranded, abandoned or in distress is guilty of an indictable offence and liable to a maximum term of five years. Subsection (2) makes it a summary conviction offence to *wilfully* prevent or impede the saving of wreck.

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**INTERFERING WITH MARINE SIGNAL, ETC. / Idem.**

**439. (1) Every one who makes fast a vessel or boat to a signal, buoy or other sea-mark that is used for purposes of navigation is guilty of an offence punishable on summary conviction.**

**(2) Every one who wilfully alters, removes or conceals a signal, buoy or other sea-mark that is used for purposes of navigation is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. R.S., c. C-34, s. 395.**

**CROSS-REFERENCES**

The term "wilfully" is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

Trial of the offence under subsec. (1) is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

For the offence under subsec. (2), the accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

### SYNOPSIS

This section describes the offence of interfering with a marine signal. The summary conviction offence is committed by fastening a boat or vessel to a sea-mark used for navigation. A person who *wilfully* alters, removes or conceals a sea-mark that is used for navigation is guilty of the indictable form of the offence and is liable upon conviction to a maximum term of 10 years imprisonment.

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### REMOVING NATURAL BAR WITHOUT PERMISSION.

**440.** Every one who wilfully and without the written permission of the Minister of Transport, the burden of proof of which lies on the accused, removes any stone, wood, earth or other material that forms a natural bar necessary to the existence of a public harbour, or that forms a natural protection to such a bar, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 396.

### CROSS-REFERENCES

The term "wilfully" is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515 although the accused is eligible for release by the officer in charge under s. 498.

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### OCCUPANT INJURING BUILDING.

**441.** Every one who, wilfully and to the prejudice of a mortgagee or owner, pulls down, demolishes or removes, all or any part of a dwelling-house or other building of which he is in possession or occupation, or severs from the freehold any fixture fixed therein or thereto, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 397.

### CROSS-REFERENCES

The term "wilfully" is defined in s. 429(1). The term "dwelling-house" is defined in s. 2. The defence of legal justification or excuse and colour of right is set out in s. 429(2). Where the accused has an interest in the thing destroyed see s. 429(3). The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515 although the accused is eligible for release by the officer in charge under s. 498.

### SYNOPSIS

In this section, an occupant of a dwelling-house or other building commits an indictable offence if he *wilfully* and *to the prejudice* of a mortgagee or owner demolishes or removes any part of the building or severs from the freehold any fixture. The maximum term of imprisonment upon conviction is five years.

### ANNOTATIONS

The offence under this section is complete when any of the specified acts, done with the requisite intent, negatively affect the security interest of the mortgagee. The interest of the mortgagee may still be inchoate before any steps have been taken by the mortgagee to realize on its security: *R. v. Lundgard* (1991), 63 C.C.C. (3d) 368, [1991] 4 W.W.R. 259, 79 Alta. L.R. (2d) 153 (C.A.).

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### INTERFERING WITH BOUNDARY LINES.

**442.** Every one who wilfully pulls down, defaces, alters or removes anything planted

or set up as the boundary line or part of the boundary line of land is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 398.

#### CROSS-REFERENCES

The term “wilfully” is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

The related offence of interfering with boundary marks is in s. 443.

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515 although the accused is eligible for release by a peace officer under ss. 496, 497, or by the officer in charge under s. 498.

#### SYNOPSIS

This section describes the summary conviction offence of interfering with a boundary line. A person who *wilfully* defaces, alters or removes anything that forms a part of a boundary line is guilty of an offence under this section.

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#### INTERFERING WITH INTERNATIONAL BOUNDARY MARKS, ETC. / Saving provision.

- 443. (1) Every one who wilfully pulls down, defaces, alters or removes**
- (a) a boundary mark lawfully placed to mark any international, provincial, county or municipal boundary, or**
  - (b) a boundary mark lawfully placed by a land surveyor to mark a limit, boundary or angle of a concession, range, lot or parcel of land,**
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.**
- (2) A land surveyor does not commit an offence under subsection (1) where, in his operations as a land surveyor,**
- (a) he takes up, when necessary, a boundary mark mentioned in paragraph (1)(b) and carefully replaces it as it was before he took it up; or**
  - (b) he takes up a boundary mark mentioned in paragraph (1)(b) in the course of surveying for a highway or other work that, when completed, will make it impossible or impracticable for that boundary mark to occupy its original position, and he establishes a permanent record of the original position sufficient to permit such position to be ascertained. R.S., c. C-34, s. 399.**

#### CROSS-REFERENCES

The term “wilfully” is defined in s. 429(1). The terms “county” and “province” are defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The defence of legal justification or excuse and colour of right is set out in s. 429(2). Section 476 enacts special rules of territorial jurisdiction where an offence is committed on the boundary between territorial divisions.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515 although the accused is eligible for release by the officer in charge under s. 498.

The related summary conviction offence of interfering with boundary lines is in s. 442.

#### SYNOPSIS

This section describes the offence of interfering with international and other boundary marks. Any person who *wilfully* defaces, alters or removes a boundary mark lawfully placed to mark an international, provincial, county or municipal boundary, or a boundary mark lawfully placed by a land surveyor, is guilty of an indictable offence and subject to a maximum term of five years’ imprisonment. Subsection (2) describes specific circumstances in which a land surveyor who takes up boundary marks is not criminally liable under this section.



## Cattle and Other Animals

### INJURING OR ENDANGERING CATTLE.

#### 444. Every one who wilfully

- (a) kills, maims, wounds, poisons or injures cattle, or
  - (b) places poison in such a position that it may easily be consumed by cattle,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 400.

#### CROSS-REFERENCES

The term "wilfully" is defined in s. 429(1). The term "cattle" is defined in s. 2. The defence of legal justification or excuse and colour of right is set out in s. 429(2).

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of injuring animals other than cattle is in s. 445. Other offences in relation to animals are set out in ss. 446 and 447.

#### ANNOTATIONS

"Heifer" is included in the word "cattle": *R. v. Allen* (1974), 17 C.C.C. (2d) 549, 8 N.B.R. (2d) 131 (S.C.App.Div.).

This section covers the killing of stray cattle not shown to have been owned by anyone: *R. v. Brown* (1984), 11 C.C.C. (3d) 191 (B.C.C.A.).

The expanded definition of "wilfully" in s. 429(1) applies to this offence and "wilfully" in this section is not simply limited to an "evil intent": *R. v. Dupont* (1976), 22 N.R. at p. 519 (Alta. S.C. App. Div.), affd [1978] 1 S.C.R. 1017, 11 A.R. 148.

### INJURING OR ENDANGERING OTHER ANIMALS.

#### 445. Every one who wilfully and without lawful excuse

- (a) kills, maims, wounds, poisons or injures dogs, birds or animals that are not cattle and are kept for a lawful purpose, or
  - (b) places poison in such a position that it may easily be consumed by dogs, birds or animals that are not cattle and are kept for a lawful purpose,
- is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 401.

#### CROSS-REFERENCES

The term "wilfully" is defined in s. 429(1). The term "cattle" is defined in s. 2. The defence of legal justification or excuse and colour of right is set out in s. 429(2).

Trial of these offences is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of injuring cattle is in s. 444. Other offences in relation to animals are set out in ss. 446 and 447.

#### SYNOPSIS

This section describes the offence of injuring or endangering animals other than cattle. Any person who *wilfully and without lawful excuse* kills, maims, wounds, injures or poisons dogs, birds or animals other than cattle that are kept for a lawful purpose or who places poison in a position that it might be easily consumed by those creatures, is guilty of a summary conviction offence.

## ANNOTATIONS

These provisions are designed to protect domesticated or domestic animals and do not apply to stray animals, the words “kept for a lawful purpose” contemplating a keeper of the animal and a measure of control exercised by that person: *R. v. Deschamps* (1978), 43 C.C.C. (2d) 45 (Ont. Prov. Ct.).

Once the dog that the defendant believed had been worrying his sheep had left the scene and was no longer a danger he had no justification for wounding it: *R. v. Etherington*, [1963] 2 C.C.C.230 (Ont. Mag. Ct.).

An accused would have a defence to a charge under this section involving the injury to a police service dog where the use of the dog in the circumstances constituted excessive use of force: *R. v. Barr* (1982), 1 C.C.C. (3d) 47 (Alta. Prov. Ct.).

## Cruelty to Animals

**CAUSING UNNECESSARY SUFFERING / Punishment / Failure to exercise reasonable care as evidence / Presence at baiting as evidence / Order of prohibition / Breach of order.**

### 446. (1) Every one commits an offence who

- (a) wilfully causes or, being the owner, wilfully permits to be caused unnecessary pain, suffering or injury to an animal or a bird;
- (b) by wilful neglect causes damage or injury to animals or birds while they are being driven or conveyed;
- (c) being the owner or the person having the custody or control of a domestic animal or a bird or an animal or a bird wild by nature that is in captivity, abandons it in distress or wilfully neglects or fails to provide suitable and adequate food, water, shelter and care for it;
- (d) in any manner encourages, aids or assists at the fighting or baiting of animals or birds;
- (e) wilfully, without reasonable excuse, administers a poisonous or an injurious drug or substance to a domestic animal or bird or an animal or a bird wild by nature that is kept in captivity or, being the owner of such an animal or a bird, wilfully permits a poisonous or an injurious drug or substance to be administered to it;
- (f) promotes, arranges, conducts, assists in, receives money for or takes part in any meeting, competition, exhibition, pastime, practice, display or event at or in the course of which captive birds are liberated by hand, trap, contrivance or any other means for the purpose of being shot when they are liberated; or
- (g) being the owner, occupier, or person in charge of any premises, permits the premises or any part thereof to be used for a purpose mentioned in paragraph (f).

(2) Every one who commits an offence under subsection (1) is guilty of an offence punishable on summary conviction.

(3) For the purposes of proceedings under paragraph (1)(a) or (b), evidence that a person failed to exercise reasonable care or supervision of an animal or a bird thereby causing it pain, suffering, damage or injury is, in the absence of any evidence to the contrary, proof that the pain, suffering, damage or injury was caused or was permitted to be caused wilfully or was caused by wilful neglect, as the case may be.

(4) For the purpose of proceedings under paragraph (1)(d), evidence that an accused was present at the fighting or baiting of animals or birds is, in the absence of any evidence to the contrary, proof that he encouraged, aided or assisted at the fighting or baiting.

(5) Where an accused is convicted of an offence under subsection (1), the court may, in addition to any other sentence that may be imposed for the offence, make an order prohibiting the accused from owning or having the custody or control of an animal or a bird during any period not exceeding two years.

(6) Every one who owns or has the custody or control of an animal or a bird while he is prohibited from doing so by reason of an order made under subsection (5) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 402; 1974-75-76, c. 93, s. 35.

#### CROSS-REFERENCES

The term "wilfully" is defined in s. 429(1). The defence of legal justification or excuse and colour of right is set out in s. 429(2).

Trial of these offences is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

The related offence of keeping a cockpit is in s. 447. Other offences in relation to animals are set out in ss. 444 and 445.

#### SYNOPSIS

This section describes the summary conviction offence of cruelty to animals or birds. Subsection (1) describes the kinds of activities which will attract criminal liability under this section. Subsection (3) contains an evidentiary provision which is applicable in proceedings under subsec. (1)(a) or (b). Evidence that a person failed to exercise reasonable care or supervision of an animal or bird, the result of which is pain, suffering or injury to that animal or bird, is, in the absence of evidence to the contrary, proof that such suffering or pain was caused *wilfully* or by *wilful neglect*. Evidence that an accused person was present at the fighting or baiting of animals or birds is, in the absence of evidence to the contrary, proof of the offence described in subsec. (1)(d). In addition to any other sentence imposed upon conviction under subsec. (1), under subsec. (5) the judge may prohibit the accused from owning an animal or bird for a maximum period of two years. Subsection (6) makes it a summary conviction offence for any person to own an animal or bird in contravention of a judge's order under subsec. (5).

#### ANNOTATIONS

**Subsec. (1)(a)** – "Unnecessary" in this context means that man in the pursuit of his legitimate purposes is obliged not to inflict pain, suffering or injury which is not inevitable taking into account the purpose sought and the circumstances of the particular case. Thus while euthanasia of stray animals is itself justified, where the method used by the accused causes pain and suffering which was not inevitable in view of alternative economically feasible methods available, the accused should be convicted: *R. v. Menard* (1978), 43 C.C.C. (2d) 458, 4 C.R. (3d) 333 (Que. C.A.).

**Subsec. (1)(d)** – In *Pitts v. Miller* (1874), L.R.9 Q.B.380 (Q.B.) Cockburn, C.J., considered baiting in terms of an animal either tied to a stake or unable to escape, and Quain, J., relied upon dictionary definitions of attacking with violence or harassing with the help of others.

**Subsec. (1)(f)** – The mischief sought to be prevented in this paragraph is cruelty to birds by their sudden release for the purpose of being shot at: *Prefontaine v. The Queen* (1973), 26 C.R.N.S. 367 (Que. C.A.).



**KEEPING COCKPIT / Confiscation.**

447. (1) Every one who builds, makes, maintains or keeps a cockpit on premises that he owns or occupies, or allows a cockpit to be built, made, maintained or kept on such premises is guilty of an offence punishable on summary conviction.

(2) A peace officer who finds cocks in a cockpit or on premises where a cockpit is located shall seize them and take them before a justice who shall order them to be destroyed. R.S., c. C-34, s. 403.

**CROSS-REFERENCES**

The term “peace officer” is defined in s. 2. This offence applies to a person who may be described as the keeper of the cockpit. The offence, if any, committed by another person is described in s. 446(1)(d) and not the presumption of encouragement, aiding or assisting in s. 446(4).

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

**SYNOPSIS**

This section makes it a summary conviction offence for a person to build or maintain, or to allow to be built or maintained, a cockpit on premises which that person owns or occupies. Subsection (2) empowers a peace officer who finds cocks in a cockpit, or on premises where there is a cockpit, to seize the birds and take them before a justice, who must order them destroyed.

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**Part XII / OFFENCES RELATING TO CURRENCY*****Interpretation***

**DEFINITIONS / “counterfeit money” / “counterfeit token of value” / “current” / “utter”.**

448. In this Part,

“counterfeit money” includes

- (a) a false coin or false paper money that resembles or is apparently intended to resemble or pass for a current coin or current paper money,
- (b) a forged bank-note or forged blank bank-note, whether complete or incomplete,
- (c) a genuine coin or genuine paper money that is prepared or altered to resemble or pass for a current coin or current paper money of a higher denomination,
- (d) a current coin from which the milling is removed by filing or cutting the edges and on which new milling is made to restore its appearance,
- (e) a coin cased with gold, silver, or nickel, as the case may be, that is intended to resemble or pass for a current gold, silver or nickel coin, and
- (f) a coin or a piece of metal or mixed metals that is washed or coloured by any means with a wash or material capable of producing the appearance of gold, silver or nickel and that is intended to resemble or pass for a current gold, silver or nickel coin;

“counterfeit token of value” means a counterfeit excise stamp, postage stamp or other evidence of value, by whatever technical, trivial or deceptive designation it may be described, and includes genuine coin or paper money that has no value as money;

**“current” means lawfully current in Canada or elsewhere by virtue of a law, proclamation or regulation in force in Canada or elsewhere as the case may be;**

**“utter” includes sell, pay, tender and put off. R.S., c. C-34, s. 406.**

#### CROSS-REFERENCES

In addition to the definitions in this section, see s. 2 and notes to that section. The term “bank-note” is defined in s. 2. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine, as the case may be, and is or is not, as the case may be, current in Canada or elsewhere. Section 462 provides that counterfeit money, counterfeit tokens of value and anything used or intended to be used to make counterfeit money or tokens of value belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items.

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## ***Making***

### **MAKING.**

**449. Every one who makes or begins to make counterfeit money is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 407.**

#### CROSS-REFERENCES

The term “counterfeit money” is defined in s. 448. Section 461(1) enacts a conclusive presumption as to when the offence is complete. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine and is or is not, as the case may be, current in Canada or elsewhere.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and is an enterprise crime offence for the purposes of Part XII.2.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515. Section 462 provides that counterfeit money and anything used or intended to be used to make counterfeit money belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items.

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## ***Possession***

### **POSSESSION, ETC., OF COUNTERFEIT MONEY.**

**450. Every one who, without lawful justification or excuse, the proof of which lies on him,**

- (a) buys, receives or offers to buy or receive,**
- (b) has in his custody or possession, or**
- (c) introduces into Canada,**

**counterfeit money is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 408.**

#### CROSS-REFERENCES

Possession is defined in s. 4(3). The term “counterfeit money” is defined in s. 448. Section 461(1) enacts a conclusive presumption as to when the offence is complete. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine and is or is not, as the case may be, current in Canada or elsewhere.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and is an enterprise crime offence for the purposes of Part XII.2.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515. Section 462 provides that counterfeit money and anything used or intended to be used to make counterfeit money belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items.

### SYNOPSIS

This section describes the indictable offence of buying, receiving, offering to buy or receive, possessing or bringing into Canada counterfeit money. A person who is charged under this section and who has dealt with counterfeit money in a fashion described above, bears the onus of proving that he had *lawful justification or excuse* for his actions. The maximum term of imprisonment upon conviction is 14 years.

### ANNOTATIONS

In *Robinson v. The Queen* (1973), 10 C.C.C. (2d) 505, 34 D.L.R. (3d) 1 (S.C.C.) it was held *per* Ritchie, J. (Abbott, Judson, Spence and Laskin, JJ., concurring), that it was no defence that the accused was in possession of counterfeit U.S. 1941/42 dimes (the genuine coins, because of some imperfections upon minting, having a numismatic value of between \$100 and \$800 each) for the purpose of sale as a numismatic curiosity and not for circulation as legal tender. The coins' primary characteristic was that they were intended to resemble a current coin within the definition of s.448 of the Code. On the question of lawful justification or excuse upon the accused Laskin, J., agreed with Ritchie, J., on the merits that there was no evidence to support such a finding, but held that if evidence of a want of intention by the accused to use the counterfeit coins as currency had been led then the accused could be said to have discharged the shifting burden cast upon him by the section.

The offence under para. (b) does not require proof of an intention to use the money as currency: *R. v. Duane* (1984), 12 C.C.C. (3d) 368, 57 A.R. 227 (C.A.), affirmed 22 C.C.C. (3d) 448n (S.C.C.) (7:0).

It is not necessary as a foundation to the opinion of the Crown's expert witness as to the bank-note being counterfeit that he first prove the authenticity of the bank-note copied: *R. v. Gagnon* (1975), 31 C.R.N.S. 332 (Ont. Co. Ct.).

Proof that the accused knew of the counterfeit nature of the bills is an essential element of the "possession" required for the offence and the burden of proof is on the Crown to prove such knowledge beyond a reasonable doubt; lack of such knowledge is not a matter of "lawful excuse" which the accused has to prove. It is only after the Crown has proved possession, including knowledge of the counterfeit nature of the money, that the issue of lawful justification or excuse, arises: *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35, 36 C.R.N.S. 1 (Ont. C.A.). Folld: *R. v. Freng* (1993), 86 C.C.C. (3d) 91 (B.C.C.A.).

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### HAVING CLIPPINGS, ETC.

**451. Every one who, without lawful justification or excuse, the proof of which lies on him, has in his custody or possession**

**(a) gold or silver filings or clippings,**

**(b) gold or silver bullion, or**

**(c) gold or silver in dust, solution or otherwise,**

**produced or obtained by impairing, diminishing or lightening a current gold or silver coin, knowing that it has been so produced or obtained, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 409.**



**CROSS-REFERENCES**

Possession is defined in s. 4(3). The term “current” is defined in s. 448. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any coin is or is not, as the case may be, current in Canada or elsewhere.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by the officer in charge under s. 498.

The related offence of clipping or uttering clipped coin is in s. 455.

**SYNOPSIS**

This section describes the offence of possessing gold or silver filings, clippings, bullion or dust in any form, which has been produced by diminishing a *current* gold or silver coin. The prosecution must prove that the accused *knew* that the gold or silver was produced or obtained in the fashion described above. As in s. 450, the accused must prove *lawful justification or excuse* for the knowing possession of the items set out in this section. This is an indictable offence with a maximum term of five years' imprisonment.

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**Uttering**

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**UTTERING, ETC., COUNTERFEIT MONEY**

**452. Every one who, without lawful justification or excuse, the proof of which lies on him,**

**(a) utters or offers to utter counterfeit money or uses counterfeit money as if it were genuine, or**

**(b) exports, sends or takes counterfeit money out of Canada,**  
**is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 410.**

**CROSS-REFERENCES**

The terms “counterfeit money” and “utter” are defined in s. 448. Section 461(1) enacts a conclusive presumption as to when the offence is complete. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine and is or is not, as the case may be, current in Canada or elsewhere.

This offence may be the basis for an application for an authorization to intercept private communications by reason of s. 183 and is an enterprise crime offence for the purposes of Part XII.2.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515. Section 462 provides that counterfeit money and anything used or intended to be used to make counterfeit money belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items.

The related offence of uttering coin that is not current is in s. 453.

**SYNOPSIS**

This section describes the offences of uttering or offering to utter counterfeit money, or using it as though it were genuine, and of exporting counterfeit money out of Canada. This is an indictable offence with a maximum term of 14 years' imprisonment.

**ANNOTATIONS**

Uttering counterfeit money includes the sale of counterfeit money as counterfeit to be put into circulation as currency notwithstanding the immediate purchaser is not deceived as to the genuineness of the money: *R. v. Kelly and Lauzon* (1979), 48 C.C.C. (2d) 560 (Ont. C.A.).

## UTTERING COIN.

**453. Every one who, with intent to defraud, knowingly utters**

**(a) a coin that is not current, or**

**(b) a piece of metal or mixed metals that resembles in size, figure or colour a current coin for which it is uttered,**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years. R.S., c. C-34, s. 411.**

## CROSS-REFERENCES

Possession is defined in s. 4(3). The terms “current” and “utter” are defined in s. 448. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any coin is or is not, as the case may be, current in Canada or elsewhere. By virtue of s. 583, an indictment which otherwise complies with s. 581 is not insufficient by reason only that: para. (c), it charges an intent to defraud without naming or describing the person whom it was intended to defraud.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by the officer in charge under s. 498.

## SYNOPSIS

This section describes the offence of *knowingly* uttering a coin that is not current, or a piece of metal that resembles a current coin in size, figure or colour. A person charged under this section must have an *intent to defraud* to be convicted. The offence is indictable and carries a maximum term of two years’ imprisonment.

## SLUGS AND TOKENS.

**454. Every one who without lawful excuse, the proof of which lies on him,**

**(a) manufactures, produces or sells, or**

**(b) has in his possession**

**anything that is intended to be fraudulently used in substitution for a coin or token of value that any coin or token-operated device is designed to receive is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 412; 1972, c. 13, s. 32.**

## CROSS-REFERENCES

Possession is defined in s. 4(3). While there is no definition of “fraudulently” which is universally applicable, generally speaking, it refers to conduct which is dishonest and morally wrong: *R. v. DeMarco* (1973), 13 C.C.C. (2d) 369 (Ont. C.A.). This offence supplements the offence of fraudulently obtaining transportation in s. 393(3). Note also the offence of possession of instruments for breaking into coin-operated devices in s. 352. Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

## SYNOPSIS

This section describes the summary conviction offence of manufacturing, producing, selling or possessing slugs or tokens. A person charged under this section must have the *intent* that these items be fraudulently used in substitution for a coin or a valuable token in a coin or token-operated device. Like ss. 450 and 451, the accused bears the onus of proving that the possession of these slugs and tokens for the purposes described in the section was with *lawful excuse*.

## ANNOTATIONS

For the offence of possession the accused must be aware of the article’s potential fraudulent use: *R. v. Kolot* (1975), 27 C.C.C. (2d) 79 (B.C. Co.Ct.).

Subway fare boxes monitored by operators who may scrutinize tickets and refuse entry do not constitute "token-operated devices". Furthermore, a subway ticket is not a token of value that a "token-operated device is designed to receive": *R. v. Aeso* (unreported, February 14, 1996, Ont. Ct. (Prov. Div.)) [096/057/054-7 pp.].

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## ***Defacing or Impairing***

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### **CLIPPING AND UTTERING CLIPPED COIN.**

#### **455. Every one who**

- (a) impairs, diminishes or lightens a current gold or silver coin with intent that it should pass for a current gold or silver coin, or**
- (b) utters a coin knowing that it has been impaired, diminished or lightened contrary to paragraph (a),**

**is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 413.**

#### **CROSS-REFERENCES**

The terms "current" and "utter" are defined in s. 448. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any coin is or is not, as the case may be, current in Canada or elsewhere.

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

The related offence of possession of clippings or filings is in s. 451.

#### **SYNOPSIS**

This section describes the offences of diminishing, impairing or lightening a current gold or silver coin *with intent* that it should pass for a current gold or silver coin, and of uttering a coin, knowing that it has been so diminished, impaired or lightened. These are indictable offences with a maximum of 14 years' imprisonment.

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### **DEFACING CURRENT COINS.**

#### **456. Every one who**

- (a) defaces a current coin, or**
- (b) utters a current coin that has been defaced,**

**is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 414.**

#### **CROSS-REFERENCES**

The terms "current" and "utter" are defined in s. 448. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any coin is or is not, as the case may be, current in Canada or elsewhere.

Trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

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### **PRINTING CIRCULARS, ETC., IN LIKENESS OF NOTES / Printing anything in likeness of bank-note, etc. / When no conviction under subsection (2).**

**457. (1) Every one who designs, engraves, prints or in any manner makes, executes, issues, distributes, circulates or uses any business or professional card, notice, placard, circular, handbill or advertisement in the likeness or appearance of**

- (a) a current bank-note or current paper money, or**



(b) any obligation or security of a government or a bank,  
is guilty of an offence punishable on summary conviction.

(2) Every one who publishes or prints anything in the likeness or appearance of

(a) all or part of a current bank-note or current paper money, or

(b) all or part of any obligation or security of a government or a bank,  
is guilty of an offence punishable on summary conviction.

(3) No person shall be convicted of an offence under subsection (2) where it is established that, in publishing or printing anything to which that subsection applies,

(a) no photography was used at any stage for the purpose of publishing or printing it, except in connection with processes necessarily involved in transferring a finished drawing or sketch to a printed surface;

(b) except for the word “Canada”, nothing having the appearance of a word, letter or numeral was a complete word, letter or numeral;

(c) no representation of a human face or figure was more than a general indication of features, without detail;

(d) no more than one colour was used; and

(e) nothing in the likeness or appearance of the back of a current bank-note or current paper money was published or printed in any form. R.S., c. C-34, s. 415.

#### CROSS-REFERENCES

The term “current” is defined in s. 448. “Bank-note” is defined in s. 2. “Bank” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money or bank-note is or is not, as the case may be, current in Canada or elsewhere.

Trial of these offences is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section describes the offence of making, issuing, publishing, printing, or circulating anything that has a *likeness* to or the *appearance* of a current banknote, current paper money, or any obligation or security of a government or a bank. The offence is punishable by summary conviction. The section stipulates that no person shall be convicted of *printing* or *publishing* a likeness where all of the provisions set out in subsec. 3(a) to (e) are met.

#### ANNOTATIONS

The act of importing and distributing goods, with the likeness or appearance of current bank-notes, to wholesalers and retailers comes within the prohibition against publishing in subsec. (2): *R. v. Gifcraft Ltd.* (1984), 13 C.C.C. (3d) 192 (Ont. H.C.J.).

### *Instruments or Materials*

#### MAKING, HAVING OR DEALING IN INSTRUMENTS FOR COUNTERFEITING.

458. Every one who, without lawful justification or excuse, the proof of which lies on him,

(a) makes or repairs,

(b) begins or proceeds to make or repair,

(c) buys or sells, or

(d) has in his custody or possession, any machine, engine, tool, instrument, material or thing that he knows has been used or that he knows is adapted and intended for use in making counterfeit money or counterfeit tokens of value is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 416.

#### CROSS-REFERENCES

The terms “counterfeit money” and “counterfeit tokens of value” are defined in s. 448. Possession is defined in s. 4(3). Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine, as the case may be, and is or is not, as the case may be, current in Canada or elsewhere. Section 461(1) enacts a conclusive presumption as to when the offence is complete. Section 462 provides that counterfeit money, counterfeit tokens of value and anything used or intended to be used to make counterfeit money or tokens of value belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items. The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

#### SYNOPSIS

This section describes the offence of possessing, making or repairing, beginning to make or repair, or buying or selling any instrument, material or thing that has been used or is intended to be used to make counterfeit money or valuable tokens. The prosecution must establish that the accused *knows* the use to which these items have been or are intended to be put. The section requires the accused to establish lawful justification or excuse for the acts described in paras. (a) to (d) and may thus be challenged under s. 11(d) of the Charter. The offence is indictable and carries a maximum term of 14 years' imprisonment.

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#### CONVEYING INSTRUMENTS FOR COINING OUT OF MINT.

**459.** Every one who, without lawful justification or excuse, the proof of which lies on him, knowingly conveys out of any of Her Majesty's mints in Canada,

(a) any machine, engine, tool, instrument, material or thing used or employed in connection with the manufacture of coins,

(b) a useful part of anything mentioned in paragraph (a), or

(c) coin, bullion, metal or a mixture of metals,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years. R.S., c. C-34, s. 417.

#### CROSS-REFERENCES

The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515.

#### SYNOPSIS

This section describes the offence of conveying certain items out of any of Her Majesty's mints in Canada. The accused person must establish lawful justification or excuse for any of the actions described in the section – a provision which could be challenged under the Charter. Any person who *knowingly* conveys out of the mint any machine, engine, tool, instrument, material or thing used in connection with the manufacture of coins, a useful part of any of these items, or coin, bullion, metal, or a mixture of metals, commits this indictable offence and is liable to a maximum term of 14 years' imprisonment.

## ***Advertising and Trafficking in Counterfeit Money or Counterfeit Tokens of Value***

**ADVERTISING AND DEALING IN COUNTERFEIT MONEY, ETC. / Fraudulent use of money genuine but valueless.**

### **460. (1) Every one who**

- (a) by an advertisement or any other writing, offers to sell, procure or dispose of counterfeit money or counterfeit tokens of value or to give information with respect to the manner in which or the means by which counterfeit money or counterfeit tokens of value may be sold, procured or disposed of, or
  - (b) purchases, obtains, negotiates or otherwise deals with counterfeit tokens of value, or offers to negotiate with a view to purchasing or obtaining them,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) No person shall be convicted of an offence under subsection (1) in respect of genuine coin or genuine paper money that has no value as money unless, at the time when the offence is alleged to have been committed, he knew that the coin or paper money had no value as money and he had a fraudulent intent in his dealings with or with respect to the coin or paper money. R.S., c. C-34, s. 418.

### **CROSS-REFERENCES**

The terms “counterfeit money” and “counterfeit tokens of value” are defined in s. 448. The term “writing” is defined in s. 2. Section 461(2) provides for admission of a certificate of an examiner of counterfeit money as proof that any money, coin or bank-note is counterfeit or genuine, as the case may be, and is or is not, as the case may be, current in Canada or elsewhere. Section 461(1) enacts a conclusive presumption as to when the offence is complete. Section 462 provides that counterfeit money, counterfeit tokens of value and anything used or intended to be used to make counterfeit money or tokens of value belong to Her Majesty. Section 462(2) gives a peace officer power to seize and detain these items. The accused may elect his mode of trial under s. 536(2). Release pending trial is determined under s. 515, although the accused is eligible for release by the officer in charge under s. 498.

### **SYNOPSIS**

This section describes the offence of dealing in counterfeit money or counterfeit tokens.

Subsection (1)(a) provides that any person who, by advertisement or other writing offers to sell, obtain or dispose of counterfeit items, or to give information on how to sell, obtain or dispose of such things is guilty of an offence.

Subsection (1)(b) similarly makes it an offence to purchase, obtain, negotiate or offer to negotiate the purchase of such counterfeit items.

Subsection (2) provides that a person who deals in genuine coin or paper money that has no value is not guilty of an offence under subsec. (1), unless he *knew* that the items had no value and he had a *fraudulent* intent in his dealings. The offence is indictable and carries a maximum term of five years imprisonment.

## ***Special Provisions as to Proof***

**WHEN COUNTERFEIT COMPLETE / Certificate of examiner of counterfeit / Cross-examination and notice.**

**461. (1) Every offence relating to counterfeit money or counterfeit tokens of value shall be deemed to be complete notwithstanding that the money or tokens of value in**



respect of which the proceedings are taken are not finished or perfected or do not copy exactly the money or tokens of value that they are apparently intended to resemble or for which they are apparently intended to pass.

(2) In any proceedings under this Part, a certificate signed by a person designated as an examiner of counterfeit by the Solicitor General of Canada, stating that any coin, paper money or bank-note described therein is counterfeit money or that any coin, paper money or bank-note described therein is genuine and is or is not, as the case may be, current in Canada or elsewhere, is evidence of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

(3) Subsections 258(6) and (7) apply, with such modifications as the circumstances require, in respect of a certificate described in subsection (2). R.S., c. C-34, s. 419; 1992, c. 1, s. 58.

#### CROSS-REFERENCES

The terms "counterfeit money", "counterfeit tokens of value" and "current" are defined in s. 448. The term "bank-note" is defined in s. 2.

With respect to subsec. (2), note that s. 25(1) of the Interpretation Act, R.S.C. 1985, c. I-21, provides that "where an enactment provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence, then, in any judicial proceedings, the document is admissible in evidence and the fact is deemed to be established in the absence of any evidence to the contrary".

With respect to subsec. (3), subsections 258(6) and (7) require that the party intending to introduce the certificate give reasonable notice of his intention and a copy of the certificate and give the judge power to order that the examiner be produced for the purposes of cross-examination.

#### SYNOPSIS

This section sets out certain special provisions in relation to proving offences relating to counterfeiting.

Subsection (1) provides that counterfeiting offences are complete, even if the counterfeit money or tokens are not finished, perfected or are not exact copies of the genuine articles.

Subsection (2) provides that any certificate signed by a person designated by the Solicitor General of Canada as an examiner of counterfeit is evidence of the statements relating to the genuineness or currency of the money without proof of the signature or official character of the person appearing to have signed the certificate.

#### ANNOTATIONS

On a charge contrary to s. 450 (b) the Crown may establish a *prima facie* case by having a police officer testify that he has been employed as an examiner of counterfeit bills and that having compared the bills with genuine bills he was of the opinion that they were counterfeit and that if they had been genuine, they would be lawfully current. It is not necessary that the Crown produce a certificate signed by a person designated as an examiner of counterfeit by the Solicitor General of Canada nor that it lead some documentary evidence or call some official from the Bank of Canada who was in a position to make reference to the proper law or proper proclamation or regulation pursuant to this section: *R. v. MacIntosh* (1971), 5 C.C.C. (2d) 239, 16 C.R.N.S. 119 (Ont.C.A.).

Similarly a member of the R.C.M.P. designated as an examiner of counterfeit by the Solicitor-General of Canada may give a *viva voce* opinion based on his training and experience that certain bills are not genuine and were intended to resemble paper money which was current legal tender in the United States: *R. v. Serratore* (1980), 53 C.C.C. (2d) 106 (Ont. C.A.).

## Forfeiture

### OWNERSHIP / Seizure.

462. (1) Counterfeit money, counterfeit tokens of value and anything that is used or is intended to be used to make counterfeit money or counterfeit tokens of value belong to Her Majesty.

(2) A peace officer may seize and detain

- (a) counterfeit money,
- (b) counterfeit tokens of value, and
- (c) machines, engines, tools, instruments, materials or things that have been used or that have been adapted and are intended for use in making counterfeit money or counterfeit tokens of value,

and anything seized shall be sent to the Minister of Finance to be disposed of or dealt with as he may direct, but anything that is required as evidence in any proceedings shall not be sent to the Minister until it is no longer required in those proceedings. R.S., c. C-34, s. 420.

### CROSS-REFERENCES

The terms “counterfeit money” and “counterfeit tokens of value” are defined in s. 448. “Her Majesty” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. The normal search warrant provisions are found in ss. 487 and 487.1.

### SYNOPSIS

This section describes a procedure for seizing counterfeit money, tokens of value and instruments designed or adapted for use in counterfeiting.

Subsection (2) states that a peace officer may seize and detain any of these items and shall send them to the Minister of Finance for disposal unless they are needed as evidence in any proceedings.

Subsection (1) makes it clear that any of the items described in this section belong to Her Majesty.

This section creates a power to seize, without warrant, which might attract scrutiny under s. 8 of the Charter.

## Part XII.1 / INSTRUMENTS AND LITERATURE FOR ILLICIT DRUG USE

### Interpretation

“CONSUME” / “Illicit drug” / “Illicit drug use” / Instrument for illicit drug use” / “Literature for illicit drug use” / “Sell”.

462.1. In this Part,

“consume” includes inhale, inject into the human body, masticate and smoke;

“illicit drug” means a narcotic, drug or other substance whose import, export, cultivation, sale or possession is prohibited pursuant to the *Narcotic Control Act*, controlled pursuant to Part III of the *Food and Drugs Act* or restricted pursuant to Part IV of the *Food and Drugs Act*;

**NOTE:** Definition “illicit drug” replaced 1996, Bill C-8, s. 67 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

*“illicit drug” means a controlled substance or precursor the import, export, production, sale or possession of which is prohibited or restricted pursuant to the Controlled Drugs and Substances Act;*

**“illicit drug use” means the importation, exportation, cultivation, sale or possession of a narcotic, drug or other substance contrary to the *Narcotic Control Act* or Part III or IV of the *Food and Drugs Act* or a regulation made thereunder;**

**NOTE:** Definition “illicit drug use” replaced 1996, Bill C-8, s. 67 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

*“illicit drug use” means the importation, exportation, production, sale or possession of a controlled substance or precursor contrary to the Controlled Drugs and Substances Act or a regulation made under that Act;*

**“instrument for illicit drug use” means anything designed primarily or intended under the circumstances for consuming or to facilitate the consumption of an illicit drug, but does not include a “device” as that term is defined in section 2 of the *Food and Drugs Act*;**

**“literature for illicit drug use” means any printed matter or video describing or depicting, and designed primarily or intended under the circumstances to promote, encourage or advocate the production, preparation or consumption of illicit drugs;**

**“sell” includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration. R.S.C. 1985, c. 50 (4th Supp.), s. 1.**

#### CROSS-REFERENCES

In addition to the definitions of this section, see s. 2 and notes to that section.

#### ANNOTATIONS

The prohibition in this Part in relation to “literature for illicit drug use” violates s. 2(b) of the Charter and is of no force and effect. Accordingly, the definition of “literature for illicit drug use” must be severed from the section: *Iorfida v. MacIntyre* (1994), 93 C.C.C. (3d) 395, 21 O.R. (3d) 186, 24 C.R.R. (2d) 293 (Gen. Div.).

## Offence

### OFFENCE.

**462.2. Every one who knowingly imports into Canada, exports from Canada, manufactures, promotes or sells instruments or literature for illicit drug use is guilty of an offence and is liable on summary conviction**

- (a) for a first offence, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding six months or to both; or
  - (b) for a second or subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding one year or to both.
- R.S.C. 1985, c. 50 (4th Supp.), s. 1.**

#### CROSS-REFERENCES

The terms “illicit drug use”, “sell”, “literature for illicit drug use”, and “instrument for illicit drug use” are defined in s. 462.1.

The trial of this offence is conducted by a summary conviction court pursuant to Part XXVII. The limitation period is set out in s. 786(2). Release pending trial is determined by s. 515, although



the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

Where the prosecution seeks the higher penalty prescribed by para. (b), it must comply with the provisions of s. 665. Section 667 provides one method of proof of the prior conviction. No reference to the prior conviction may be made in the information by virtue of s. 664.

## SYNOPSIS

This section describes the offence of *knowingly* importing into Canada, exporting from Canada, manufacturing, promoting, or selling instruments or literature for *illicit* drug use. The offence is a summary one, punishable on a first conviction by a maximum fine of \$100,000 and/or a term of imprisonment not exceeding six months. For every offence following a first conviction, the punishment increases to a maximum fine of \$300,000 and/or a term of imprisonment not exceeding one year.

## ANNOTATIONS

The prohibition in this section in relation to literature for illicit drug use violates s. 2(b) of the Charter and is of no force and effect. Accordingly, the words “or literature” must be severed from the section: *Iorfida v. MacIntyre* (1994), 93 C.C.C. (3d) 395, 21 O.R. (3d) 186, 24 C.R.R. (2d) 293 (Gen. Div.).

## Part XII.2 / PROCEEDS OF CRIME

### Interpretation

**DEFINITIONS / “designated drug offence” / “enterprise crime offence” / “judge” / “proceeds of crime”.**

**462.3. In this Part,  
“designated drug offence” means**

- (a) an offence against section 39, 44.2, 44.3, 48, 50.2 or 50.3 of the *Food and Drugs Act*,
- (b) an offence against section 4, 5, 6, 19.1 or 19.2 of the *Narcotic Control Act*, or
- (c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or (b);

**NOTE:** Definition “designated drug offence” repealed 1996, Bill C-8, s. 68(1) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 but has not yet received Royal Assent).

**NOTE:** Definition “designated substance offence” enacted 1996, Bill C-8, s. 68(2) (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefore printed in *lightface italics* and reads as follows:

*designated substance offence” means*

- (a) an offence under Part I of the *Controlled Drugs and Substances Act*, except subsection 4(1) of that Act, or
- (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a)

**“enterprise crime offence” means**

- (a) an offence against any of the following provisions, namely,
  - (i) section 119 (bribery of judicial officers, etc.),

**NOTE:** Paragraph (a)(i) of the definition “enterprise crime offence” replaced 1995, c. 39, s. 151(1) by subparas. (i) to (i.5) (to come into force by order of the Governor in

Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (i) subsection 99(1) (weapons trafficking),
  - (i.1) subsection 100(1) (possession for purpose of weapons trafficking),
  - (i.2) subsection 102(1) (making automatic firearm),
  - (i.3) subsection 103(1) (importing or exporting knowing it is unauthorized),
  - (i.4) subsection 104(1) (unauthorized importing or exporting),
  - (i.5) section 119 (bribery of judicial officers, etc.).
- (ii) section 120 (bribery of officers),
- (iii) section 121 (frauds upon the government),
- (iv) section 122 (breach of trust by public officer),
- (v) section 163 (corrupting morals),
- (v.1) section 163.1 (child pornography),
- (vi) subsection 201(1) (keeping gaming or betting house),
- (vii) section 202 (betting, pool-selling, book-making, etc.),
- (viii) section 210 (keeping common bawdy-house),
- (viii.1) section 347 (criminal interest rate),
- (ix) section 212 (procuring),
- (x) section 235 (punishment for murder),
- (xi) section 334 (punishment for theft),
- (xii) section 344 (punishment for robbery),
- (xiii) section 346 (extortion),
- (xiii.1) section 347 (criminal interest rate),
- (xiv) section 367 (punishment for forgery),
- (xv) section 368 (uttering forged document),
- (xvi) section 380 (fraud),
- (xvii) section 382 (fraudulent manipulation of stock exchange transactions),
- (xviii) section 426 (secret commissions),
- (xix) section 433 (arson),
- (xx) section 449 (making counterfeit money),
- (xxi) section 450 (possession, etc., of counterfeit money),
- (xxii) section 452 (uttering, etc., counterfeit money), or
- (xxiii) section 462.31 (laundering proceeds of crime),
- (b) an offence against section 354 (possession of property obtained by crime), committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of

**NOTE:** Paragraph (b) of the definition “enterprise crime offence” amended 1995, c. 39, s. 151(2) (to come into force by order of the Governor in Council) by replacing the portion before subpara. (i). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *an offence against subsection 96(1) (possession of weapon obtained by commission of offence) or section 354 (possession of property obtained by crime), committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of*
  - (i) *the commission in Canada of an offence referred to in paragraph (a) or a designated drug offence, or*
  - (ii) *an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a) or a designated drug offence,*

**NOTE:** Paragraph (b)(i) and (ii) amended 1996, Bill C-8, s. 70(a) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

(b.1) an offence against section 126.1 or 126.2 or subsection 233(1) or 240(1) of the *Excise Act* or section 153, 159, 163.1 or 163.2 of the *Customs Act*, or

(c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a), (b) or (b.1);

“judge” means a judge as defined in section 552 or a judge of a superior court of criminal jurisdiction;

“proceeds of crime” means any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an enterprise crime offence or a designated drug offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence, or R.S.C. 1985, c. 42 (4th Supp.), s. 2; 1993, c. 25, s. 95; 1993, c. 37, s. 32; 1993, c. 46, s. 5; 1994, c. 44, s. 29.

**NOTE:** Definition “proceeds of crime” amended 1996, Bill C-8, s. 70(b) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence” in paras. (a) and (b).

**Editor’s Note:** We believe that the word “or” at the end of para. (b) in the definition “proceeds of crime” should have been deleted by 1993, c. 37, s. 32(b).

#### CROSS-REFERENCES

The scope of what is considered an attempt is set out in s. 24 of the Criminal Code. The meaning of being an accessory after the offence is found in s. 23. Section 22 determines the meaning of counselling. The definition of “enterprise crime offence” sets out descriptive cross-references following the list of section numbers included in this definition. Section 3 explains the limited use to which descriptive cross-references may be put, namely, that they are for convenience only and are not to be used to interpret the meaning of the section. Section 2 (the general definition provision) sets out the meaning of “property” and “superior court of criminal jurisdiction”. These definitions, together with much of the rest of this Part, are incorporated into the Narcotic Control Act by s. 19.3 of that Act, and into the Food and Drugs Act by s. 44.4 of that Act regarding controlled drugs and s. 51 regarding restricted drugs.

#### SYNOPSIS

This section provides definitions for the new proceeds of crime provisions of the Criminal Code. In particular, the section provides definitions for the terms “designated drug offence” (consisting of certain offences against the Food and Drugs Act and Narcotic Control Act, as well as conspiracies, attempts, being an accessory and counselling with respect to these offences), and “enterprise crime offences” (consisting of certain specified offences against the Criminal Code).

The term “proceeds of crime” is also defined, and encompasses any property, benefit or advantage within or outside Canada, obtained or derived directly or indirectly as a result of an enterprise crime or designated drug offence or conduct that would have constituted such an offence if it had occurred in Canada.

## Offence

#### LAUNDERING PROCEEDS OF CRIME / Punishment.

**462.31.** (1) Every one commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or



otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

**NOTE:** Subsection (1)(a) and (b) amended 1996, Bill C-8, s. 70(c) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

**(2) Every one who commits an offence under subsection (1)**

- (a) is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The meaning of “property” and “person” are contained in s. 2.

The terms “designated drug offence” and “enterprise crime offence” are defined in s. 462.3. Section 4(3) sets out what being in “possession” means in this Act.

This offence has been added to the list of offences in relation to which, according to s. 183, an authorization for interception of private communications must be obtained.

If the accused is prosecuted by indictment under s. 462.31(2)(a), the accused has a right to make an election under s. 536(2). If tried by summary conviction, Part XXVII will govern the procedure and s. 787(1) sets out the maximum punishment upon conviction as six months imprisonment or a \$2,000 fine, or both [except in the case of a corporation, see s. 719(b)].

The equivalent provision in the Food and Drugs Act, dealing with controlled drugs is s. 44.3 and regarding restricted drugs is s. 50.3. The similar section in the Narcotic Control Act is s. 19.2.

**SYNOPSIS**

This section describes the offence of laundering the proceeds of crime. The offence is committed when a person deals with any property, or any proceeds of property, in any manner and by any means, with the intent to conceal or convert it, knowing that the property or proceeds were, in whole or in part, obtained or derived directly or indirectly as a result of the conduct described in the definition of the term “proceeds of crime”.

The offence may be prosecuted by indictment, with a maximum punishment of imprisonment for 10 years, or by summary conviction.

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## ***Search, Seizure and Detention of Proceeds of Crime***

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**SPECIAL SEARCH WARRANT / Procedure / Execution of warrant in other territorial jurisdictions / Detention and record of property seized / Notice / Undertaking by Attorney General.**

**462.32. (1)** Subject to subsection (3), where a judge, on application of the Attorney General, is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in any building, receptacle or place any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), the judge may issue a warrant authorizing a person named therein or a peace officer to search the building, receptacle or place for that property and to seize

that property and any other property in respect of which that person or peace officer believes, on reasonable grounds, that an order of forfeiture may be made under that subsection.

(2) An application for a warrant under subsection (1) may be made *ex parte* and shall be made in writing.

(3) Subsections 487(2) to (4) and section 488 apply, with such modifications as the circumstances require, to a warrant issued under this section.

(4) Every person who executes a warrant issued by a judge under this section shall

- (a) detain or cause to be detained the property seized, taking reasonable care to ensure that the property is preserved so that it may be dealt with in accordance with the law;
- (b) as soon as practicable after the execution of the warrant but within a period not exceeding seven days thereafter, prepare a report in Form 5.3, identifying the property seized and the location where the property is being detained and cause the report to be filed with the clerk of the court; and
- (c) cause a copy of the report to be provided, on request, to the person from whom the property was seized and to any other person who, in the opinion of the judge, appears to have a valid interest in the property.

(5) Before issuing a warrant under this section in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before the issuance of the warrant would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be seized pursuant to the warrant.

(6) Before issuing a warrant under this section, a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the issuance and execution of the warrant. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

#### CROSS-REFERENCES

The terms “property”, “Attorney General”, “peace officer”, “clerk of the court” and “person” are defined in s. 2. “Judge” is defined in s. 462.3.

Sections 487 to 489 deal with search warrants generally, and telewarrants are dealt with in s. 487.1. Form 5.3 has been created to report of what property is seized under a search warrant authorized by this section. Section 462.35 provides that such warrants automatically expire after six months unless the Attorney General brings an application to extend the life of the warrant within that time. In addition, any person with an interest in the property seized under this type of warrant may apply under s. 463.24 to examine the property or to have the property returned.

Section 462.34 provides that if a warrant is issued under this section and the accused is later committed to trial for an enterprise crime offence (as defined in s. 462.3) a copy of the report of what was seized shall be forwarded to the clerk of the court in which the accused is ordered to stand trial.

#### SYNOPSIS

This section provides for special search warrants with respect to property which falls into the category of proceeds of crime and which is subject to forfeiture under this Part.

An application for such a search warrant must be brought in writing, by an Attorney General, to a judge as defined in s. 462.3 (generally, a superior, district or county court judge). It may be made *ex parte*.

Where information on oath in Form 1 satisfies the judge that such property is in a building, receptacle or place, he may issue a warrant, which may be in Form 5, authorizing a named person or a peace officer to search for that property in that place, and to

seize it and any other property which he believes, on reasonable grounds, falls within this provision.

The backing and time of execution provisions in ss. 487 and 488 apply to these special warrants.

Subsection (4) requires that a person executing a warrant under this section must detain and preserve the property seized and prepare a report within seven days of seizure which shall be given to the court, the person from whom the seizure was made and any other person whom the issuing judge decides has an apparent valid interest in the property.

Subsection (5) provides that, prior to issuing a warrant, a judge may require that notice be given to and may hear any person who, in the judge's opinion, appears to have a valid interest in the property, unless he believes that notice would result in disappearance, dissipation or reduction in value of the property, or otherwise affect the property so that all or part of it could not be seized.

Subsection (6) compels a judge, before issuing a warrant, to require the Attorney General to give such undertaking as the judge considers appropriate with respect to the payment of damages or costs in relation to the warrant.

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**APPLICATION FOR RESTRAINT ORDER / Procedure / Restraint order / Appointment of Minister of Supply and Services / Idem / Notice / Order in writing / Undertakings by Attorney General / Service of order / Registration of order / Continues in force / Offence.**

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**462.33. (1) The Attorney General may make an application in accordance with subsection (2) for a restraint order under subsection (3) in respect of any property.**

**(2) An application made under subsection (1) for a restraint order under subsection (3) in respect of any property may be made ex parte and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters, namely,**

- (a) the offence or matter under investigation;**
- (b) the person who is believed to be in possession of the property;**
- (c) the grounds for the belief that an order of forfeiture may be made under subsection 462.37(1) or 462.38(2) in respect of the property; and**
- (d) a description of the property.**

**(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that there exists any property in respect of which an order of forfeiture may be made under subsection 462.37(1) or 462.38(2), make an order**

- (a) prohibiting any person from disposing of, or otherwise dealing with any interest in, the property specified in the order otherwise than in such manner as may be specified in the order; and**
- (b) at the request of the Attorney General, where the judge is of the opinion that the circumstances so require,**
  - (i) appointing a person to take control of and to manage or otherwise deal with all or part of that property in accordance with the directions of the judge, which power to manage or otherwise deal with all or part of that property includes, in the case of perishable or rapidly depreciating property, the power to make an interlocutory sale of that property, and**
  - (ii) requiring any person having possession of that property to give possession of the property to the person appointed under subparagraph (i).**

**(3.1) Where the Attorney General of Canada so requests, a judge appointing a person under subparagraph 462.33(3)(b)(i) shall appoint the Minister of Supply and Services.**



- (4) An order made by a judge under subsection (3) may be subject to such reasonable conditions as the judge thinks fit.
- (5) Before making an order under subsection (3) in relation to any property, a judge may require notice to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property unless the judge is of the opinion that giving such notice before making the order would result in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under subsection 462.37(1) or 462.38(2).
- (6) An order made under subsection (3) shall be made in writing.
- (7) Before making an order under subsection (3), a judge shall require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs, or both, in relation to the making and execution of the order.
- (8) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.
- (9) A copy of an order made under subsection (3), shall be registered against any property in accordance with the laws of the province in which the property is situated.
- (10) An order made under subsection (3) remains in effect until
- (a) it is revoked or varied under subsection 462.34(4) or revoked under paragraph 462.43(a);
  - (b) it ceases to be in force under section 462.35; or
  - (c) an order of forfeiture or restoration of the property is made under subsection 462.37(1), 462.38(2) or 462.41(3) or any other provision of this or any other Act of Parliament.
- (11) Any person on whom an order made under subsection (3) is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction. R.S.C. 1985, c. 42 (4th Supp.), s. 2; 1993, c. 37, s. 21.

#### CROSS-REFERENCES

The terms “property”, “person” and “Attorney General” are defined in s. 2. “Judge” is defined in s. 462.3. Section 4(3) sets out when a person is in possession. Section 482 gives courts the power to make their own rules of court.

The offence created by 462.33(11) is one for which an application to intercept private communications may be made under s. 183. As there is no specified punishment if the prosecution is by way of indictment, s. 730 provides that the maximum period of imprisonment upon conviction is five years. In addition, an accused prosecuted by indictment would have a right to make an election under s. 536(2). If tried by summary conviction, Part XXVII will govern the procedure, and s. 787(1) sets out the maximum punishment upon conviction as six months imprisonment or a \$2,000 fine, or both.

This provision is incorporated into the Food and Drugs Act, dealing with controlled drugs using s. 44.4 and regarding restricted drugs is s. 51. This provision is incorporated into the Narcotic Control Act through s. 19.3 of that Act.

Section 462.35 provides for the automatic expiry of a restraint order made under this section after six months unless the Attorney General has, within that time, successfully applied for an extension of the order.

Section 462.36 provides that if the court makes a restraint order and the accused is later commit-

ted to trial for an enterprise crime offence (as defined in s. 462.3) a copy of the restraint order shall be forwarded to the clerk of the court in which the accused is ordered to stand trial.

If notice is given under subsec. (8), the court may use s. 462.4(b) to set aside any conveyance or transfer of property relating to the property subject to the restraint order unless the transaction was made for valuable consideration to a purchaser acting in good faith and without notice of the order.

Section 462.43 provides for the residual disposal of property seized under a restraint order.

### SYNOPSIS

This section provides for the issuance of restraint orders with respect to property which falls into the definition of "proceeds of crime" and is subject to forfeiture under this part.

An application for such an order must be made in writing by an Attorney General to a judge as defined in s. 462.3 (generally a superior, district or county court judge). It may be made *ex parte* and shall be accompanied by an affidavit sworn on information or belief. The affidavit must identify the offence in question; the person believed to be in possession of the property; the grounds for the belief that the property is subject to forfeiture, and its description.

If the judge is satisfied that reasonable grounds exist to believe that the property is subject to forfeiture, the judge may make an order in writing prohibiting any dealing with or disposing of any interest in the property. He may also appoint a manager and order that possession be given to that person if the Attorney General so requests and circumstances so require. He may also impose such conditions as he thinks fit. Before making a restraint order, the judge may require notice be given to and may hear any person who in the judge's opinion appears to have a valid interest in the property unless he believes that giving such notice would result in the disappearance, dissipation or reduction in value of the property, or otherwise affect the property so that all or part of it could not be subject to an order of forfeiture.

Subsection (7) compels the judge, before making an order, to require the Attorney General to give such undertakings as the judge considers appropriate with respect to the payment of damages or costs in relation to the warrant.

A copy of an order must be served on the person to whom it is addressed, and a copy shall be registered in accordance with provincial law.

An order remains in effect until its revocation, variation or automatic expiry, or until an order of forfeiture or restoration is made.

Subsection (11) creates an offence triable by indictment or on summary conviction for contravening or failing to comply with a restraint order which has been served as required.

### ANNOTATIONS

A restraint order under this section is not a seizure within the meaning of s. 8 of the Charter: *Serrano v. Canada* (1992), 73 C.C.C. (3d) 437, 91 D.L.R. (4th) 747, 8 O.R. (3d) 673 (Gen. Div.).

The use of the word "may" in subsec. (2)(c) simply refers to the judicial power to make a forfeiture order, but does not permit the making of the order merely on the basis of a reasonable possibility. Rather, the affiant must depose his affirmative belief in the existence of the grounds which would justify a forfeiture order: *Serrano v. Canada*, *supra*.

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**APPLICATION FOR REVIEW OF SPECIAL WARRANTS AND RESTRAINT ORDERS / Notice to Attorney General / Terms of examination order / Order of restoration of property or revocation or variation of order / Hearing / Conditions to be satisfied / Saving provision / Form of recognizance.**

**462.34. (1) Any person who has an interest in property that was seized under a war-**

warrant issued pursuant to section 462.32 or in respect of which a restraint order was made under subsection 462.33(3) may, at any time, apply to a judge

(a) for an order under subsection (4); or

(b) for permission to examine the property.

(2) Where an application is made under paragraph (1)(a),

(a) the application shall not, without the consent of the Attorney General, be heard by a judge unless the applicant has given to the Attorney General at least two clear days notice in writing of the application; and

(b) the judge may require notice of the application to be given to and may hear any person who, in the opinion of the judge, appears to have a valid interest in the property.

(3) A judge may, on an application made to the judge under paragraph (1)(b), order that the applicant be permitted to examine property subject to such terms as appear to the judge to be necessary or desirable to ensure that the property is safeguarded and preserved for any purpose for which it may subsequently be required.

(4) On an application made to a judge under paragraph (1)(a) in respect of any property and after hearing the applicant and the Attorney General and any other person to whom notice was given pursuant to paragraph (2)(b), the judge may order that the property or a part thereof be returned to the applicant or, in the case of a restraint order made under subsection 462.33(3), revoke the order, vary the order to exclude the property or any interest in the property or part thereof from the application of the order or make the order subject to such reasonable conditions as the judge thinks fit,

(a) if the applicant enters into a recognizance before the judge, with or without sureties, in such amount and with such conditions, if any, as the judge directs and, where the judge considers it appropriate, deposits with the judge such sum of money or other valuable security as the judge directs;

(b) if the conditions referred to in subsection (6) are satisfied; or

(c) for the purpose of

(i) meeting the reasonable living expenses of the person who was in possession of the property at the time the warrant was executed or the order was made or any person who, in the opinion of the judge, has a valid interest in the property and of the dependants of that person,

(ii) meeting the reasonable business and legal expenses of a person referred to in subparagraph (i), or

(iii) permitting the use of the property in order to enter into a recognizance under Part XVI.

(5) For the purpose of determining the reasonableness of legal expenses referred to in subparagraph (4)(c)(ii), a judge shall hold an in camera hearing and without the presence of the Attorney General.

(6) An order under paragraph (4)(b) in respect of property may be made by a judge if the judge is satisfied

(a) where the application is made by

(i) a person charged with an enterprise crime offence or a designated drug offence, or

**NOTE:** Subsection (6)(a)(i) amended 1996, Bill C-8, s. 70(d) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

(ii) any person who acquired title to or a right of possession of that property from a person referred to in subparagraph (i) under circumstances that give



rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property, that a warrant should not have been issued pursuant to section 462.32 or a restraint order under subsection 462.33(3) should not have been made in respect of that property, or

- (b) in any other case, that the applicant is the lawful owner of or lawfully entitled to possession of the property and appears innocent of any complicity in an enterprise crime offence or designated drug offence or of any collusion in relation to such an offence,

**NOTE:** Subsection (6)(b) amended 1996, Bill C-8, s. 70(e) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

and that the property will no longer be required for the purpose of any investigation or as evidence in any proceeding.

(7) Section 354 of this Act, sections 44.2 and 50.2 of the *Food and Drugs Act* and section 19.1 of the *Narcotic Control Act* do not apply to a person who comes into possession of any property or thing that, pursuant to an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).

**NOTE:** Subsection (7) replaced 1996, Bill C-8, s. 69 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

*Saving provision.*

*(7) Section 354 of this Act and subsection 8(1) of the Controlled Drugs and Substances Act do not apply to a person who comes into possession of any property or thing that, pursuant to an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).*

(8) A recognizance entered into pursuant to paragraph (4)(a) may be in Form 32. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

#### CROSS-REFERENCES

The terms “property”, “person” and “Attorney General” are defined in s. 2. “Judge”, “designated drug offence” and “enterprise crime offence” are defined in s. 462.3.

If the Attorney General is required to return documents as part of a successful application under this section, copies can be made, pursuant to s. 462.46, of such documents before they are returned, and may be used as evidence as if they were the originals. Section 462.45 provides that an order returning property pursuant to s. 462.34(4) is suspended if an appeal from such an order or an application for restoration is made.

#### SYNOPSIS

This section provides for an application to a judge, as defined in s. 462.3, for an order returning property seized under s. 462.32, revoking a restraint order made under s. 462.34, or permitting the examination of seized or restrained property on such terms as the judge may require. Two clear days’ notice must be given the Attorney General, unless the judge requires notice to be given to and hearing accorded to other interested parties.

The judge may also exclude property from the warrant or order if: the warrant or order should not have been issued with respect to that property; the property belongs to an innocent third party and the property is not required for evidence; the property is

required for reasonable living, business or legal expenses; or the applicant enters into a recognizance.

Possession of property returned or excluded pursuant to this section is not an offence.

## ANNOTATIONS

**Application** – These provisions do not apply to money seized from the accused at the time of his arrest and not pursuant to the provisions in this Part: *R. v. Galas* (1990), 57 C.C.C. (3d) 353 (B.C.S.C.).

Similarly, these provisions do not apply to funds seized pursuant to a warrant issued under s. 487 albeit the accused is charged with offences contrary to ss. 19.1 and 19.2 of the Narcotic Control Act and the warrant was issued in relation to a conspiracy to commit the offence under s. 19.1 Unless the property is seized under the provisions of this Part then the remedial measures contained therein cannot be invoked: *Giles v. Canada (Department of Justice)* (1991), 63 C.C.C. (3d) 184 (B.C.S.C.); *R. Gaudreau* (1994), 90 C.C.C. (3d) 436, 120 Sask. R. 270, 68 W.A.C. 270 (C.A.).

**General** – The review under this section is not a *de novo* hearing. The reviewing judge is required to determine only whether the authorizing judge, on the basis of the evidence presented, could have made the restraint order, giving due consideration to whether there might have been fraud, non-disclosure or any relevant new evidence which would determine whether the order should continue in force: *R. v. Fremanco Ltd.* (1995), 135 Nfld. & P.E.I.R. 327 (Nfld. S.C.).

**Legal expenses** – The application to vary the order must be made by the client, not the lawyer. On the hearing of the application, the client, who is still facing charges, cannot be examined as to the source of his assets. Further, the client should not be required to answer any questions which may assist the Crown to prosecute him on further charges in other proceedings. Once the accused has established that the variation is required to meet legal expenses, then the judge will hold an *in camera* hearing in the absence of Crown counsel to determine the amount which should be released from the restraint order: *R. v. Morra* (1992), 77 C.C.C. (3d) 380, 17 C.R. (4th) 325, 11 C.R.R. (2d) 379 (Ont. Ct. (Gen. Div.)).

## AUTOMATIC EXPIRATION OF SPECIAL WARRANTS AND RESTRAINT ORDERS.

**462.35.** Where property has been seized under a warrant issued pursuant to section 462.32 or a restraint order has been made under section 462.33 in relation to property, the property shall not be detained or the order shall not continue in force, as the case may be, for a period of more than six months after the time of the seizure or the making of the order, as the case may be, unless, before the expiration of that period, the Attorney General establishes to the satisfaction of a judge that the property may be required after the expiration of that period for the purpose of section 462.37 or 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

## CROSS-REFERENCES

The terms “property”, and “Attorney General” are defined in s. 2. “Judge” is defined in s. 462.3.

If a successful application is not made by the Attorney General to extend the length of a restraint order or a search warrant issued under s. 462.32, the property seized will be disposed of under s. 462.32 or 462.43. If the Attorney General is required to return documents under this section, copies can be made, pursuant to s. 462.46, of such documents before they are returned, and may be used as evidence as if they were the originals.

Unlike most of the provisions in this Part, there is no right of appeal from a decision under this section.

**SYNOPSIS**

This section provides for the automatic expiry of warrants and restraint orders after six months, unless a judge, prior to the expiration of the six-month period, is satisfied by the Attorney General that the property may be required after the expiration of that period for the purpose of ss. 462.37, 462.38, any other provision of the Code, or any other federal Act respecting forfeiture, or for the purpose of any investigation or as evidence in any proceeding, extends the time. This section also pertains to property seized or restrained under ss. 462.32 and 462.33.

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**FORWARDING TO CLERK WHERE ACCUSED TO STAND TRIAL.**

**462.36.** Where a judge issues a warrant under section 462.32 or makes a restraint order under section 462.33 in respect of any property, the clerk of the court shall, when an accused is ordered to stand trial for an enterprise crime offence, cause to be forwarded to the clerk of the court to which the accused has been ordered to stand trial a copy of the report filed pursuant to paragraph 462.32(4)(b) or of the restraint order in respect of the property. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The terms “property” and “clerk of the court” are defined in s. 2. “Judge” and “enterprise crime offence” are defined in s. 462.3.

**SYNOPSIS**

This section provides for the transmission to the clerk of the court, to which an accused has been ordered to stand trial for an enterprise crime offence, of a copy of the report filed under s. 462.32(4)(b), or the restraint order under s. 462.33, with respect to the seized or restrained property.

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***Forfeiture of Proceeds of Crime***

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**ORDER OF FORFEITURE OF PROPERTY ON CONVICTION / Proceeds of crime derived from other offences / Fine instead of forfeiture / Imprisonment in default of payment of fine / Fine option program not available to offender.**

**462.37.** (1) Subject to this section and sections 462.39 to 462.41, where an offender is convicted or discharged under section 736 of an enterprise crime offence and the court imposing sentence on the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime and that the enterprise crime offence was committed in relation to that property, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

**NOTE:** Subsection (1) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

(2) Where the evidence does not establish to the satisfaction of the court that the enterprise crime offence of which the offender is convicted or discharged under section 736 was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

(3) Where a court is satisfied that an order of forfeiture under subsection (1) should



be made in respect of any property of an offender, but that that property or any part thereof or interest therein cannot be made subject to such an order and, in particular,

- (a) cannot, on the exercise of due diligence, be located,
- (b) has been transferred to a third party,
- (c) is located outside Canada,
- (d) has been substantially diminished in value or rendered worthless, or
- (e) has been commingled with other property that cannot be divided without difficulty,

the court may, instead of ordering that property or part thereof or interest therein to be forfeited pursuant to subsection (1), order the offender to pay a fine in an amount equal to the value of that property, part or interest.

(4) Where a court orders an offender to pay a fine pursuant to subsection (3), the court shall

(a) impose, in default of payment of that fine, a term of imprisonment

- (i) not exceeding six months, where the amount of the fine does not exceed ten thousand dollars,
- (ii) of not less than six months and not exceeding twelve months, where the amount of the fine exceeds ten thousand dollars but does not exceed twenty thousand dollars,
- (iii) of not less than twelve months and not exceeding eighteen months, where the amount of the fine exceeds twenty thousand dollars but does not exceed fifty thousand dollars,
- (iv) of not less than eighteen months and not exceeding two years, where the amount of the fine exceeds fifty thousand dollars but does not exceed one hundred thousand dollars,
- (v) of not less than two years and not exceeding three years, where the amount of the fine exceeds one hundred thousand dollars but does not exceed two hundred and fifty thousand dollars,
- (vi) of not less than three years and not exceeding five years, where the amount of the fine exceeds two hundred and fifty thousand dollars but does not exceed one million dollars, or
- (vii) of not less than five years and not exceeding ten years, where the amount of the fine exceeds one million dollars; and

(b) direct that the term of imprisonment imposed pursuant to paragraph (a) be served consecutively to any other term of imprisonment imposed on the offender or that the offender is then serving.

(5) Section 718.1 does not apply to an offender against whom a fine is imposed pursuant to subsection (3). R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**NOTE:** Subsection (5) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 718.1 with s. 736.

#### CROSS-REFERENCES

The terms “property” and “Attorney General” are defined in s. 2. The terms “enterprise crime offence” and “proceeds of crime” are defined in s. 462.3.

Section 462.39 provides for an inference to be drawn that the property was obtained as a result of an “enterprise crime offence” if the conditions of that section are satisfied. Section 462.41 requires that notice be given to any person who may have a valid interest in the property before an order is made for the forfeiture of the property. In addition, before any property is forfeited under this section, the court may set aside any improper conveyances, using its powers under s. 462.4. Section 462.42 allows persons with a valid interest in the property which is to be forfeited to apply to have their interest declared not affected by any forfeiture, and to either retrieve the portion of the property in which they have an interest or an equivalent sum of money. Section 462.43 provides for the disposal of any residual property remaining after all persons with a valid interest have had their

claims determined. If documents are returned under s. 462.37, the Attorney General has the right to make copies before returning the documents and to use them as evidence as if they were originals, pursuant to s. 462.46.

Section 673, which defines "sentence" for the purpose of indictable offences, includes an order under this section so that s. 683 permits an appeal to the appropriate appellate court. Section 462.45 provides that a forfeiture order is not to be carried out for 30 days and is stayed if it is under appeal, an application is made for restoration of the property or there are any proceedings in which the right to seize the property is questioned.

Section 44.4 of the Food and Drugs Act incorporates this section into that Act with respect to controlled drugs, and s. 51 with respect to restricted drugs. Sections 43 to 44 also deal with other forfeiture provisions and applications for restoration in relation to controlled drugs, as does s. 51 regarding restricted drugs. Section 19.3 of the Narcotic Control Act performs the same function in that Act. For other sections in the Narcotic Control Act dealing with forfeiture and requests for restoration, see ss. 15 to 19.

### SYNOPSIS

This section deals with the forfeiture of proceeds of crime after an accused person has been convicted of an enterprise crime offence.

Subsection (1) provides for an order, for the forfeiture of property, by the judge imposing sentence when a person is found guilty of an enterprise crime offence. If the Attorney General satisfies the judge, *on a balance of probabilities*, that any property is the proceeds of crime, and that the enterprise crime offence which is the subject of the trial was committed in relation to such property, he shall order its forfeiture.

Subsection (2) provides that where, in the proceedings described in subsec. (1), the connection between the offence and the property is not established, but the judge is satisfied *beyond a reasonable doubt* that the property is proceeds of crime, he may order its forfeiture.

Where an order should be made under subsec. (1), but the property cannot be found after the exercise of due diligence, it has been transferred, it is outside Canada, or it has been diminished or commingled, the court may, instead of ordering forfeiture, impose a fine of equal value to such property on the offender.

Subsection (4) provides a sliding scale for consecutive imprisonment in lieu of payment of the fine.

### ANNOTATIONS

The trial judge at the time of sentencing erred in refusing to make an order under subsec. (1) with respect to certain monies seized from the accused at the time of his arrest, in part because the judge believed that the monies had been given the accused by his mother. The entitlement claims of other persons to the proceeds are not to be dealt with in conjunction with a sentence hearing but rather pursuant to s. 462.42 after the order of forfeiture has been made: *R. v. Pawlyk* (1991), 65 C.C.C. (3d) 63, 4 C.R. (4th) 388, 72 Man. R. (2d) 1 (C.A.).

The forfeiture order is part of the sentence and, once the order has been made, the trial judge is *functus*. Thus, the judge had no jurisdiction to subsequently vacate a portion of the order on the application of the mortgagee: *R. v. Sterling* (1992), 71 C.C.C. (3d) 222 (B.C.S.C.). *Contra*: *Wilson v. Canada* (1993), 86 C.C.C. (3d) 464, 25 C.R. (4th) 239, 15 O.R. (3d) 645 (C.A.) where it was held that third party claims can be considered at the sentence hearing in view of s. 462.41.

It was not appropriate to impose a fine under subsec. (3) where the proceeds had been used by the accused to enter into a recognizance and then for lawyer fees. If the Crown had moved to seize the funds, they would have been available for these purposes in any event by an application under s. 462.34: *R. v. Gagnon* (1993), 80 C.C.C. (3d) 508, 139 A.R. 264 (Q.B.).

In view of the provisions of subsec. (3) and (4) a lawyer, representing the accused,

who has taken an assignment of seized funds is in a potential conflict of interest. If the court makes an order in favour of the lawyer then the accused is liable to have a fine (and jail in default) imposed in the equivalent amount. On the other hand, it would be inappropriate for the lawyer to wait until after sentencing and then make a claim under s. 462.42 in an effort to circumvent the scheme of the legislation: *R. v. Wilson, supra*.

**APPLICATION FOR FORFEITURE / Order of forfeiture of property / Person deemed absconded.**

**462.38.** (1) Where an information has been laid in respect of an enterprise crime offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2) in respect of any property.

(2) Subject to sections 462.39 to 462.41, where an application is made to a judge under subsection (1), the judge shall, if the judge is satisfied that

- (a) any property is, beyond a reasonable doubt, proceeds of crime,
- (b) proceedings in respect of an enterprise crime offence committed in relation to that property were commenced, and
- (c) the accused charged with the offence referred to in paragraph (b) has died or absconded,

order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(3) For the purposes of this section, a person shall be deemed to have absconded in connection with an enterprise crime offence if

- (a) an information has been laid alleging the commission of the offence by the person,
- (b) a warrant for the arrest of the person has been issued in relation to that information, and
- (c) reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful during the period of six months commencing on the day the warrant was issued,

and the person shall be deemed to have so absconded on the last day of that period of six months. **R.S.C. 1985, c. 42 (4th Supp.), s. 2.**

**CROSS-REFERENCES**

The terms “property”, “person” and “Attorney General” are defined in s. 2. The terms “judge” and “enterprise crime offence” are defined in s. 462.3.

Section 462.39 provides for an inference to be drawn that the property was obtained as a result of an “enterprise crime offence” if the conditions of that section are satisfied. Section 462.41 requires that notice be given to any person who may have a valid interest in the property before an order is made for the forfeiture of the property. In addition, before any property is forfeited under this section, the court may set aside any improper conveyances using its powers under s. 462.4. Section 462.42 allows persons with a valid interest in the property which is to be forfeited to apply to have their interest declared not affected by any forfeiture, and to either retrieve the portion of the property in which they have an interest or an equivalent sum of money. Section 462.43 provides for the disposal of any residual property remaining after all persons with a valid interest have had their claims determined. If documents are returned under 462.37, the Attorney General has the right to make copies before returning the documents and to use them as evidence as if they were originals, pursuant to s. 462.46.

Section 462.44 provides for a right of appeal from a forfeiture order. In addition, s. 673, which defines “sentence” for the purpose of indictable offences, includes an order under this section so that s. 683 permits an appeal to the appropriate appellate court. Section 462.45 provides that a forfeiture order is not to be carried out for 30 days and is stayed if it is under appeal, an application is made for restoration of the property or there are any proceedings in which the right to seize the property is questioned.



Section 44.4 of the Food and Drugs Act incorporates this section into that Act with respect to controlled drugs, and s. 51 with respect to restricted drugs. Section 19.3 of the Narcotic Control Act performs the same function in that Act.

## SYNOPSIS

This section provides for an *in rem* forfeiture hearing for proceeds of crime in certain circumstances. The Attorney General may apply for such a hearing if an information has been laid in respect of an enterprise crime offence. On such an application, the judge shall order forfeiture if the Attorney General establishes that the property is, *beyond reasonable doubt*, proceeds of crime, that related enterprise crime proceedings were commenced, and that the accused has died or absconded.

Subsection (3) deems a person to have absconded if an information has been laid, a warrant issued, and reasonable attempts to arrest have been unsuccessful during the six-month period after the issuance of the warrant.

In establishing that any property which was seized is beyond a reasonable doubt the "proceeds of crime", there is no burden on the Crown to prove that the funds seized were the proceeds of any specific illegal transaction such as sale of narcotics. Thus, the fact that the funds or other property are proceeds of crime may be established by circumstantial evidence. The hearing under s. 462.38 is in its nature between a criminal trial proper where the strict rules of evidence apply and a sentence hearing. Thus, while it must be proved beyond a reasonable doubt that the property was the proceeds of crime, the fact that proceedings in respect of an enterprise crime offence had been commenced and that the accused absconded need only be proved on a balance of probabilities. Similarly, bearing in mind the standard of proof beyond a reasonable doubt as to the source of the funds sought to be forfeited, the general rule that all relevant evidence is admissible applies and the effect of exclusionary rules of evidence is to be left to the judge hearing the application. This includes the weight, if any, to be accorded to hearsay evidence, bearing in mind its reliability and the explanation for not making better evidence available: *R. v. Clymore* (1992), 74 C.C.C. (3d) 217 (B.C.S.C.).

Where the prerequisites set out in subsec. (3) have been met so that the accused is deemed to have absconded, then the requirement is subsec. (1)(c) has been made out even if, in the course of the proceedings, the accused's whereabouts become known. Thus, in this case, the accused had still absconded for the purpose of the Crown's application, even if during the course of the proceedings his whereabouts were discovered as a result of his arrest by American authorities while apparently attempting to import drugs into that country. There was no requirement that the Crown attempt to extradite the accused before the end of the proceedings under this section. His status as an absconding accused continues for the purpose of this section: *R. v. Clymore, supra*.

Although the proceedings under this section lead only to the forfeiture of property, it would be open to the accused to rely on s. 8 of the Charter and to argue for exclusion of the funds seized, on the basis that his right to protection against unreasonable search and seizure was violated: *R. v. Clymore, supra*.

## INFERENCE.

**462.39.** For the purpose of subsection 462.37(1) or 462.38(2), the court may infer that property was obtained or derived as a result of the commission of an enterprise crime offence where evidence establishes that the value, after the commission of that offence, of all the property of the person alleged to have committed the offence exceeds the value of all the property of that person before the commission of that offence and the court is satisfied that the income of that person from sources unrelated to enterprise crime offences or designated drug offences committed by that person cannot reasonably account for such an increase in value. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**NOTE:** Amended 1996, Bill C-8, s. 70(f) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

#### CROSS-REFERENCES

The terms “property” and “person” are defined in s. 2. The terms “enterprise crime offence” and “designated drug offence” are defined in s. 462.3. This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 44.3 and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

#### SYNOPSIS

This section provides that the court may infer in forfeiture hearings under this Part that property was obtained or derived from an enterprise crime offence where it is established that the value of all of a person’s property after the commission of such an offence exceeds the previous value, and that unrelated legitimate income cannot reasonably account for the increase.

#### VOIDABLE TRANSFERS.

**462.4. A court may,**

- (a) prior to ordering property to be forfeited under subsection 462.37(1) or 462.38(2), and
- (b) in the case of property in respect of which a restraint order was made under section 462.33, where the order was served in accordance with subsection 462.33(8),

set aside any conveyance or transfer of the property that occurred after the seizure of the property or the service of the order under section 462.33, unless the conveyance or transfer was for valuable consideration to a person acting in good faith and without notice. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

#### CROSS-REFERENCES

The term “property” is defined in s. 2. This property could have been seized by a warrant issued under s. 462.32.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

#### SYNOPSIS

This section provides that, prior to ordering forfeiture, a court may void any transfers of seized or restrained property. The court is authorized to so order in the case of restrained property if the order was served and unless the transfer was made for valuable consideration to a person acting in good faith and without notice.

#### NOTICE / Service, duration and contents of notice / Order of restoration of property.

**462.41. (1) Before making an order under subsection 462.37(1) or 462.38(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to and may hear any person who, in the opinion of the court, appears to have a valid interest in the property.**

**(2) A notice given under subsection (1) shall**

- (a) be given or served in such manner as the court directs or as may be prescribed by the rules of the court;
- (b) be of such duration as the court considers reasonable or as may be prescribed by the rules of the court; and

(c) set out the enterprise crime offence charged and a description of the property.

**(3) Where a court is satisfied that any person, other than**

(a) a person who was charged with an enterprise crime offence or a designated drug offence, or

**NOTE:** Subsection (3)(a) amended 1996, Bill C-8, s. 70(g) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression "designated drug offence" with the expression "designated substance offence".

(b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,

is the lawful owner or is lawfully entitled to possession of any property or any part thereof that would otherwise be forfeited pursuant to subsection 462.37(1) or 462.38(2) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part thereof be returned to that person. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The terms "property" and "person" are defined in s. 2. The terms "enterprise crime offence" and "designated drug offence" are defined in s. 462.3. The powers of a court to make rules is stated in s. 482.

Persons who receive notice under this section and seek to prevent their property from being forfeited can apply under s. 462.42 for relief from forfeiture.

This Part of the Criminal Code does not provide for any right of appeal from an order made under s. 462.42(3) and, unlike an order made under s. 462.37, this type of order does not come within the definition of "sentence" for appeal purposes under s. 673 (dealing with indictable offences). However, if a proceeding is brought, under which the restoration of the property under s. 462.41(3) is challenged, s. 462.45 will stay the restoration pending the completion of the further proceedings to determine the validity of the restoration order.

If documents are ordered returned under 462.41(3), the Attorney General has the right to make copies before returning the documents and to use them as evidence as if they were originals, pursuant to s. 462.46.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

**SYNOPSIS**

This section provides for notice to and the hearing of interested parties before forfeiture is ordered, and for the return of property to such persons if they are innocent of complicity.

Before making a forfeiture order, whether after a conviction or in an *in rem* proceeding, a court must require notice to be given in accordance with subsec. (2) to any person whom the court believes has a valid interest in the property in question, and may hear such person.

Where the court is satisfied that a person is the lawful owner of, or is entitled to possession of, all or part of the property in question, and appears innocent of complicity of collusion in an enterprise crime or designated drug offence, the court may order it returned to that person, unless that person was charged with an enterprise crime or derived his interest in the property from such persons, in circumstances giving rise to a reasonable inference that the transfer was made to avoid forfeiture.



**ANNOTATIONS**

Where the process under this section makes otherwise forfeitable property not subject to forfeiture, the judge may impose a fine equivalent pursuant to s. 462.37: *Wilson v. Canada* (1993), 86 C.C.C. (3d) 464, 25 C.R. (4th) 239, 15 O.R. (3d) 645 (C.A.).

**APPLICATION BY PERSON CLAIMING INTEREST FOR RELIEF FROM FORFEITURE /**  
**Fixing day for hearing / Notice / Order declaring interest not subject to forfeiture /**  
**Appeal from order under subsection (4) / Return of property.**

**462.42. (1)** Where any property is forfeited to Her Majesty under subsection 462.37(1) or 462.38(2), any person who claims an interest in the property, other than

- (a) a person who was charged with an enterprise crime offence or a designated drug offence that was committed in relation to the property forfeited, or

**NOTE:** Subsection (1)(a) amended 1996, Bill C-8, s. 70(h) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

- (b) a person who acquired title to or a right of possession of that property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,  
 may, within thirty days after that forfeiture, apply by notice in writing to a judge for an order under subsection (4).

- (2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of filing of the application for the hearing thereof.

- (3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing thereof on the Attorney General at least fifteen days before the day fixed for the hearing.

- (4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant is not a person referred to in paragraph (1)(a) or (b) and appears innocent of any complicity in any enterprise crime offence or designated drug offence that resulted in the forfeiture or of any collusion in relation to any such offence, the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

**NOTE:** Subsection (4) amended 1996, Bill C-8, s. 70(i) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

- (5) An applicant or the Attorney General may appeal to the court of appeal from an order under subsection (4) and the provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this subsection.

- (6) The Attorney General shall, on application made to the Attorney General by any person who has obtained an order under subsection (4) and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined,

- (a) direct that the property or the part thereof to which the interest of the applicant relates be returned to the applicant; or  
 (b) direct that an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The terms "property", "person" and "Attorney General" are defined in s. 2. The terms "judge", "enterprise crime offence" and "designated drug offence" are defined in s. 462.3.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

**SYNOPSIS**

This section provides for written applications by innocent third parties for relief from forfeiture under this part within 30 days after such forfeiture is ordered.

Such application may be brought by any person who claims an interest in forfeited property, other than a person described in subsec. 1(a) or (b), that is, a person who was charged with an enterprise crime or designated drug offence in relation to the property, or a person who acquired his interest from such person, in circumstances giving rise to a reasonable inference that the transfer was made to avoid forfeiture.

A judge to whom such application is made shall fix a hearing date not less than 30 days after the application is filed. The Attorney General is entitled to at least 15 days notice of the hearing.

The judge hearing the application may make an order declaring the nature and extent of the applicant's interest, and also declaring that it is not affected by the forfeiture, if he is satisfied that the applicant was not a person described in subsec. 1(a) or (b) and that he appears innocent of complicity or collusion in the offence that resulted in the forfeiture.

Appeals are available from orders under this section to the Court of Appeal.

Upon the application of a person who has obtained an order under this section, if the appeal period has expired and any appeal has been determined, the Attorney General is required to direct the return of the property or the repayment of its value as declared in the order to the applicant.

**ANNOTATIONS**

Even where the applicant has met the conditions in this section, the judge has a discretion to refuse to make a declaration in favour of the applicant. In exercising the discretion, the judge must consider whether the innocent third party should suffer so that the goal of divesting the accused of his proceeds of crime can be achieved: *Wilson v. Canada* (1993), 86 C.C.C. (3d) 464, 25 C.R. (4th) 239, 15 O.R. (3d) 645 (C.A.).

In *R. v. Wilson, supra*, the accused and his wife had assigned their interest in seized funds to their lawyers for the payment of legal fees. At the time of sentencing, an order was made forfeiting those funds pursuant to s. 462.37. Once that order was made, any interest that the accused and his wife had in the funds was extinguished as was the interest that the lawyers had. Accordingly, they had no assertable interest in the funds within the meaning of this section.

The victim of an offence who had served a garnishee summons upon a company holding funds owed to the accused, before the Attorney General applied for forfeiture of those funds, was entitled to an order declaring an interest in those funds: *R. v. Tatarchuk*, [1993] 1 W.W.R. 349, 4 Alta. L.R. (3d) 300 (Q.B.).

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**RESIDUAL DISPOSAL OF PROPERTY SEIZED OR DEALT WITH PURSUANT TO SPECIAL WARRANTS OR RESTRAINT ORDERS.**

**462.43.** Where property has been seized under a warrant issued pursuant to section 462.32, a restraint order has been made under section 462.33 in relation to any property or a recognizance has been entered into pursuant to paragraph 462.34(4)(a) in relation to any property and a judge, on application made to the judge by the Attorney General or any person having an interest in the property or on the judge's own motion, after notice given to the Attorney General and any other person having an interest in the property, is satisfied that the property will no longer be required for

the purpose of section 462.37, 462.38 or any other provision of this or any other Act of Parliament respecting forfeiture or for the purpose of any investigation or as evidence in any proceeding, the judge

- (a) in the case of a restraint order, shall revoke the order;
- (b) in the case of a recognizance, shall cancel the recognizance; and
- (c) in the case of property seized under a warrant issued pursuant to section 462.32 or property under the control of a person appointed pursuant to subparagraph 462.33(3)(b)(i),
  - (i) if possession of it by the person from whom it was taken is lawful, shall order that it be returned to that person,
  - (ii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, shall order that it be returned to the lawful owner or the person who is lawfully entitled to its possession, or
  - (iii) if possession of it by the person from whom it was taken is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, may order that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

#### CROSS-REFERENCES

The terms “property”, “person” and “Attorney General” are defined in s. 2.

If documents are returned under s. 462.43, the Attorney General has the right to make copies before returning the documents and to use them as evidence as if they were originals, pursuant to s. 462.46.

Section 462.44 provides a right of appeal from a decision made under this section. Section 462.45 provides that a forfeiture order is not to be carried out for 30 days and is stayed if it is under appeal, an application is made for restoration of the property or there are any proceedings in which the right to seize the property is questioned.

#### SYNOPSIS

This section provides for the revocation of restraint orders, the cancellation of any recognizances, and the return of seized property (or its forfeiture where the owner is not known), on application by the Attorney General or an interested party, where the property is no longer required for the purposes of this Part, or of any Act of Parliament, or for any investigation or as evidence.

#### APPEALS FROM ORDERS UNDER SUBSECTION 462.38(2) OR SECTION 462.43.

**462.44.** Any person who considers himself aggrieved by an order made under subsection 462.38(2) or section 462.43 may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI and that Part applies, with such modifications as the circumstances require, to such an appeal. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

#### CROSS-REFERENCES

The term “person” is defined in s. 2.

Section 462.45 provides that any order for forfeiture or restoration is stayed if an appeal is brought.

Section 462.44 does not refer to orders made pursuant to s. 462.37 as they come within the definition of “sentence” under s. 673 (applicable to indictable offences), and s. 689(1) provides for the stay of such orders pending the appeal.

Section 462.42 provides an avenue for those not implicated in the “designated drug offence” or the “enterprise crime offence” to seek relief from a forfeiture order.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4



and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

### SYNOPSIS

This section provides for appeals from *in rem* forfeiture decisions, and decisions under s. 462.43, as if they were appeals from convictions or acquittal in proceedings by indictment.

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### SUSPENSION OF FORFEITURE PENDING APPEAL.

**462.45.** Notwithstanding anything in this Part, the operation of an order of forfeiture or restoration of property under subsection 462.34(4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43 is suspended pending

- (a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for the restoration or forfeiture of such property,
- (b) any appeal taken from an order of forfeiture or restoration in respect of the property, or
- (c) any other proceeding in which the right of seizure of the property is questioned, and property shall not be disposed of within thirty days after an order of forfeiture is made under any of those provisions. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**NOTE:** Amended 1996, Bill C-8, s. 70(j) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression "designated drug offence" with the expression "designated substance offence".

### CROSS-REFERENCES

The term "property" is defined in s. 2. Section 490(12), which also deals with the return, forfeiture and disposition of seized property, contains a similar provision requiring a 30 day stay of all such orders, in addition to stays pending any appeals or similar challenges to the order made under that section. If the order appealed from is made under s. 462.37(1), s. 689(1) stays the operation of the order if it was made in relation to an indictable offence and an appeal is launched against the order.

### SYNOPSIS

This section provides for the automatic suspension of forfeiture or restoration orders pending applications or appeals under this Part, or other proceedings in which the right of seizure is questioned. In addition, it also stipulates that property may not be disposed of 30 days after being ordered forfeit.

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### COPIES OF DOCUMENTS RETURNED OR FORFEITED / Probative force.

**462.46.** (1) Where any document is returned or ordered to be returned, forfeited or otherwise dealt with under subsection 462.34(3) or (4), 462.37(1), 462.38(2) or 462.41(3) or section 462.43, the Attorney General may, before returning the document or complying with the order, cause a copy of the document to be made and retained.

(2) Every copy made under subsection (1) shall, if certified as a true copy by the Attorney General, be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the original document would have had if it had been proved in the ordinary way. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

### CROSS-REFERENCES

The term "Attorney General" is defined in s. 2.

This provision is quite similar to the power given under s. 490(13) and (14) to use photocopies of

documents returned to their owner although those provisions require the Attorney General to certify that the copies are true before they may be admitted as if they were original documents.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

## SYNOPSIS

This section permits the Attorney General to make and retain copies of documents returned or ordered to be returned, forfeited or otherwise dealt with under this Part. Such copies, if certified by the Attorney General, are admissible in evidence, and have the same probative force as the original, in the absence of evidence to the contrary.

## Disclosure Provisions

### NO CIVIL OR CRIMINAL LIABILITY INCURRED BY INFORMANTS.

**462.47.** For greater certainty but subject to section 241 of the *Income Tax Act*, a person is justified in disclosing to a peace officer or the Attorney General any facts on the basis of which that person reasonably suspects that any property is proceeds of crime or that any person has committed or is about to commit an enterprise crime offence or a designated drug offence. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**NOTE:** Amended 1996, Bill C-8, s. 70(j) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

## CROSS-REFERENCES

The terms “property”, “peace officer”, “person” and “Attorney General” are defined in s. 2. The terms “enterprise crime offence”, “proceeds of crime” and “designated drug offence” are defined in s. 462.3.

## SYNOPSIS

This section clarifies that, subject to s. 241 of the *Income Tax Act*, a person may disclose to a peace officer or the Attorney General information resulting in a reasonable suspicion that property is proceeds of crime, or that a person has committed or is about to commit an enterprise crime or designated drug offence.

**DISCLOSURE OF INCOME TAX INFORMATION / Application / Order for disclosure of information / Service of order / Extension of period for compliance with order / Objection to disclosure of information / Determination of objection / Judge may examine information / Limitation period / Appeal to Federal Court of Appeal / Limitation period for appeal / Special rules for hearings / Ex parte representations / Copies / Further disclosure / Form / Definitions of “police officer”.**

**462.48. (1)** The Attorney General may, for the purposes of an investigation in relation to

- (a) a designated drug offence, or
- (b) an offence against section 354 or 462.31 where the offence is alleged to have been committed in relation to any property, thing or proceeds obtained or derived directly or indirectly as a result of
  - (i) the commission in Canada of a designated drug offence, or
  - (ii) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated drug offence,

make an application in accordance with subsection (2) for an order for disclosure of information under subsection (3).

**NOTE:** Subsection (1)(a) and (b) amended 1996, Bill C-8, s. 70(k) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and also may change before receiving Royal Assent) by replacing the expression “designated drug offence” with the expression “designated substance offence”.

(2) An application under subsection (1) shall be made *ex parte* in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or a person specially designated by the Attorney General for that purpose deposing to the following matters, namely,

- (a) the offence or matter under investigation;
- (b) the person in relation to whom the information or documents referred to in paragraph (c) are required;
- (c) the type of information or book, record, writing, return or other document obtained by or on behalf of the Minister of National Revenue for the purposes of the *Income Tax Act* to which access is sought or that is proposed to be examined or communicated; and
- (d) the facts relied on to justify the belief, on reasonable grounds, that the person referred to in paragraph (b) has committed or benefited from the commission of an offence referred to in paragraph (1)(a) or (b) and that the information or documents referred to in paragraph (c) are likely to be of substantial value, whether alone or together with other material, to the investigation for the purposes of which the application is made.

(3) Where the judge to whom an application under subsection (1) is made is satisfied

- (a) of the matters referred to in paragraph (2)(d), and
- (b) that there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents to which the application relates, having regard to the benefit likely to accrue to the investigation if the access is obtained,

the judge may, subject to such conditions as the judge considers advisable in the public interest, order the Deputy Minister of National Revenue or any person specially designated in writing by that Deputy Minister for the purposes of this section

- (c) to allow a police officer named in the order access to all such information and documents and to examine them, or
- (d) where the judge considers it necessary in the circumstances, to produce all such information and documents to the police officer and allow the police officer to remove the information and documents from the possession of that person,

within such period as the judge may specify after the expiration of seven clear days following the service of the order pursuant to subsection (4).

(4) A copy of an order made by a judge under subsection (3) shall be served on the person to whom the order is addressed in such manner as the judge directs or as may be prescribed by rules of court.

(5) A judge who makes an order under subsection (3) may, on application of the Minister of National Revenue, extend the period within which the order is to be complied with.

(6) The Minister of National Revenue or any person specially designated in writing by that Minister for the purposes of this section may object to the disclosure of any information or document in respect of which an order under subsection (3) has been made by certifying orally or in writing that the information or document should not be disclosed on the ground that



- (a) the Minister of National Revenue is prohibited from disclosing the information or document by any bilateral or international treaty, convention or other agreement respecting taxation to which the Government of Canada is a signatory;
  - (b) a privilege is attached by law to the information or document;
  - (c) the information or document has been placed in a sealed package pursuant to law or an order of a court of competent jurisdiction; or
  - (d) disclosure of the information or document would not, for any other reason, be in the public interest.
- (7) Where an objection to the disclosure of information or a document is made under subsection (6), the objection may be determined, on application, in accordance with subsection (8), by the Chief Justice of the Federal Court, or by such other judge of that court as the Chief Justice may designate to hear such applications.
- (8) A judge who is to determine an objection pursuant to subsection (7) may, if the judge considers it necessary to determine the objection, examine the information or document in relation to which the objection is made and shall grant the objection and order that disclosure of the information or document be refused where the judge is satisfied of any of the grounds mentioned in subsection (6).
- (9) An application under subsection (7) shall be made within ten days after the objection is made or within such greater or lesser period as the Chief Justice of the Federal Court, or such other judge of that court as the Chief Justice may designate to hear such applications, considers appropriate.
- (10) An appeal lies from a determination under subsection (7) to the Federal Court of Appeal.
- (11) An appeal under subsection (10) shall be brought within ten days from the date of the determination appealed from or within such further time as the Federal Court of Appeal considers appropriate in the circumstances.
- (12) An application under subsection (7) or an appeal brought in respect of that application shall
- (a) be heard *in camera*; and
  - (b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.
- (13) During the hearing of an application under subsection (7) or an appeal brought in respect of that application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*.
- (14) Where any information or document is examined or provided under subsection (3), the person by whom it is examined or to whom it is provided or any officer of the Department of National Revenue may make, or cause to be made, one or more copies thereof and any copy purporting to be certified by the Minister of National Revenue or an authorized person to be a copy made pursuant to this subsection is evidence of the nature and content of the original information or document and has the same probative force as the original information or document would have had if it had been proved in the ordinary way.
- (15) No person to whom information or documents have been disclosed or provided pursuant to this subsection or pursuant to an order made under subsection (3) shall further disclose the information or documents except for the purposes of the investigation in relation to which the order was made.
- (16) An order made under subsection (3) may be in Form 47.

(17) In this section, “police officer” means any officer, constable or other person employed for the preservation and maintenance of the public peace. R.S.C. 1985, c. 42 (4th Supp.), s. 2; 1994, c. 13, s. 7.

#### CROSS-REFERENCES

The terms “property” and “Attorney General” are defined in s. 2. The terms “designated drug offence” and “judge” are defined in s. 462.3. Section 46 of the Federal Court Act gives that court the power to make rules of court. The meaning of “clear days” (see s. 462.3) is to be determined by referring to s. 27(1) of the Interpretation Act.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

#### SYNOPSIS

This section authorizes *ex parte* applications in writing by an Attorney General to a judge for an order that the Deputy Minister of National Revenue, or his designate, allow access to a peace officer, or produce information and documents.

The Attorney General must depose by affidavit sworn on his information and belief, or that of his designate, that the information is sought for the purpose of an investigation in relation to a designated drug offence (or certain related offences). The Attorney General must also identify the person in relation to whom the information or documents are required, as well as the type of information sought, and set out the facts relied upon to justify the *belief on reasonable grounds* that the person has committed or benefited from the offence. Finally, the Attorney General must state that the information or documents are likely to be of substantial value.

In determining whether to grant the order the judge shall consider the facts attested to in the affidavit, the public interest and the likely benefit to the investigation.

Where an order is issued, it may be subject to such terms as the judge considers advisable in the public interest. The order shall also set out the period of its validity (commencing seven days after service), and shall provide for service in some manner on the person to whom it is addressed.

The section further provides for objection by the Minister of National Revenue or his/her designate to the disclosure of information and for extension of time to comply, and for certain appeals.

Where information or documents are examined or provided, they may be copied. Copies certified by the Minister of National Revenue may be used in evidence. No person to whom information or documents have been disclosed or provided can make further disclosure except for the purpose of the particular investigation.

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### *Specific Rules of Forfeiture*

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#### SPECIFIC FORFEITURE PROVISIONS UNAFFECTED BY THIS PART / Priority for restitution to victims of crime.

**462.49. (1)** This Part does not affect the operation of any other provision of this or any other Act of Parliament respecting the forfeiture of property.

(2) The property of an offender may be used to satisfy the operation of a provision of this or any other Act of Parliament respecting the forfeiture of property only to the extent that it is not required to satisfy the operation of any other provision of this or any other Act of Parliament respecting the restitution or compensation of persons affected by the commission of offences. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The term “property” is defined in s. 2. Provisions regarding restitution of property are to be found in s. 491.1 and those regarding compensation to victims of crime are in ss. 725, 726 and 727 to 727.9.

This section is incorporated into the Food and Drugs Act relating to controlled drugs in s. 43.4 and to restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

**SYNOPSIS**

This section clarifies that this Part does not affect the operation of other forfeiture provisions in the Code or in any other Act of Parliament. It also provides that the property of an offender may be used to satisfy such other forfeiture provisions only to the extent not required to satisfy orders for restitution or compensation of victims of crime made pursuant to federal enactment.

***Regulations*****REGULATIONS.**

**462.5.** The Attorney General may make regulations governing the manner of disposing of or otherwise dealing with, in accordance with the law, property forfeited under this Part. R.S.C. 1985, c. 42 (4th Supp.), s. 2.

**CROSS-REFERENCES**

The terms “property” and “Attorney General” are defined in s. 2.

This section is incorporated into the Food and Drugs Act, relating to controlled drugs in s. 43.4 and restricted drugs in s. 51. Section 19.3 of the Narcotic Control Act serves the same purpose in that Act.

**Part XIII / ATTEMPTS – CONSPIRACIES – ACCESSORIES****ATTEMPTS, ACCESSORIES.**

**463.** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:

- (a) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to be sentenced to death or to imprisonment for life is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years;
- (b) every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for fourteen years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable;
- (c) every one who attempts to commit or is an accessory after the fact to the commission of an offence punishable on summary conviction is guilty of an offence punishable on summary conviction; and
- (d) every one who attempts to commit or is an accessory after the fact to the commission of an offence for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not



- exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable, or
- (ii) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 421; R.S.C. 1985, c. 27 (1st Supp.), s. 59.

#### CROSS-REFERENCES

Attempt is defined in s. 24. Accessory after the fact is defined in s. 23. Also see s. 23.1.

The offence of attempted murder is punishable under s. 239, of accessory after the fact to murder under s. 240. As to mode of trial for these offences, see the cross-references under those sections. Note that where the substantive offence, for example theft of goods of a value not exceeding \$1,000, is within the absolute jurisdiction of a provincial court judge by virtue of s. 553, then an attempt to commit or being an accessory after the fact to the commission of the offence is, by virtue of s. 553(b), also within the absolute jurisdiction of the provincial court judge. For notes concerning the operation of that section as it applies to the particular offence, see the cross-references under the section creating the substantive offence.

Similarly, for other offences, the rights of election and mode of trial generally follow the substantive offence and therefore see notes under the section creating the substantive offence. Note however that attempted murder, unlike murder, is not within the exclusive jurisdiction of the superior court under s. 469.

See s. 7 enacting territorial jurisdictional rules respecting offences committed on aircraft, offences in relation to nuclear material, attempt to commit or being an accessory after the fact to the offence in s. 269.1 (torture), war crimes and crimes against humanity.

Under s. 586, no count that alleges an attempt by fraudulent means is insufficient by reason only that it does not set out in detail the nature of the fraudulent means. Section 587(1) however gives the court power to order that further particulars be provided of the alleged attempt by fraudulent means.

#### SYNOPSIS

This section sets out a general scheme of punishment for attempting to commit, or being an accessory after the fact, to the commission of all offences which are not otherwise expressly dealt with by law.

Paragraph (a) provides that a person who attempts to commit or is an accessory after the fact to the commission of an indictable offence which carries a maximum punishment of life imprisonment, is guilty of an indictable offence and liable to a term of imprisonment not exceeding 14 years.

Paragraph (b) provides that a person who attempts to commit, or is an accessory after the fact to the commission of an indictable offence which carries a maximum term of 14 years' imprisonment or less, is guilty of an indictable offence and liable to imprisonment for a term not exceeding one-half the maximum punishment set out for the actual commission of that offence.

Paragraph (c) provides that any person who attempts to commit, or is an accessory after the fact to the commission of a summary conviction offence is also guilty of a summary conviction offence.

Paragraph (d) states that any person who attempts to commit, or is an accessory after the fact to the commission of a hybrid offence is guilty of an indictable offence and liable to a term of imprisonment that is half the maximum provided for the actual commission of the offence, or is guilty of a summary conviction offence.

#### COUNSELLING OFFENCE THAT IS NOT COMMITTED.

464. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and liable to the

same punishment to which a person who attempts to commit that offence is liable; and

- (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 422; R.S.C. 1985, c. 27 (1st Supp.), s. 60.

#### CROSS-REFERENCES

“Counsel” is defined in s. 22(3). The liability of a person who counsels commission of an offence and an offence is committed is defined in s. 22(1) and (2). Punishment for attempt to commit an offence is set out in s. 463 with the exception of attempted murder (s. 239) and thus see cross-references under s. 463. Note that where the substantive offence, for example theft of goods of a value not exceeding \$1000, is within the absolute jurisdiction of a provincial court judge by virtue of s. 553, then counselling the offence is by virtue of s. 553(b) also within the absolute jurisdiction of the provincial court judge. Presumably, that provision would also apply to counselling an offence listed in s. 553 which is not committed. For counselling all other indictable offences which are not committed, the accused would have an election as to mode of trial under s. 536(2). For the offence in para. (b), the trial of the offence is conducted by a summary conviction court pursuant to Part XXVII. The limitation period is set out in s. 786(2).

See s. 7 enacting special territorial jurisdictional rules respecting offences committed on aircraft, offences in relation to nuclear material, counselling the offence in s. 269.1 (torture), war crimes and crimes against humanity.

#### SYNOPSIS

This section makes it an offence to counsel another person to commit an offence, where that offence is not committed.

Paragraph (a) states that every one who counsels another person to commit an indictable offence, provided that the offence is not committed, is him/herself guilty of an indictable offence and liable to the same punishment as would be imposed for an attempt to commit that offence.

Paragraph (b) likewise makes it a summary conviction offence to counsel another person to commit an offence punishable on summary conviction, given that the offence is not committed.

#### ANNOTATIONS

The accused was properly convicted of procuring the death of his wife where he accepted the offer of an undercover police officer posing as a contract killer and agreed to pay the officer for the killing. Further, although the officer had no intention of carrying out the plan and the accused's acts had no influence on the officer's conduct or state of mind, the accused was properly convicted of the full offence under this section rather than merely an attempt: *R. v. Glubisz* (1979), 47 C.C.C. (2d) 232, 9 C.R. (3d) 300 (B.C.C.A.). Similarly, *R. v. Walia (No. 1)* (1975), 9 C.R. (3d) 293 (B.C.C.A.).

A person may be convicted of this offence although the person counselled would only be a party to the offence if it were committed: *Re Meikle and The Queen* (1983), 9 C.C.C. (3d) 91 (Ont. H.C.J.).

“Procure” means to instigate, persuade or solicit. The offence is complete when the solicitation or incitement occurs even though it is immediately rejected by the person solicited and it is no defence to the charge that the accused subsequently renounces the criminal purpose: *R. v. Gonzague* (1983), 4 C.C.C. (3d) 505, 34 C.R. (3d) 169 (Ont. C.A.).

**CONSPIRACY / Conspiracy to commit offences / Idem / Jurisdiction / Appearance of accused at trial / here previously tried outside Canada.**

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:

- (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;
- (b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and liable
  - (i) to imprisonment for a term not exceeding ten years, if the alleged offence is one for which, on conviction, that person would be liable to be sentenced to death or to imprisonment for life or for a term not exceeding fourteen years, or
  - (ii) to imprisonment for a term not exceeding five years, if the alleged offence is one for which, on conviction, that person would be liable to imprisonment for less than fourteen years; and
- (c) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a) or (b) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and
- (d) every one who conspires with any one to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction.

(2) [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 61(3).*]

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

(4) Every one who, while in a place outside Canada, conspires with any one to do anything referred to in subsection (1) in Canada shall be deemed to have conspired in Canada to do that thing.

(5) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4), proceedings in respect of that offence may, whether or not that person is in Canada, be commenced in any territorial division in Canada, and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(6) For greater certainty, the provisions of this Act relating to

- (a) requirements that an accused appear at and be present during proceedings, and
  - (b) the exceptions to those requirements,
- apply to proceedings commenced in any territorial division pursuant to subsection (5).

(7) Where a person is alleged to have conspired to do anything that is an offence by virtue of subsection (3) or (4) and that person has been tried and dealt with outside Canada in respect of the offence in such a manner that, if the person had been tried and dealt with in Canada, he would be able to plead *autrefois acquit*, *autrefois convict* or pardon, the person shall be deemed to have been so tried and dealt with in Canada. R.S., c. C-34, s. 423; 1974-75-76, c. 93, s. 36; 1980-81-82-83, c. 125, s. 23; R.S.C. 1985, c. 27 (1st Supp.), s. 61.

#### CROSS-REFERENCES

Trial of the offence of conspiracy to commit the offences listed in s. 469(a), namely: s. 47, treason; s. 49, alarming Her Majesty; s. 51, intimidating Parliament or a legislature; s. 53, inciting to mutiny; s. 61, seditious offences; s. 74, piracy; s. 75, piratical acts; s. 235, murder, is by the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469. By virtue of s. 522,



only a judge of the superior court of criminal jurisdiction may release an accused charged with any of those offences. For the offence described in subsec. (1)(b), the accused has his election as to mode of trial pursuant to s. 536(2) and release is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498 for the offence described in para. (b)(ii). For conspiracy to commit all other indictable offences, including the indictable offences within the absolute jurisdiction of a provincial court judge under s. 553, the accused has his election as to mode of trial under s. 536(2). Release pending trial is determined by s. 515, although the accused is eligible for release by the officer in charge pursuant to s. 498 where the substantive offence is punishable by five years imprisonment or less.

For conspiracy to commit a summary conviction offence (para. (d)) then the proceedings are conducted by a summary conviction court pursuant to Part XXVII. The punishment is then as set out in s. 787 [although see s. 719(b) where the accused is a corporation] and the limitation period is set out in s. 786(2). Release pending trial is determined under s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

In addition to the special jurisdictional rules in subsecs. (3) to (6), see s. 7 respecting offences committed on aircraft, offences in relation to nuclear material, conspiracy to commit the offence in s. 269.1 (torture), war crimes and crimes against humanity.

The procedure respecting the pleas of *autrefois* is found in ss. 607 to 610.

Under s. 586, no count that alleges a conspiracy by fraudulent means is insufficient by reason only that it does not set out in detail the nature of the fraudulent means. Section 587(1), however, gives the court power to order that further particulars be provided of the alleged conspiracy by fraudulent means.

See s. 467, a saving provision in respect of refusing to work and trade combinations.

## SYNOPSIS

This section sets out various offences of conspiracy and provides for punishment upon conviction for each of these offences.

Subsection (1) states that the provisions contained therein apply except where otherwise expressly provided by law.

Subsection (1)(a) provides that any person who conspires with another person to commit murder anywhere is guilty of an indictable offence and liable to a maximum term of life imprisonment.

Subsection (1)(b) sets out the punishments applied to a person who is guilty of conspiring to prosecute another person for an alleged offence, *knowing* that that person did not commit the offence.

Subsection (1)(c) and (d) described the offences of conspiracy to commit either an indictable or a summary conviction offence and the punishment upon conviction for these offences.

Subsection (3) states that any person who, while in Canada, conspires to do anything described in subsec. (1) in a place outside Canada that is against the law in that place is deemed to have committed the conspiracy in Canada.

Subsection (4) provides that a person who conspires to do anything referred to in subsec. (1) in Canada while outside Canada is deemed to have committed the offence of conspiracy in Canada.

Subsection (5) states that proceedings against any person under subsecs. (3) or (4) may be commenced anywhere in Canada and that the accused may be tried and punished in the same manner as if the offence had been committed in that location.

Subsection (6) clarifies that, subject to certain exceptions the accused must appear and be present during proceedings commenced under subsec. (5).

Subsection (7) states that if a person has been tried and dealt with outside Canada in relation to offences under subsecs. (3) and (4), in such a manner that would, in Canada, give rise to the pleas of *autrefois acquit*, *autrefois convict*, or pardon, the person shall be deemed to have been so tried and dealt with in Canada.

## ANNOTATIONS

**Meaning of conspiracy** – The essential elements of a conspiracy are an agreement by two or more persons to commit a criminal offence, or to achieve a lawful object by commission of a criminal offence; an intention by two or more persons to agree, and an intention to put this common design into effect. It is not necessary that there be proof of any overt act in furtherance of the conspiracy, to complete the crime. Where there are alleged to be only two conspirators and one of them had no intention of carrying out the common design, then there is no proof of a conspiracy: *R. v. O'Brien* (1954), 110 C.C.C. 1, [1954] S.C.R. 666, 19 C.R. 371 (3:2).

On the trial of a charge contrary to para. (1)(c) of conspiracy to commit a specified indictable offence the Crown must establish an intention by the accused to enter into an agreement to commit that offence. Mere recklessness with respect to the subject of the agreement is not sufficient where the evidence indicates that a number of courses of actions were being considered only some of which were illegal: *R. v. Lessard* (1982), 10 C.C.C. (3d) 61 (Que. C.A.).

Aiding and abetting pursuant to a common intent and design in the commission of a substantive offence is not necessarily the same thing as conspiring to commit the same offence, and accordingly an acquittal of the conspiracy is not inconsistent with a conviction on the substantive count: *Koury v. The Queen*, [1964] 2 C.C.C. 97, 42 C.R. 210 (S.C.C.) (6:3).

It was held in *R. v. Cotroni; Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1, 93 D.L.R. (3d) 161, 7 C.R. (3d) 185 (S.C.C.) (7:0), that to have a conspiracy it was essential that there be an agreement between the co-conspirators, and that there must be a common purpose of a single enterprise. In this case although there was in the most general terms an adventure with a common object, namely to possess certain extorted funds, there was no general agreement, rather, two competing and mutually exclusive objects: the agreement of one group of conspirators being to relieve the others of the extorted funds. There were therefore two separate conspiracies revealed by the evidence and since only one took place in Ontario, the venue of the trial, it was to be assumed that it was this conspiracy which was embraced by the indictment.

Conspiracy rests in the joint decision of two or more persons to pursue a common object. In the absence of such common object, mutual conduct which involves the commission of one or more offences does not render those involved liable as conspirators. Thus, before an accused could be convicted of conspiracy to commit fraud arising out of a scheme involving submission of false refund claims by a co-worker, in which the accused participated on one occasion only, there must be evidence that the accused was not only aware of the general scheme but had made its object her own and agreed to work with her co-worker in achieving that object: *R. v. Cebulak* (1988), 46 C.C.C. (3d) 437 (Ont. H.C.J.).

**Party to conspiracy** – To constitute a conspiracy the conspirators must not only agree but must agree to do something and mere knowledge of, discussion of or passive acquiescence in a plan of criminal conduct is not of itself sufficient. However, an accused can become a party to the offence of conspiracy (as opposed to a participant in the conspiracy) by virtue of s. 21 if, for example, at any time prior to the attainment of the conspiracy's object he abetted or encouraged any of the conspirators to pursue its object: *R. v. McNamara et al. (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 452-4.

**Conspiracy between spouses** – A husband and wife cannot be found guilty of conspiring together as in law they are considered as one person: *Kowbel v. The Queen* (1954), 110 C.C.C. 47, 18 C.R. 380 (S.C.C.) (4:1).

**Effect of acquittal of co-conspirator or where co-conspirator cannot be convicted** – Where two alleged co-conspirators are tried separately the acquittal of one does not necessarily invalidate the conviction of the other. Moreover, where the evidence against one of two conspirators is substantially stronger the better course is to direct separate trials,

particularly when a damaging statement admissible only against the one is to be tendered by the Crown. Of course when substantially the same evidence is admissible against jointly-tried conspirators as a matter of logic (although not any imperative rule of law) both should be either convicted or acquitted: *Guimond v. The Queen* (1979), 44 C.C.C. (2d) 481, 26 N.R. 91 (S.C.C.) (7:2).

Moreover, even where one of the two parties to the agreement cannot, as a matter of law, be convicted of the conspiracy, such as the prostitute on a charge of conspiracy to live on the avails of her prostitution, the other person may be convicted of conspiracy: *R. v. Murphy and Bieneck* (1981), 60 C.C.C. (2d) 1, 21 C.R. (3d) 39 (Alta. C.A.).

**Proof of conspiracy alleged** – Although the gravamen of the offence of conspiracy to import narcotics is the agreement to import narcotics rather than a particular narcotic, where the Crown has chosen to particularize the narcotic, in this case heroin, the Crown was required to prove that offence and not some other conspiracy. To allow the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars: that purpose is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. In this case, it was not appropriate to amend the indictment on appeal to remove reference to the term “heroin”. No such amendment was sought at trial and the trial had proceeded originally on the basis that the Crown must prove a conspiracy relating to heroin and, on this basis, one of the accused took the stand and testified that he was only involved in a conspiracy relating to cocaine. It would be unfair and prejudicial to the accused after that course of events to permit an amendment fundamentally and retroactively changing the nature of what the Crown must prove: *R. v. Saunders* (1990), 56 C.C.C. (3d) 220, 108 N.R. 234, [1990] 1 S.C.R. 1020, 77 C.R. (3d) 397.

**Conspiracy having more than one object** – An agreement to commit a number of indictable offences is only one conspiracy transaction: *R. v. Krueger*, [1966] 3 C.C.C. 127, 55 W.W.R. 624 (Sask.C.A.) and *R. v. Addison ex p. Mooney*, [1970] 1 C.C.C. 127, [1969] 2 O.R. 674 (C.A.).

A single conspiracy may have more than one illegal object, and it is proper to allege in one count a conspiracy to commit several crimes. If the Crown proves a conspiracy to do any of the prohibited acts alleged in the indictment as the objects of the conspiracy then that is sufficient to support a conviction. In fact, where there is but one agreement and not separate agreements as to the different unlawful objects there can be only one conviction. On the other hand, where the prosecution proves only that some of those accused had conspired with one of their number for their own purposes no common purpose such as that alleged has been established. However, where the evidence establishes the conspiracy alleged against two or more accused or against one accused and an unknown person, where the indictment alleges that the accused conspired together with persons unknown, it is immaterial that the evidence also discloses another wider conspiracy to which the accused or some of them were also parties: *R. v. Paterson, Ackworth and Kovach* (1985), 18 C.C.C. (3d) 137, 44 C.R. (2d) 150 (Ont. C.A.), affd 39 C.C.C. (3d) 575, 60 C.R. (3d) 107 (S.C.C.) (7:0).

Indictments charging conspiracy may raise problems as to whether a conspiracy count has charged the accused with two or more conspiracies, which raises an issue of duplicity. In the alternative, the count may charge only one conspiracy but the proof at trial may demonstrate that there was more than one conspiracy. In the latter case, the issue is whether the Crown has proved the conspiracy charged despite the evidence of a second conspiracy. In determining this issue, the court will have regard to the wording of the indictment and may also look to the opening of the Crown. In order to find that a specific conspiracy lies within the scope of the indictment, it is sufficient if the evidence adduced demonstrates that the conspiracy proven included some of the accused; established that it occurred at some time within the time frame alleged in the indictment; and



had as its object the type of crime alleged: *R. v. Douglas* (1991), 63 C.C.C. (3d) 29, [1991] 1 S.C.R. 301, 3 C.R. (4th) 246 (5:0).

**Multiple convictions ["Kienapple rule"]** – The doctrine in *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 26 C.R.N.S. 1 (S.C.C.) which precludes multiple convictions for the same delict does not prevent a conviction for conspiracy and for a substantive offence which also formed some of the evidence relied upon by the Crown in proof of the conspiracy: *Sheppe v. The Queen* (1980), 51 C.C.C. (2d) 481, [1980] 2 S.C.R. 22, 15 C.R. (3d) 381 (7:0).

**Conspiracy and attempt** – It was held in *R. v. Dungey* (1979), 51 C.C.C. (2d) 86 (Ont. C.A.) that there is no offence known to law of attempt to conspire to commit a further substantive offence such as fraud. The Court left open the question whether it would be possible to have an attempted conspiracy where the conspiracy is the substantive offence.

Conspiracy to commit the offence contrary to s. 139(2) of attempting to obstruct justice is an offence known to law: *R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused December 20, 1984.

**Effect of withdrawal from conspiracy** – It is no defence that an accused having agreed to carry out the unlawful act with the intention to carry out the common design later withdraws from the conspiracy, since the offence is already complete: *R. v. O'Brien, supra*.

**Co-conspirator's exception to hearsay rule** – The case of *R. v. Baron and Wertman* (1976), 31 C.C.C. (2d) 525, 73 D.L.R. (3d) 213 (Ont. C.A.) contains a detailed review of the law of evidence which permits evidence of the acts and declarations of one conspirator done in furtherance of the conspiracy to be admitted against other co-conspirators. Martin, J.A., for the Court suggests that the following procedure be followed:

1. At the end of the whole case the trial Judge must decide as a matter of law, whether there is any admissible evidence against an accused from his own acts and declarations, that he is a participant in the conspiracy charged.
2. If there is no evidence directly admissible against an accused connecting him with the conspiracy the trial Judge must direct the jury to acquit that accused.
3. If the trial Judge concludes that there is some evidence admissible directly against an accused that he was a party to the conspiracy, he will instruct the jury that they must first find from evidence admissible directly against an accused (that is by evidence other than the acts and declarations of alleged co-conspirators) that he was a party to the conspiracy charged. The trial Judge will then instruct the jury that if they find from such evidence that the accused was a party to the conspiracy the acts and declarations of alleged co-conspirators in furtherance of the conspiracy may be used as evidence against him. . .
4. As a general rule, it would be desirable for the trial Judge to *then* refer the jury to the principal evidence admissible *directly* against each accused from which they may find that such accused was a party to the conspiracy but the jury should be instructed that it is for them to say if the evidence has this effect.
5. Finally, he must instruct the jury that on the whole of the evidence they must be satisfied beyond a reasonable doubt that the accused was a member of the conspiracy.

In *R. v. Filiault and Kane* (1981), 63 C.C.C. (2d) 321 (Ont. C.A.), affd 15 C.C.C. (3d) 352n, [1984] 1 S.C.R. 389 (7:0) it was held that in determining whether the condition in rule (1), *supra*, was met the trial Judge is entitled to view the accused's own acts and declarations against the picture provided by the acts of the alleged co-conspirators. The Judge is not required to view the accused's acts and declarations in isolation, divorced from the context in which they occurred.

Hearsay evidence is inadmissible on the initial determination whether the alleged con-

spiracy or alleged common design existed: *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287, 90 N.S.R. (2d) 164 (C.A.).

In charging the jury on the applicability of the co-conspirator's exception to the hearsay rule the trial Judge should instruct them to consider whether on all the evidence they are satisfied beyond a reasonable doubt that the conspiracy charged in the indictment existed. If they conclude that a conspiracy as alleged did exist, they must then review the evidence and decide whether, on the basis of the evidence directly received against the accused, a probability is raised that he was a member of the conspiracy. If this conclusion is reached, they then become entitled to apply the hearsay exception and consider evidence of the acts and declarations performed and made by the co-conspirators in furtherance of the objects of the conspiracy as evidence against the accused on the issue of his guilt. They should be told, however, that the ultimate determination of guilt is for them alone and that the mere fact that they have found sufficient evidence directly admissible against the accused to enable them to consider his participation in the conspiracy probable, and to apply the hearsay exception, does not make a conviction automatic: *R. v. Carter* (1982), 67 C.C.C. (2d) 568, 31 C.R. (3d) 97, [1982] 1 S.C.R. 938 (5:0).

**Conspiracy to commit offence outside Canada [subsec. (3)]** – In *Gunn v. The Queen* (1982), 66 C.C.C. (2d) 294, 27 C.R. (3d) 120, [1982] 1 S.C.R. 522, the Supreme Court of Canada, having allowed the accused's appeal from the decision of the Manitoba Court of Appeal (1980), 54 C.C.C. (2d) 163, 4 Man. R. (2d) 269 *sub nom. R. v. Apaya and Gunn* on other grounds, did not find it necessary to give any direction in detail as to how the charge of conspiracy involving breach of foreign criminal law as envisaged by this subsection should be framed. However, it was held that the statutory fiction of a conspiracy in Canada in violation of foreign law can only become operative if a breach of the foreign law is charged.

And in *R. v. Baldini and Gullekson* (1984), 39 C.R. (3d) 43, 31 Alta. L.R. (2d) 69 (C.A.), the court considered that the charge should also make specific reference to subsec. (3).

Although the accused had agreed to supply narcotics to an undercover police officer in the United States, there was a substantial link between the offence alleged and Canada. Thus, *inter alia*, the accused were in Canada for the negotiations with the officer and when the agreement was finally made. Accordingly, there was no need for the Crown to charge the accused under subsec. (3), but could rely on the general conspiracy provisions in subsec. (1)(c): *R. v. Douglas* (1989), 51 C.C.C.(3d) 129, 72 C.R. (3d) 309 (Ont. C.A.).

The accused could properly be convicted of conspiracy to traffic in narcotics without reference to subsec. (3) where the evidence showed that they agreed in Canada to sell or offered to sell narcotics to a third person, even if the deal was to be completed in the United States. Under the Narcotic Control Act, a simple offer to sell can constitute trafficking and the absence of delivery of the drug or receipt of the proceeds in Canada is not relevant: *R. v. Rowbotham*; *R. v. Roblin* (1992), 76 C.C.C. (3d) 542 (Ont. C.A.).

**Conspiracy outside Canada to commit offence in Canada [subsec. (4)]** – Where the indictment alleges that the conspiracy actually took place in Canada it is not open to the Crown to rely on the provisions of subsec. (4) to prove all the components of the charge. If the agreement took place wholly outside Canada the indictment must so allege: *R. v. Dass* (1979), 47 C.C.C. (2d) 194, 8 C.R. (3d) 224 (Man. C.A.), leave to appeal to S.C.C. refused 30 N.R. 609n, 4 Man. R. (2d) 86n.

**Territorial jurisdiction [subsec. (5)]** – An offence is “an offence by virtue of subsection ... (4)” although it could also be tried in Canada, albeit in another province, at common law. Subsection (4) is not restricted to cases which would not have been offences against Canadian law before the passage of that provision: *R. v. Lai and Lau* (1985), 24 C.C.C. (3d) 237 (B.C.C.A.).

**CONSPIRACY IN RESTRAINT OF TRADE / Trade union, exception.**

**466. (1)** A conspiracy in restraint of trade is an agreement between two or more persons to do or to procure to be done any unlawful act in restraint of trade.

**(2)** The purposes of a trade union are not, by reason only that they are in restraint of trade, unlawful within the meaning of subsection (1). R.S., c. C-34, s. 424.

**CROSS-REFERENCES**

Conspiracy in restraint of trade is a common law offence. As this section does not create an offence and with the repeal of s. 465(2) (common law conspiracy), it is entirely possible that the offence of conspiracy in restraint of trade can no longer be charged nor punished and that resort must be had to the substantive offences in other parts of the Code such as ss. 422 to 425 or to the offences under Part VI of the Competition Act, R.S.C. 1985, c. C-34.

**SYNOPSIS**

This section provides a definition of conspiracy in restraint of trade.

Subsection (1) states that such a conspiracy is an agreement between two or more persons to do, or arrange to have done, any *unlawful act* in restraint of trade.

Subsection (2) specifically provides that a trade union does not commit an offence under this section only by reason of the fact that its purposes are in restraint of trade.

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**SAVING / Definition of "trade combination".**

**467. (1)** No person shall be convicted of the offence of conspiracy by reason only that he

(a) refuses to work with a workman or for an employer; or

(b) does any act or causes any act to be done for the purpose of a trade combination, unless that act is an offence expressly punishable by law.

**(2)** In this section, "trade combination" means any combination between masters or workmen or other persons for the purpose of regulating or altering the relations between masters or workmen, or the conduct of a master or workman in or in respect of his business, employment or contract of employment or service. R.S., c. C-34, s. 425.

**CROSS-REFERENCES**

These provisions would appear to apply to any conspiracy offence, not just those punishable under s. 465. Thus see, for example, s. 425(c).

**SYNOPSIS**

This section provides an exception to the general offence of conspiracy.

Subsection (1) states that no person shall be convicted of conspiracy *by reason only* that he refuses to work with a workman or for an employer, or that he does any *lawful act* for the purpose of trade combination.

Subsection (2) defines the term "trade combination" for the purposes of subsec. (1).

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**Part XIV / JURISDICTION**

**General**

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**SUPERIOR COURT OF CRIMINAL JURISDICTION.**

**468.** Every superior court of criminal jurisdiction has jurisdiction to try any indictable offence. R.S., c. C-34, s. 426.



## CROSS-REFERENCES

The term “superior court of criminal jurisdiction” is defined in s. 2.

Note on mode of trial – The scheme of the Criminal Code is to classify offences as purely indictable (*e.g.*, robbery, s. 344), purely summary (*e.g.*, soliciting, s. 213) or hybrid, *i.e.*, the prosecution may elect whether to proceed by way of summary conviction or by indictment (*e.g.*, assault, s. 266). The effect of s. 468 is that the superior court of criminal jurisdiction may try any purely indictable offence or any hybrid offence where the prosecution elects to proceed by way of indictment. Other courts of criminal jurisdiction (defined in s. 2) may, however, try indictable offences except those offences listed in s. 469 (*e.g.*, murder, s. 235). The offences listed in s. 469 may only be tried by the superior court of criminal jurisdiction with a jury subject to a re-election in conformity with s. 473. Indictable offences not listed in s. 469 fall into two categories. For the majority of the indictable offences not listed in s. 469, the accused may elect his mode of trial as set out in s. 536(2) and, within limits, may change his election (see, *e.g.*, s. 561). While the Attorney General is given a narrow discretion to override this election and require a jury trial under s. 568 in the circumstances defined therein and, in addition, a provincial court judge has a discretion to override or not record an accused’s election for trial by provincial court judge and hold a preliminary inquiry (see, for example, ss. 555 and 567), the thrust of the provisions is to give the accused the right to determine the manner of trial. [In those provinces which still maintain two levels of courts in addition to the provincial court, it is in the discretion of the Crown whether to place the indictment in the superior court or the other court, however described, *e.g.*, county court, where the accused elects trial other than by provincial court judge.] The other group of offences are those offences listed in s. 553 (*e.g.*, keeping common bawdy house, s. 210(1)) which fall within the absolute jurisdiction of a provincial court judge, meaning that the accused does not have a normal election as to the mode of trial under s. 536(2). Nevertheless, the other courts with jurisdiction to try indictable offences have jurisdiction to try the offences listed in s. 553, if the provincial court judge elects not to try the offence and requires that the case proceed by way of preliminary inquiry pursuant to s. 555(1), or in the course of the trial it is disclosed that, in fact, the offence is not one over which the provincial court judge has absolute jurisdiction, in which case, the accused must then be put to his election under s. 536(2). [For example, a charge of theft of goods of a value not exceeding \$1,000 where the evidence discloses that the value of the goods exceeds \$1,000.]

For all summary conviction offences, meaning purely summary conviction or hybrid offences, where the prosecution elects to proceed by way of summary conviction, only the summary conviction court (defined in s. 785) may try the accused. The procedure for trial of summary conviction offences generally resembles trial of an indictable offence by a provincial court judge but that procedure, including special rights of appeal, is set out in Part XXVII.

## ANNOTATIONS

A superior court of criminal jurisdiction has the right to try those offences within the absolute jurisdiction of a provincial court judge: *R. v. Holliday* (1973), 12 C.C.C. (2d) 56, [1973] 5 W.W.R.363 (Alta.S.C.App.Div.).

## COURT OF CRIMINAL JURISDICTION / Accessories / Corrupting justice / Attempts / Conspiracy.

**469.** Every court of criminal jurisdiction has jurisdiction to try an indictable offence other than

- (a) an offence under any of the following sections:
  - (i) section 47 (treason),
  - (ii) section 49 (alarming Her Majesty),
  - (iii) section 51 (intimidating Parliament or a legislature),
  - (iv) section 53 (inciting to mutiny),
  - (v) section 61 (seditious offences),
  - (vi) section 74 (piracy),
  - (vii) section 75 (piratical acts), or
  - (viii) section 235 (murder);

- (b) the offence of being an accessory after the fact to high treason or treason or murder;
- (c) an offence under section 119 (bribery) by the holder of a judicial office;
- (d) the offence of attempting to commit any offence mentioned in subparagraphs (a)(i) to (vii); or
- (e) the offence of conspiring to commit any offence mentioned in paragraph (a). R.S., c. C-34, s. 427; 1972, c. 13, s. 33; 1974-75-76, c. 93, s. 37, c. 105, s. 29; R.S.C. 1985, c. 27 (1st Supp.), s. 62.

**CROSS-REFERENCES**

Note that s. 3 provides that the descriptions in parenthesis after the section number are inserted for convenience of reference only and are no part of the provision.

The term "court of criminal jurisdiction" is defined in s. 2. Only the superior court of criminal jurisdiction has jurisdiction to try the offences listed in this section. As well, only a judge of the superior court of criminal jurisdiction may release an accused pending trial for these offences, by virtue of s. 522. The ordinary mode of trial for these offences is by virtue of the combined effect of ss. 468 and 471, by way of jury. However, provision is made for re-election for trial by judge alone under s. 473.

As to mode of trial generally, see the note under s. 468.

**ANNOTATIONS**

Neither the superior Court of criminal jurisdiction nor the Court of criminal jurisdiction have jurisdiction to try a summary conviction offence *ab initio*: *R. v. Rahim* (1977), 36 C.C.C. (2d) 533 (Ont. Co. Ct.).

**JURISDICTION OVER PERSON.**

**470. Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence**

- (a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
- (b) if the accused has been ordered to be tried by
  - (i) that court, or
  - (ii) any other court, the jurisdiction of which has by lawful authority been transferred to that court. R.S., c. C-34, s. 428; R.S.C. 1985, c. 27 (1st Supp.), s. 101(3).

**CROSS-REFERENCES**

The terms "superior court of criminal jurisdiction" and "court of criminal jurisdiction" are defined in s. 2. The effect of this section is to overcome the common law rule that a criminal court's jurisdiction to try the accused was strictly local and subject to a statutory exception, *e.g.*, for offences committed at sea, the court had no jurisdiction to try an accused for an offence committed in some other country. In the circumstances set out in this section, the court can try the accused, although the offence was not committed within the territorial division (defined in s. 2), provided that the accused is found, arrested or is in custody within the territorial jurisdiction (defined by provincial legislation) of the court or has been ordered to be tried by that court, *e.g.*, by an order for change of venue under s. 599. [Note that this section deals only with territorial jurisdiction over the person of the accused, some other section must be resorted to to ensure that the information or indictment is also before the court, *e.g.*, as in s. 599(4) where an order for a change of venue is made. An alternative is by laying the information under s. 504.]

In addition to this section, a court may also acquire territorial jurisdiction over an accused by reason of special statutory provisions such as those found in s. 7, s. 465(5), or ss. 477 to 481. Sections 478 and 479 are especially useful in providing that offences committed in a number of different divisions or provinces may, with consent of the Crown, be transferred to the jurisdiction where the

accused is for guilty pleas. Further, s. 476 attempts to resolve difficult issues of territorial jurisdiction where an offence is committed near the border of a territorial division, such as on a bridge between two divisions.

As to mode of trial, see the note under s. 468.

## SYNOPSIS

This section provides that every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is also *competent to try* a person for that offence: (a) if the person is physically found within the territorial jurisdiction of the court; or (b) if the person has been ordered to be tried by that court, or any other court, the jurisdiction of which has been *lawfully* transferred to that court.

## ANNOTATIONS

Where proceedings were properly commenced under permissible territorial jurisdiction of a Justice and the accused was committed for trial to a particular Court of criminal jurisdiction that Court has jurisdiction to hear and determine the charges even though the offence was committed in another territorial division within the same province: *R. v. McMorris And Francis* (1971), 4 C.C.C. (2d) 268, [1971] 3 O.R. 748 (Ont. Co. Ct.).

Where an accused appears and enters a plea the Court before which he appears has jurisdiction by virtue of para. (a) in that the accused is “in custody within the territorial jurisdiction of the Court” notwithstanding the offence was not committed in that territorial division. Alternatively, if an objection is taken to the Court’s jurisdiction and the objection is overruled then the accused has been “ordered to be tried by that Court” within the meaning of para. (b)(i) and the Court by virtue of that section has jurisdiction: *R. v. Rice, ex p. Katz and Laviuch et al.*, [1968] 3 C.C.C. 85, 63 W.W.R. 64 (Man. C.A.).

Where the accused is briefly in custody in the county and appears in the same county for his preliminary hearing he is “in custody” and is “found” in the county for the purposes of this section and the County Court of that county has jurisdiction to try him notwithstanding the offence is not committed in that county. Further, in British Columbia, as the Provincial Court has jurisdiction to hold a preliminary hearing in any part of the province a committal for trial to a County Court of a particular county where the preliminary hearing is held by the Provincial Court Judge will vest that County Court with jurisdiction under para. (b): *Re Falkner and The Queen* (1977), 37 C.C.C. (2d) 330 (B.C.S.C.), *affd* 40 C.C.C. (2d) 117 (C.A.).

At common law the accused has a *prima facie* right to be tried in the county in which the offence was committed and this rule, in the absence of a court-ordered change of venue, continues except as modified by this section. However, the words “is in custody within the territorial jurisdiction of the court” do not give the Court of one county jurisdiction where the accused, arrested in another county where the offence was committed, is merely brought to the former county in custody and then released on bail. If this section were to apply in such circumstances then it would be open to the Crown to select the venue of the trial by simply arranging to have an accused held in custody in the jurisdiction of its choice: *R. v. Sarazin and Sarazin* (1978), 39 C.C.C. (2d) 131, 3 C.R. (3d) 97 (P.E.I.S.C.).

## TRIAL BY JURY COMPULSORY.

471. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury. R.S., c. C-34, s. 429.

## CROSS-REFERENCES

The Code has, of course, enacted a number of exceptions to the rule set out in this section, generally, but not always conditional on the accused’s consent to some other form of trial. As to mode of



trial generally, see the note under s. 468. Also see notes under s. 11(f) of the Charter concerning the constitutional right to a jury trial.

#### 472. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 63.]

##### Transitional provision

Note: R.S.C. 1985, c. 27 (1st Supp.), s. 205, proclaimed in force December 4, 1985, provides as follows:

"205. The *Criminal Code*, as it read immediately before the coming into force of the repeal of section 429.1 [now s. 472] made by section 63 of this Act, continues to apply to any prosecution in which the information was laid before the coming into force of that amendment."

#### TRIAL WITHOUT JURY / Joinder of other offences / Withdrawal of consent.

473. (1) Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

(1.1) Where the consent of the accused and the Attorney General is given in accordance with subsection (1), the judge of the superior court of criminal jurisdiction may order that any offence be tried by that judge in conjunction with the offence listed in section 469.

(2) Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal. R.S., c. C-34, s. 430; R.S.C. 1985, c. 27 (1st Supp.), s. 63; 1994, c. 44, s. 30.

#### CROSS-REFERENCES

The terms "Attorney General" and "superior court of criminal jurisdiction" are defined in s. 2. Also see the note as to mode of trial under s. 468.

#### SYNOPSIS

This section describes the circumstances in which a person charged with an offence listed in s. 469 may have a trial without a jury. If the accused and the Attorney General consent, a s. 469 offence may be tried by judge of a superior court of criminal jurisdiction without a jury. Consent given under this section cannot be withdrawn unless both the accused and the Attorney General agree to the withdrawal.

#### ANNOTATIONS

Where an accused who is represented by counsel consents under this section to be tried on a charge of murder by a Judge alone there is no duty on the Judge to inquire into the accused's understanding of his choice. Specifically no such duty arises merely because the accused is only 16 years of age: *R. v. Davis* (No. 2) (1977), 35 C.C.C. (2d) 464, [1977] 4 W.W.R. 47 (Alta. S.C., App.Div.).

A Crown Attorney, as agent of the Attorney General, may consent to the re-election under this section. On the other hand, no re-election is required where the jury has not been empanelled and the accused merely intends to plead guilty to the offence charged or an included offence: *R. v. Luis* (1989), 50 C.C.C. (3d) 398 (Ont. H.C.J.).

It was held in *R. v. Turpin* (1989), 48 C.C.C. (3d) 8, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97 (6:0), that s. 11(f) of the Charter confers no constitutional right to be tried by a judge without a jury. The purpose of s. 11(f) is to give an accused the right to a jury trial and to ensure that if a jury trial is not of benefit to the accused, the accused may waive the constitutional right to a jury trial. However, where the Criminal Code requires a jury trial then s. 11(f) gives the accused no right to elect another mode of trial.

In *R. v. Cardinal* (unreported, January 31, 1996, Alta. Q.B.) [096/075/004-38 pp.], it was held that prosecutorial discretion to refuse to consent to a re-election may be reviewable pursuant to ss. 7 and 11(d) of the Charter.

#### **ADJOURNMENT WHEN NO JURY SUMMONED / Adjournment on instruction of judge.**

474. (1) Where the competent authority has determined that a panel of jurors is not to be summoned for a term or sittings of the court for the trial of criminal cases in any territorial division, the clerk of the court may, on the day of the opening of the term or sittings, if a judge is not present to preside over the court, adjourn the court and the business of the court to a subsequent day. R.S., c. C-34, s. 431.

(2) A clerk of the court for the trial of criminal cases in any territorial division may, at any time, on the instructions of the presiding judge or another judge of the court, adjourn the court and the business of the court to a subsequent day. R.S., c. C-34, s. 431; 1994, c. 44, s. 31.

#### **CROSS-REFERENCES**

The terms “territorial division” and “clerk of the court” are defined in s. 2. See s. 763 respecting the accused’s recognizance remaining in force.

#### **SYNOPSIS**

This section empowers the clerk of the court, where no judge is present at the opening of the term, to adjourn court proceedings to a subsequent day if the competent authority has determined that a panel of jurors is not to be summoned for a term or sittings of the court. It also provides in subsec. (2) that, on instructions of a judge, the clerk may, at any time, adjourn the court.

#### **ACCUSED ABSCONDING DURING TRIAL / Adverse inference / Accused not entitled to re-opening / Counsel for accused may continue to act.**

475. (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of his trial,

- (a) he shall be deemed to have waived his right to be present at his trial, and
- (b) the court may

- (i) continue the trial and proceed to a judgment or verdict and, if it finds the accused guilty, impose a sentence on him in his absence, or

- (ii) if a warrant in Form 7 is issued for the arrest of the accused, adjourn the trial to await his appearance,

but where the trial is adjourned pursuant to subparagraph (b)(ii), the court may, at any time, continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.

(2) Where a court continues a trial pursuant to subsection (1), it may draw an inference adverse to the accused from the fact that he has absconded.

(3) Where an accused reappears at his trial that is continuing pursuant to subsection (1), he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the court is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the proceedings.

(4) Where an accused has absconded during the course of his trial and the court continues the trial, counsel for the accused is not thereby deprived of any authority he may have to continue to act for the accused in the proceedings. 1974-75-76, c. 93, s. 39.

## CROSS-REFERENCES

The term "counsel" is defined in s. 2. A similar provision respecting an accused who absconds in the course of his preliminary inquiry is found in s. 544 and in the course of his summary conviction trial in s. 803(2). As well, an accused who fails to appear for his trial or remain at his trial may lose his right to trial by jury by virtue of s. 598.

Section 650 provides for other circumstances in which an accused may be absent from the trial.

## SYNOPSIS

This section deals with the situation where an accused person absconds *during the course* of a trial.

Subsection (1) provides that an absconding accused, whether or not he is charged jointly with another, is deemed to have waived his right to be present at his trial. Subsection (1)(b) also provides that the court may continue the trial to its conclusion and impose a sentence on the absconding accused, or issue an arrest warrant and adjourn the trial until the accused appears. If the court adjourns the trial under subsec. (1)(b), that court may at any time continue the trial if it is satisfied that it is no longer in the interests of justice to await the appearance of the accused.

Subsection (2) allows the court to draw an adverse inference from the fact that the accused has absconded.

Subsection (3) provides that when an accused reappears at a trial that has continued in his absence, he is not entitled to have any portion of the proceedings conducted when he was not present reopened unless he establishes that because of exceptional circumstances, it is in the best interests of justice to re-open such proceedings.

Subsection (4) states that counsel for an absconding accused has the authority to continue to act for the accused during the proceedings.

## ANNOTATIONS

**Meaning of absconds** – The word "absconds" in this section means more than mere failure to appear and imports a requirement that the accused has voluntarily absented himself from his trial for the purpose of impeding or frustrating the trial, or with the intention of avoiding its consequences. The necessary intent can however be inferred from proof that the accused deliberately absented himself. Upon proof that the accused absconded, the trial may proceed although defence counsel has been permitted to withdraw: *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.), *affd* on this point 60 C.C.C. (3d) 161, 80 C.R. (3d) 317, 116 N.R. 241 (S.C.C.).

**Procedure** – Once the accused absconds, he has waived his right to be present as required by s. 650 and even after he has been apprehended the trial may continue in his absence until it was reasonably practicable to return him to court: *R. v. Tzimopoulos*, *infra*.

It is for the trial judge to determine whether or not the accused has absconded and in directing the jury as to the adverse inference as permitted by subsec. (2) the judge need not leave it to the jury to first determine whether the accused absconded: *R. v. Tzimopoulos*, *infra*, *revd* on other grounds (unreported November 22, 1990, S.C.C.).

Notwithstanding subsec. (4) in most cases it would be unfair to require defence counsel to continue to represent an accused who has absconded. This subsection does not confer any authority on counsel to continue to act, nor does it interfere with or restrict counsel's right, in accordance with professional standards, to cease to act for the accused: *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.), *revd* on other grounds 60 C.C.C. (3d) 161, 80 C.R. (3d) 317, 116 N.R. 241 (S.C.C.).

**Constitutional considerations** – This provision does not offend the guarantee to fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms: *R. v. Czuczman* (1986), 26 C.C.C. (3d) 43, 49 C.R. (3d) 385, 27 D.L.R. (4th) 694 (Ont. C.A.), nor the



right to a fair trial under s. 11(d): *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304, 54 C.R. (3d) 1 (Ont. C.A.).

## Special Jurisdiction

### SPECIAL JURISDICTIONS.

#### 476. For the purposes of this Act,

- (a) where an offence is committed in or on any water or on a bridge between two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
- (b) where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;
- (c) where an offence is committed in or on a vehicle employed in a journey, or on board a vessel employed on a navigable river, canal or inland water, the offence shall be deemed to have been committed in any territorial division through which the vehicle or vessel passed in the course of the journey or voyage on which the offence was committed, and where the center or other part of the road, or navigable river, canal or inland water on which the vehicle or vessel passed in the course of the journey or voyage is the boundary of two or more territorial divisions, the offence shall be deemed to have been committed in any of the territorial divisions;
- (d) where an offence is committed in an aircraft in the course of a flight of that aircraft, it shall be deemed to have been committed
  - (i) in the territorial division in which the flight commenced,
  - (ii) in any territorial division over which the aircraft passed in the course of the flight, or
  - (iii) in the territorial division in which the flight ended; and
- (e) where an offence is committed in respect of the mail in the course of its door-to-door delivery, the offence shall be deemed to have been committed in any territorial division through which the mail was carried on that delivery. R.S., c. C-34, s. 432; R.S.C. 1985, c. 27 (1st Supp.), s. 186; 1992, c. 1, s. 58.

### CROSS-REFERENCES

The term “territorial division” is defined in s. 2. The term “mail” is defined in s. 2 of the Canada Post Corporation Act, R.S.C. 1985, c. C-10. For other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470.

### SYNOPSIS

This section clarifies territorial jurisdiction in a number of unusual or special sets of circumstances.

### ANNOTATIONS

**Offences committed in more than one division [para. (b)]** – Jurisdiction in inferior courts must be established like any essential ingredient of an offence and is not presumed, as in the case of superior courts, so where the Crown in a questionable boundary case failed strictly to prove jurisdiction over the accused by a county magistrate an acquittal was ordered: *R. v. O’Blenis*, [1965] 2 C.C.C. 165, (N.B.S.C. App. Div.).

In *Re Bigelow and The Queen* (1982), 69 C.C.C. (2d) 204, 37 O.R. (2d) 304 (C.A.) the Court in holding that the effect of this paragraph was to establish a broad basis for juris-

diction over interprovincial offences reviewed the case law as to its application and drew the following conclusions: (i) this paragraph conferred jurisdiction over crimes involving continuity of operation extending over more than one province in any province where a component of the offence took place; (ii) the courts in one province have assumed jurisdiction where an overt act referable to or in furtherance of a criminal plan extending beyond that province was committed in the province; and (iii) where the act of the accused in one province generates effects in another this paragraph confers jurisdiction on the courts of the second province.

**Offences committed on vehicle or vessel [para. (c)]** – The word “deemed” in this paragraph means “deemed conclusively”. Thus even where evidence is led that the offence actually took place in a particular territorial division, not the division named in the indictment, as long as the vehicle passed through the territorial division named in the indictment in the course of the journey in which the offence was committed, the offence is proved: *R. v. Moore and Grazier* (1970), 1 C.C.C. (2d) 521, [1971] 1 W.W.R. 656 (B.C.C.A.).

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#### WORDS AND EXPRESSIONS / Saving.

**477. (1)** In this section and sections 477.1 to 477.4,

- (a) “fishing zone of Canada” has the same meaning as in the *Territorial Sea and Fishing Zones Act*, but does not include any portion of the internal waters or territorial sea; and
- (b) unless the context otherwise requires, other words and expressions have the same meaning as in the *Canadian Laws Offshore Application Act*.

(2) Nothing in sections 477.1 to 477.4 limits the operation of any other Act of Parliament or the jurisdiction that a court may exercise apart from those sections. 1990, c. 44, s. 15.

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#### OFFENCES IN, ABOVE OR BEYOND CONTINENTAL SHELF / Restriction.

**477.1. (1)** Every person who commits an act or omission that would be an offence under a federal law if it occurred in Canada shall be deemed to have committed that act or omission in Canada if it occurred

- (a) in a place in or above the continental shelf or in any exclusive economic zone created by Canada, where the act or omission is an offence in that place by virtue of section 5 of the *Canadian Laws Offshore Application Act*;
- (b) in any fishing zone of Canada;
- (c) outside Canada, on board or by means of a ship registered or licensed, or for which an identification number has been issued, pursuant to any Act of Parliament;
- (d) outside Canada, in the course of hot pursuit; or
- (e) in the case of a Canadian citizen, outside the territory of any state.

(2) Paragraph (1)(b) applies only where

- (a) the act or omission is committed by a person who is in a fishing zone of Canada in connection with the exploration, exploitation, management or conservation of the living resources thereof; and
- (b) the act or omission is committed by or in relation to a person who is a Canadian citizen or a permanent resident within the meaning of the *Immigration Act*. 1990, c. 44, s. 15.

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#### CONSENT OF ATTORNEY GENERAL / Exception / Consent of Attorney General / Idem / Consent to be filed.

**477.2. (1)** No proceedings in respect of an offence committed by a person in or on

the territorial sea shall be continued unless the consent of the Attorney General of Canada is obtained no later than eight days after proceedings are instituted, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

(1.1) Subsection (1) does not apply to proceedings by way of summary conviction.

(2) No proceedings in respect of which courts have jurisdiction by virtue only of paragraph 477.1(1)(a) or (b) shall be continued unless the consent of the Attorney General of Canada is obtained no later than eight days after proceedings are instituted, if the accused is not a Canadian citizen and the offence is alleged to have been committed on board any ship registered outside Canada.

(3) No proceedings in respect of which courts have jurisdiction by virtue only of paragraph 477.1(1)(d) or (e) shall be continued unless the consent of the Attorney General of Canada is obtained no later than eight days after proceedings are instituted.

(4) The consent of the Attorney General required by subsection (1), (2) or (3) must be filed with the clerk of the court in which the proceedings have been instituted. 1990, c. 44, s. 15; 1994, c. 44, s. 32.

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**EXERCISING POWERS OF ARREST, ENTRY, ETC. / Arrest, search, seizure, etc. / Limitation.**

477.3. (1) Every power of arrest, entry, search or seizure or other power that could be exercised in Canada in respect of an act or omission referred to in subsection 477.1(1), and in the circumstances referred to in that subsection, may be exercised

- (a) at the place or on board the ship or marine installation or structure where the act or omission occurred; or
- (b) where hot pursuit has been commenced, at any place on the seas, other than a place that is part of the territorial sea of any other state.

(2) A justice or a judge in any territorial division in Canada has jurisdiction to authorize an arrest, entry, search or seizure or an investigation or other ancillary matter related to an offence

- (a) committed in or on the territorial sea or any area of the sea that forms part of the internal waters, or
- (b) referred to in subsection 477.1(1)

in the same manner as if the offence had been committed in that territorial division.

(3) Where an act or omission that is an offence by virtue only of subsection 477.1(1) is alleged to have been committed on board any ship registered outside Canada, the powers referred to in subsection (1) shall not be exercised outside Canada with respect to that act or omission without the consent of the Attorney General of Canada. 1990, c. 44, s. 15.

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**TERRITORIAL DIVISION FOR PROSECUTION / Appearance of accused at trial / Evidence / Certificate cannot be compelled.**

477.4. (1) Proceedings in respect of an offence

- (a) committed in or on the territorial sea or any area of the sea that forms part of the internal waters, or
- (b) referred to in subsection 477.1(1)

may, whether or not the accused is in Canada, be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

(2) For greater certainty, the provisions of this Act relating to

- (a) the requirement of the appearance of an accused at proceedings, and



(b) the exceptions to that requirement,  
 apply to proceedings commenced in any territorial division pursuant to subsection (1) or section 481.

(3) In proceedings in respect of an offence,

(a) a certificate referred to in subsection 10(1) of the *Canadian Laws Offshore Application Act*, or

(b) a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that any geographical location specified in the certificate was, at any time material to the proceedings, in a fishing zone of Canada or outside the territory of any state,

is conclusive proof of the truth of the statement without proof of the signature or official character of the person appearing to have issued the certificate.

(4) A certificate referred to in subsection (3) is admissible in evidence in proceedings referred to in that subsection but its production cannot be compelled. 1990, c. 44, s. 15; 1995, c. 5, s. 25.

#### CROSS-REFERENCES

The definition of territorial sea is in the Territorial Sea and Fishing Zones Act, R.S.C. 1985, T-8. "Attorney General" is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to other notes concerning sufficiency of consent, see s. 583.] The term "Canadian ship" is defined in s. 2 of the Canada Shipping Act, R.S.C. 1985, c. S-9. For definition of Canadian citizen, see Citizenship Act, R.S.C. 1985, c. C-29. For other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470.

#### SYNOPSIS

This section states that where an offence is committed by any person on Canadian seas or waters off the Canadian coast, whether or not such offence was committed on a Canadian ship, the offence is within the jurisdiction of Canadian law. The accused in this situation will be tried by the court having jurisdiction over similar offences in the closest territorial division. The offence will be tried in the same manner as it had been committed in that territorial jurisdiction.

Subsection (2) provides that consent of the Attorney General of Canada is necessary for the institution of indictable proceedings under this section against a person who is not a Canadian citizen.

#### ANNOTATIONS

**Common law territorial jurisdiction** – A ship moored to a dock in Canada is within the realm over which common law courts have exercised jurisdiction. Accordingly, the Court's jurisdiction where an offence is committed on such a ship does not depend on this section and the consent under subsec. (2) is not necessary: *R. v. Prendes*, [1965] 1 C.C.C.356 (B.C.S.C.).

**Effect of subsec. (1)** – This section gives Canadian courts jurisdiction to try offences committed on the territorial sea of Canada, although neither the accused nor the victim are Canadian citizens and the offence was committed on a foreign ship. This section is not limited to offences having extraterritorial effect such as piracy: *R. v. Frisbee* (1989), 48 C.C.C. (3d) 386 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi.

**Where consent required under subsec. (2)** – The consent required by subsec. (2) is necessary where the offence took place on the territorial waters of Canada even if the place was also within the boundaries of the county where the trial is taking place: *Re R. and Piersanti* (1979), 48 C.C.C. (2d) 161 (B.C.S.C.).

Consent is also required where the offence is a hybrid offence for such offence is

deemed to be indictable by s. 34(1) of the Interpretation Act, R.S.C. 1985, c. I-21: *R. v. Gallagher* (1981), 62 C.C.C. (2d) 3 (B.C. Co. Ct.).

The Great Lakes are neither the “territorial sea” nor “internal waters” within the meaning of subsec. (1) and thus the consent referred to in subsec. (2) is not required where the offence is committed on the Great Lakes by a non-Canadian citizen: *R. v. Farnquist* (1980), 54 C.C.C. (2d) 417 (Ont. Prov. Ct.).

An offence committed in the 200-mile fishing zone, contrary to the Coastal Fisheries Protection Act, R.S.C. 1970, c. C-21, but outside the territorial sea does not come within this section and the Attorney-General’s consent is therefore not required: *Re Gordon and The Queen* (1980), 55 C.C.C. (2d) 197, [1980] 5 W.W.R. 519 (B.C.C.A.).

There must at least be some evidence in the case to indicate that the accused is not a Canadian citizen before the Crown must prove that the accused was a Canadian citizen and that the consent of the Attorney General was not required: *R. v. Erickson* (1989), 49 C.C.C. (3d) 33, 14 M.V.R. (2d) 122 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi, 104 N.R. 109n.

**Proof of consent under subsec. (2)** – Failure to obtain the necessary consent will result in a conviction being quashed: *R. v. Ford*; *R. v. Gilkey* (1956), 115 C.C.C. 113, 18 W.W.R. 563 (B.C.C.A.).

The decision to consent under this section is not an administrative decision which can be delegated to an official such as the Assistant Deputy Attorney-General: *R. v. Sunila* (1987), 35 C.C.C. (3d) 289, 78 N.S.R. (2d) 24 (S.C. App. Div.).

A consent given by the Deputy Attorney General is valid in view of the provision of s. 24(7)(c) of the Interpretation Act, R.S.C. 1985, c. I-21. Further, a consent referring to a charge of “murder” was sufficient to permit trial of the accused on a charge of first degree murder, there being nothing to indicate that the consent was restricted to a charge of second degree murder: *R. v. Frisbee* (1989), 48 C.C.C. (3d) 386 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi.

An objection to the validity of the form of consent cannot be raised for the first time near the conclusion of the trial just prior to the charge to the jury: *R. v. Sunila* (1987), 35 C.C.C. (3d) 289, 78 N.S.R. (2d) 24 (S.C. App. Div.).

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#### OFFENCE COMMITTED ENTIRELY IN ONE PROVINCE / Exception / Idem / Where accused committed to stand trial / Definition of “newspaper”.

478. (1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.

(2) Every proprietor, publisher, editor or other person charged with the publication of a defamatory libel in a newspaper or with conspiracy to publish a defamatory libel in a newspaper shall be dealt with, indicted, tried and punished in the province where he resides or in which the newspaper is printed.

(3) An accused who is charged with an offence that is alleged to have been committed in Canada outside the province in which the accused is, may, if the offence is not an offence mentioned in section 469 and

(a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, if the Attorney General of Canada consents, or

(b) in any other case, if the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not

plead guilty, the accused shall, if the accused was in custody prior to appearance, be returned to custody and shall be dealt with according to law.

(4) Notwithstanding that an accused described in subsection (3) has been ordered to stand trial or that an indictment has been preferred against the accused in respect of the offence to which he desires to plead guilty, the accused shall be deemed simply to stand charged of that offence without a preliminary inquiry having been conducted or an indictment having been preferred with respect thereto.

(5) In this section, “newspaper” has the same meaning as in section 297. R.S., c. C-34, s. 434; 1974-75-76, c. 93, s. 40; R.S.C. 1985, c. 27 (1st Supp.), ss. 64, 101(3); 1994, c. 44, s. 33.

#### CROSS-REFERENCES

The term “province” is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. “Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.] Defamatory libel is dealt with under ss. 297 to 317. A related provision for transfer of charges between territorial divisions within the same province is in s. 479. Respecting transfer of probation orders between provinces, see s. 739. For other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470.

#### SYNOPSIS

This section deals with offences committed within the jurisdiction of one province.

Subsection (1) provides that subject to exceptions found within the Code, a court in one province shall not try an offence entirely committed in another province.

Subsection (2) states that any person charged with the offence of publishing, or conspiring to publish, a defamatory libel in a newspaper must deal with in the province where he resides or where the newspaper is printed.

Subsection (3) provides that any person charged with an offence, other than an offence listed in s. 469, that is alleged to have been committed outside the province in which that person is, may plead guilty before a court having jurisdiction over the offence in that province and be sentenced in that location. The appropriate Attorney General must consent to this procedure.

Subsection (4) makes it clear that an accused person pleading guilty under subsec. (3), whether or not he has been ordered to stand trial, or an indictment has been preferred against him in the province where the offence was committed, shall be deemed to stand charged of that offence in the province in which the plea is entered without a preliminary inquiry having been held or an indictment preferred.

Subsection (5) gives the term “newspaper” the same meaning as is found in s. 297.

#### ANNOTATIONS

**Subsec. (1)** – In determining jurisdiction it is questionable whether civil law should be employed to locate the *actus reus*, particularly where the offence is of a continuing character that might occur in more than one jurisdiction: *R. v. Trudel, ex p. Horbas and Myhaluk*, [1969] 3 C.C.C.95, 5 C.R.N.S.342 *sub nom. R. v. Horbas and Myhaluk* (Man. C.A.).

**Subsec. (3)** – The authorities of one province did not notify the accused of an indictable offence warrant that they held for him while he was being tried, convicted and then serving his sentence in another province for other offences committed there. Upon appeal against the sentence finally imposed upon him when he was brought back for trial some years later the appellate Court indicated its disapproval of this procedure by substantially reducing the sentence: *R. v. Parisien* (1971), 3 C.C.C. (2d) 433, [1971] 4 W.W.R.81 (B.C.C.A.).

If the accused can show that the exercise of the discretion by the Attorney General to



refuse to consent to the transfer is arbitrary, then the accused would be entitled to a remedy under s. 24 of the Charter on the basis that there has been an infringement of s. 7 of the Charter. However, if reasonable grounds exist for the exercise of the discretion one way or another and there has been a fair consideration as to whether, or in what way, the discretion should be exercised, the ultimate decision cannot be said to be arbitrary. In this case, Crown counsel provided the accused with a letter setting out several valid reasons for refusing to consent to the transfer including that, as a general rule, the accused should be sentenced in the community where the offence occurred in order for the deterrent affect of that sentence; disposition of the offence in the jurisdiction where it arose will most likely ensure the application of local provincial sentencing standards for like defences; and the more serious the offence the more appropriate it is to dispose of the case where the offence occurred: *R. v. Fleming* (1992), 72 C.C.C. (3d) 133 (Man. Q.B.).

#### OFFENCE OUTSTANDING IN SAME PROVINCE.

**479.** Where an accused is charged with an offence that is alleged to have been committed in the province in which he is, he may, if the offence is not an offence mentioned in section 469, and

- (a) in the case of proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, the Attorney General of Canada consents, or
- (b) in any other case, the Attorney General of the province where the offence is alleged to have been committed consents,

appear before a court or judge that would have had jurisdiction to try that offence if it had been committed in the place where the accused is, and where the accused consents to plead guilty and pleads guilty to that offence, the court or judge shall determine the accused to be guilty of the offence and impose the punishment warranted by law, but where the accused does not consent to plead guilty and does not plead guilty, the accused shall, if the accused was in custody prior to his appearance, be returned to custody and shall be dealt with according to law. R.S., c. C-34, s. 435; 1974-75-76, c. 93, s. 41; R.S.C. 1985, c. 27 (1st Supp.), s. 65; 1994, c. 44, s. 34.

#### CROSS-REFERENCES

“Attorney General” is defined in s. 2. Section 583(h) provides that a count in an indictment is not insufficient by reason only that it does not state that the required consent has been obtained. [As to notes concerning sufficiency of consent, see s. 583.] For a related provision for transfer of charges between provinces, see s. 478. For other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470. Change of venue for trial within the province but in another territorial division is governed by s. 599.

#### SYNOPSIS

This section allows an accused person to plead guilty to an offence, other than the one listed in s. 469, before a court or a judge within the province where the offence was committed but not within the territorial division of that province having jurisdiction over the offender. The appropriate Attorney General must consent to this procedure and the accused must, in fact, plead guilty to the offence.

#### OFFENCE IN UNORGANIZED TERRITORY / New territorial division.

**480. (1)** Where an offence is committed in an unorganized tract of country in any province or on a lake, river or other water therein, not included in a territorial division or in a provisional judicial district, proceedings in respect thereof may be commenced and an accused may be charged, tried and punished in respect thereof within any territorial division or provisional judicial district of the province in the same

manner as if the offence had been committed within that territorial division or provisional judicial district.

(2) Where a provisional judicial district or a new territorial division is constituted in an unorganized tract referred to in subsection (1), the jurisdiction conferred by that subsection continues until appropriate provision is made by law for the administration of criminal justice within the provisional judicial district or new territorial division. R.S., c. C-34, s. 436.

#### CROSS-REFERENCES

The term "territorial division" is defined in s. 2. The term "province" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Also see s. 481 and for other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470.

#### SYNOPSIS

This section clarifies jurisdiction in situations where an offence is committed in an unorganized tract in any province that is not included in a territorial division or provisional judicial district.

Subsection (1) states that the trial of an offence committed in such a location may take place in any territorial division or provisional judicial district in that province.

Subsection (2) provides that when a provincial judicial district or new territorial division is constituted in an unorganized tract, subsec. (1) will continue to apply until provision for the administration of justice within that division or district is made.

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#### OFFENCE NOT IN A PROVINCE.

**481. Where an offence is committed in a part of Canada not in a province, proceedings in respect thereof may be commenced and the accused may be charged, tried and punished within any territorial division in any province in the same manner as if that offence had been committed in that territorial division. R.S., c. C-34, s. 437.**

#### CROSS-REFERENCES

The term "territorial division" is defined in s. 2. The term "province" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Also see s. 480 and for other notes respecting territorial jurisdiction, see cross-references under ss. 6, 7 and 470.

#### SYNOPSIS

This section provides that an accused who commits an offence in a part of Canada which is not a province may be tried and punished within any territorial division in any province of Canada.

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### *Rules of Court*

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**POWER TO MAKE RULES / Idem / Purpose of rules / Publication / Regulations to secure uniformity.**

**482. (1) Every superior court of criminal jurisdiction and every court of appeal may make rules of court not inconsistent with this or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.**

(2) Every court of criminal jurisdiction for a province and every appeal court within the meaning of section 812 that is not a court referred to in subsection (1) may, sub-

ject to the approval of the lieutenant governor in council of the province, make rules of court not inconsistent with this Act or any other Act of Parliament, and any rules so made apply to any prosecution, proceeding, action or appeal, as the case may be, within the jurisdiction of that court, instituted in relation to any matter of a criminal nature or arising from or incidental to any such prosecution, proceeding, action or appeal.

(3) Rules under subsection (1) or (2) may be made

- (a) generally to regulate the duties of the officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of the law;
- (b) to regulate the sittings of the court or any division thereof, or of any judge of the court sitting in chambers, except in so far as they are regulated by law;
- (c) to regulate in criminal matters the pleading, practice and procedure in the court including pre-hearing conferences held pursuant to section 625.1 and proceedings with respect to judicial interim release and, in the case of rules under subsection (1), proceedings with respect to *mandamus*, *certiorari*, *habeas corpus*, prohibition and *procedendo* and proceedings on an appeal under section 830; and
- (d) to carry out the provisions of this Act relating to appeals from conviction, acquittal or sentence and, without restricting the generality of this paragraph,
  - (i) for furnishing necessary forms and instructions in relation to notices of appeal or applications for leave to appeal to officials or other persons requiring or demanding them,
  - (ii) for ensuring the accuracy of notes taken at a trial and the verification of any copy or transcript,
  - (iii) for keeping writings, exhibits or other things connected with the proceedings on the trial,
  - (iv) for securing the safe custody of property during the period in which the operation of an order with respect to that property is suspended under subsection 689(1), and
  - (v) for providing that the Attorney General and counsel who acted for the Attorney General at the trial be supplied with certified copies of writings, exhibits and things connected with the proceedings that are required for the purposes of their duties.

(4) Rules of court that are made under the authority of this section shall be published in the *Canada Gazette*.

(5) Notwithstanding anything in this section, the Governor in Council may make such provision as he considers proper to secure uniformity in the rules of court in criminal matters, and all uniform rules made under the authority of this subsection prevail and have effect as if enacted by this Act. R.S., c. C-34, s. 438; 1974-75-76, c. 93, s. 42; R.S.C. 1985, c. 27 (1st Supp.), s. 66; 1994, c. 44, s. 35.

#### CROSS-REFERENCES

The terms “Attorney General”, “superior court of criminal jurisdiction”, “court of appeal”, “court of criminal jurisdiction” and “writing” are defined in s. 2. Section 745(5) makes separate provision for making of rules of procedure on applications for review of parole ineligibility of a person convicted of murder.

#### SYNOPSIS

This section empowers courts to make rules.

Subsection (1) states that every superior court of criminal jurisdiction and every court of appeal may make rules of court in relation to any criminal proceedings or matters incidental to a prosecution arising before it.



Subsection (2) states that every court of criminal jurisdiction for a province and every appeal court within the meaning of s. 812 that is not a court referred to in subsec. (1) may, with the approval of the Lieutenant Governor in Council of the province, make similar rules governing criminal and incidental proceedings. The rules made under both subssecs. (1) and (2) may not be inconsistent with the Code or any other Act of Parliament.

Subsection (3) sets out the matters which such rules may regulate and subsec. (4) requires publication of the rules in the Canada Gazette. Subsection (5) empowers the Governor in Council to ensure uniformity of the rules of court in criminal matters and any uniform rules made under this subsection prevail.

## ANNOTATIONS

In *R. v. Jacobs* (1971), 2 C.C.C. (2d) 26, 16 D.L.R. (3d) 591 (S.C.C.), the Que. C.A. had, on March 24, 1969, dismissed the accused's appeal when his counsel failed to appear to argue the appeal. Subsequently, on April 18, 1969, the Court rescinded its order, and from that order the Crown appealed. It was held (5:0) that both of the Appeal Court orders, neither of which dealt with the merits of the accused's appeal, were made in the exercise of its discretionary power relating to practice concerning the proper administration of justice in criminal matters.

While subsec. (3)(c) does not authorize the making of rules which would permit the Court to award costs on an application for *habeas corpus*, in a criminal matter the Superior Court has the power to award costs by virtue of its inherent jurisdiction to control proceedings, to penalize abuses and to maintain its authority. However, the power to award costs arises only in circumstances similar to a contempt of Court, such as misconduct or dishonesty by a party, or a serious interference with the administration of justice: *A.-G. Que. et al. v. Cronier* (1981), 63 C.C.C. (2d) 437, 23 C.R. (3d) 97 (Que. C.A.).

Similarly, while the Superior Court has an inherent jurisdiction to award costs against the inferior Court, the power is to be used sparingly and only where the circumstances were akin to a contempt of Court or reveal malice or bad faith thereby creating a flagrant injustice. Moreover, before the order is made the Judge of the inferior Court is entitled to notice and an opportunity to be heard on the question of costs: *Mayrand v. Cronier* (1981), 63 C.C.C. (2d) 561, 23 C.R. (3d) 114 (Que. C.A.).

Where the trial judge, a judge of the district court, considers it necessary to call an expert witness, he has the power to require the Crown to pay the costs involved: *Re R. and P.R.S.* (1987), 38 C.C.C. (3d) 109, 60 C.R. (3d) 159 *sub nom. R. v. Smigel* (Ont. H.C.J.).

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## Part XV / SPECIAL PROCEDURE AND POWERS

### *General Powers of Certain Officials*

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#### OFFICIALS WITH POWERS OF TWO JUSTICES.

**483.** Every judge or provincial court judge authorized by the law of the province in which he is appointed to do anything that is required to be done by two or more justices may do alone anything that this Act or any other Act of Parliament authorizes two or more justices to do. R.S., c. C-34, s. 439.

#### CROSS-REFERENCES

The terms "provincial court judge" and "justice" are defined in s. 2.

#### SYNOPSIS

This section authorizes every judge or provincial court judge who is authorized by the law of a province to do anything required to be done by two or more justices to also act

in the place of two or more justices when such a provision is found in the Code or any other Act of Parliament.

## **PRESERVING ORDER IN COURT.**

**484.** Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof. R.S., c. C-34, s. 440.

## **CROSS-REFERENCES**

The terms “provincial court judge”, “justice” and “superior court of criminal jurisdiction” are defined in s. 2.

For notes on the common law power over contempt of court, see notes following ss. 9 and 10.

## **SYNOPSIS**

This section gives to every judge or provincial court judge the same power as may be exercised by the superior court of criminal jurisdiction to preserve order during the sittings of courts over which they preside.

## **ANNOTATIONS**

A provincial court judge has the power to punish for contempt on preliminary inquiry a person who refused to rise when the Court was called to order: *R. v. Hume, ex p. Hawkins*, [1966] 3 C.C.C. 43, 53 D.L.R. (2d) 453, 53 W.W.R. 406 *sub nom. Hawkins Habeas Corpus Application (Re)* (B.C.S.C.).

This section gives a provincial court judge presiding at a preliminary hearing power to convict for contempt in the face of the Court where required to preserve order in the Court. Thus, a counsel’s refusal despite the judge’s order to remove a tape recorder from the court-room during a preliminary hearing could in certain circumstances amount to contempt: *R. v. Barker* (1980), 53 C.C.C. (2d) 322, [1980] 4 W.W.R. 202 (Alta. C.A.).

This section gives a provincial court judge power to cite for contempt an accused who appears for his trial in such an intoxicated condition that the trial is unable to proceed: *R. v. Heer* (1982), 68 C.C.C. (2d) 333, 38 B.C.L.R. 176 (S.C.).

Under this section one judge of the Alberta Provincial Court has no jurisdiction to try a contempt of court charge initiated by another judge as a result of conduct by the accused committed in the face of the court: *R. v. Doz* (1987), 38 C.C.C. (3d) 479, 55 Alta. L.R. (2d) 289 (S.C.C.) (7:0).

The words “order in a court” do not embrace a refusal by a witness to testify and thus this section cannot be invoked to authorize a provincial court judge presiding at a preliminary hearing to punish such refusal as a contempt of court. The judge’s only power in such circumstances is to use the procedure in s. 545: *R. v. Bubley* (1976), 32 C.C.C. (2d) 79, [1976] 6 W.W.R. 179 (Alta.S.C. App.Div.).

**PROCEDURAL IRREGULARITIES / Summons or warrant / Dismissal for want of prosecution / Adjournment and order / Part XVI to apply.**

**485.** (1) Jurisdiction over an offence is not lost by reason of the failure of any court, judge, provincial court judge or justice to act in the exercise of that jurisdiction at any particular time, or by reason of a failure to comply with any of the provisions of this Act respecting adjournments or remands.

(2) Where jurisdiction over an accused or a defendant is lost and has not been regained, a court, judge, provincial court judge or justice may, within three months after the loss of jurisdiction, issue a summons, or if it or he considers it necessary in the public interest, a warrant for the arrest of the accused or defendant.

(3) Where no summons or warrant is issued under subsection (2) within the period provided therein, the proceedings shall be deemed to be dismissed for want of prosecution and shall not be recommenced except in accordance with section 485.1.

(4) Where, in the opinion of the court, judge, provincial court judge or justice, an accused or a defendant who appears at a proceeding has been misled or prejudiced by reason of any matter referred to in subsection (1), the court, judge, provincial court judge or justice may adjourn the proceeding and may make such order as it or he considers appropriate.

(5) The provisions of Part XVI apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (2). 1974-75-76, c. 93, s. 43; R.S.C. 1985, c. 27 (1st Supp.), s. 67.

#### CROSS-REFERENCES

The terms "provincial court judge" and "justice" are defined in s. 2.

Calculation of a period of months is determined in accordance with s. 28 of the Interpretation Act, R.S.C. 1985, c. I-21.

#### SYNOPSIS

This section deals with specific examples of procedural irregularities as they relate to jurisdiction over the offender and the offence.

Subsection (1) states that jurisdiction over an offence is not lost when the court fails to exercise jurisdiction at any particular time, or when it fails to comply with any of the provisions in the Code with respect to adjournments or remands.

Subsection (2) empowers a court to issue a summons or, if necessary in the public interest, a warrant for the arrest of an accused person within three months after jurisdiction over that person has been lost and has not been regained.

Subsection (3) states that if no summons or warrant is issued within the three-month period stipulated in subsec. (2), the proceedings shall be deemed dismissed for want of prosecution. Such proceedings cannot be reinstituted except in accordance with s. 485.1.

Subsection (4) empowers a court to adjourn a proceeding and make such order as is considered appropriate when it appears that an accused person has been misled or prejudiced by reason of any matter referred to in subsec. (1).

Subsection (5) provides that the provisions of Part XVI, which deal with compelling the appearance of an accused before a justice and interim release, apply with the necessary modifications when a summons or warrant is issued under subsec. (2).

#### ANNOTATIONS

This section was applied to cure a failure to comply with s. 537(1)(a), the preliminary hearing having been adjourned for longer than eight days without the accused's consent. The Court noted that *Doyle v. The Queen* (1976), 29 C.C.C. (2d) 177, 68 D.L.R. (3d) 270, [1977] 1 S.C.R. 597, which held that adjourning a case for longer than eight days without the accused's consent resulted in a loss of jurisdiction over the person of the accused, was decided at a time when this section did not apply: *Re Ulrich and The Queen* (1977), 38 C.C.C. (2d) 1, [1978] 1 W.W.R. 422 (Alta. S.C.T.D.).

It was held in *R. v. Krannenburg* (1980), 51 C.C.C. (2d) 205, [1980] 1 S.C.R. 1053, 17 C.R. (3d) 357, [1980] 2 W.W.R. 651 (7:0) that the predecessor to this section could not cure a loss of jurisdiction which resulted when there was a proper adjournment to a fixed day but upon that day nothing happened. The court distinguished between a loss of jurisdiction "over the person" such as a remand in excess of eight days without consent, and a loss of jurisdiction "over the offence" when nothing is done on the return date of a proper adjournment. However, the recent amendment to this section with the addition of the reference to the failure to exercise jurisdiction at any particular time, may well cover the loss of jurisdiction dealt with in *R. v. Krannenburg*.



Where an accused did not appear, and nothing was done on the return date of an adjournment because the accused, on being remanded to a hospital for observation had been found unfit and not returned to court, the court regained jurisdiction over him on a subsequent appearance one month later. *R. v. Fogarty* (1988), 46 C.C.C. (3d) 289, 87 N.S.R. (2d) 422 (N.S.C.A.).

#### RECOMMENCEMENT WHERE DISMISSAL FOR WANT OF PROSECUTION.

**485.1** Where an indictment in respect of a transaction is dismissed or deemed by any provision of this Act to be dismissed for want of prosecution, a new information shall not be laid and a new indictment shall not be preferred before any court in respect of the same transaction without

- (a) the personal consent in writing of the Attorney General or Deputy Attorney General, in any prosecution conducted by the Attorney General or in which the Attorney General intervenes; or
- (b) the written order of a judge of that court, in any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene. R.S.C. 1985, c. 27 (1st Supp.), s. 67.

#### CROSS-REFERENCES

The terms “indictment” and “prosecutor” are defined in s. 2. The latter term is also defined in s. 785 for summary conviction proceedings.

#### SYNOPSIS

This section sets out the circumstances under which a proceeding may be recommenced after it has been dismissed for want of prosecution. No new information can be laid, or indictment preferred, in this situation unless the personal written consent of the Attorney General or the Deputy Attorney General is obtained, or, in the case of a matter that is not prosecuted by the Attorney General and in which the Attorney General has not intervened, a judge of the relevant court issues a written order.

#### ANNOTATIONS

This section does not apply where the indictment is quashed by the trial judge for failing to comply with the sufficiency requirements of s. 581. Thus the Attorney-General’s consent is not required to lay a new information: *R. v. Richardson* (1987), 39 C.C.C. (3d) 262 (N.S.C.A.).

Although the charges which were initially dismissed for want of prosecution were laid by a private prosecutor, the Attorney General may consent to the laying of a new information by agents of the Crown: *R. v. Proctor & Gamble Inc.* (1993), 82 C.C.C. (3d) 477, 11 Alta. L.R. (3d) 1, 11 C.E.L.R. (N.S.) 89 (C.A.).

**EXCLUSION OF PUBLIC IN CERTAIN CASES / Protection of child witnesses / Support person / Witness not to be a support person / No communication while testifying / Reasons to be stated / Testimony outside court room / Condition of exclusion / Accused not to cross-examine child witness / Order restricting publication / Mandatory order on application / Failure to comply with order.**

**486. (1)** Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order.

**(1.1)** For the purposes of subsections (1) and (2.3) and for greater certainty, the “proper administration of justice” includes ensuring that the interests of witnesses under the age of fourteen years are safeguarded in proceedings in which the accused

is charged with a sexual offence, an offence against any of sections 271, 272 and 273 or an offence in which violence against the person is alleged to have been used, threatened or attempted.

(1.2) In proceedings referred to in subsection (1.1), the presiding judge, provincial court judge or justice may, on application of the prosecutor or a witness who, at the time of the trial or preliminary hearing, is under the age of fourteen years, order that a support person of the witness' choice be permitted to be present and to be close to the witness while testifying.

(1.3) The presiding judge, provincial court judge or justice shall not permit a witness in the proceedings referred to in subsection (1.1) to be a support person unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice so requires.

(1.4) The presiding judge, provincial court judge or justice may order that the support person and the witness not communicate with each other during the testimony of the witness.

(2) Where an accused is charged with an offence mentioned in section 274 and the prosecutor or the accused makes an application for an order under subsection (1), the presiding judge, provincial court judge or justice, as the case may be, shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.

(2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant, at the time of the trial or preliminary inquiry, is under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.

(2.2) A complainant shall not testify outside the court room pursuant to subsection (2.1) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

(2.3) In proceedings referred to in subsection (1.1), the accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of fourteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination and, where the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross-examination.

(3) Subject to subsection (4), where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347, the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

(4) The presiding judge or justice shall,

(a) at the first reasonable opportunity, inform any witness under the age of eight-

een years and the complainant to proceedings in respect of an offence mentioned in subsection (3) of the right to make an application for an order under subsection (3); and

(b) on application made by the complainant, the prosecutor or any such witness, make an order under that subsection.

(5) Every one who fails to comply with an order made pursuant to subsection (3) is guilty of an offence punishable on summary conviction. R.S., c. C-34, s. 442; 1974-75-76, c. 93, s. 44; 1980-81-82-83, c. 110, s. 74, c. 125, s. 25; R.S.C. 1985, c. 19 (3rd Supp.), s. 14; c. 23 (4th Supp.), s. 1; 1992, c. 21, s. 9; 1993, c. 45, s. 7.

(6) [Repealed. R.S.C. 1985, c. 19 (3rd Supp.), s. 14(2).]

#### CROSS-REFERENCES

The terms “complainant”, “provincial court judge” and “justice” are defined in s. 2. Age is determined by reference to s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. The offences mentioned in s. 274 are as follows: ss. 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272, and 273.

This section is one of several which enact special procedural provisions in respect of trial of sexual offences and trial of offences involving children. For other notes, see the cross-references under the particular substantive offence and the notes under s. 150.1.

The trial of the offence in subsec. (5) is conducted by a summary conviction court pursuant to Part XXVII. The punishment for the offence is then as set out in s. 787 and the limitation period is set out in s. 786(2). In either case, release pending trial is determined by s. 515, although the accused is eligible for release by a peace officer under s. 496, 497 or by the officer in charge under s. 498.

#### SYNOPSIS

This section sets out the circumstances in which a judge may exclude the public from the court-room, permit testimony outside the court-room and make an order restricting publication.

Subsection (1) states that there is a presumption that proceedings will be held in open court. If the presiding judge is of the opinion that, for any of the reasons set out therein, the public should be excluded from the court-room, he may make such an order.

Subsections (1.2) to (1.4) provide for the role of a “support person” for the witness.

Subsection (2) provides that where an accused person is charged with any of the offences mentioned in s. 274 and either the prosecutor or the accused makes an application under subsec. (1), the judge must give his reasons for not making such an order if he so decides.

Subsection (2.1) states that where an accused is charged with any of the offences enumerated therein and the complainant is under the age of 18, the judge may order that the complainant testify outside the court-room or behind a screen or device that would prevent a view of the accused. The judge must be of the opinion that such an order is necessary in order to allow the complainant to testify fully and candidly. This subsection specifically overrides s. 650 which sets out the rights of an accused to be present during a trial and to make full answer and defence.

Subsection (2.2) requires that the accused, the court and the jury be in a position to view the evidence of a complainant testifying outside the court-room pursuant to subsec. (2.1) by means of closed-circuit television or other device.

Subsection (2.3) gives the court power to prohibit the accused from personally cross-examining the complainant where this is necessary in the proper administration of justice. Where necessary, the judge will appoint counsel to cross-examine the complainant.

Subsection (3) provides that when an accused is charged under any of the sections specified therein, the court may make an order directing that the identity of, or information that would identify the complainant or another witness not be published or broadcast.



Subsection (4) requires that the presiding judge or justice must inform any witness under the age of 18 and the complainant, at the first reasonable opportunity, of the right to make an application under subsec. (3). If such an application is made by the complainant, any witness as described in subsec. (3) or the prosecutor, the presiding judge or justice must make such an order.

Subsection (5) makes it a summary conviction offence to fail to comply with an order issued under subsec. (3).

## ANNOTATIONS

**Grounds for exclusion of public generally [subsec. (1)]** – On the trial of a drug charge an application was made under this subsection to exclude the public while the accused testified, as she would be revealing the fact that she was a police informer. The application was refused and on appeal it was held there was no error in the refusal of the Judge to exercise his power in this section. The reason put forward was not sufficient reason to exclude the public since it had already been revealed in open Court that she was an informer and it could not be said that the disclosure that she intended to do it again added in any substantial way to whatever danger was alleged to attend her testifying in open Court. It would, however, have been preferable for the trial Judge to at least have listened to defence counsel's reasons for wishing exclusion *in camera*: *R. v. Douglas* (1977), 33 C.C.C. (2d) 395, 1 C.R. (3d) 238 (Ont. C.A.).

The mere fact that the charges are of sexual offences is not sufficient to justify an order excluding the public. Exclusion of the public in the interest of public morals relates not to the category of the offence charged but to the evidence proposed to be tendered of acts or circumstances which might reasonably be expected to offend, or to have an adverse or corrupting effect on, public morals by publicity of obscenities, perversions, or the like. Alternatively, a witness might need the reassurance of exclusion of the public in testifying to certain matters which would justify the order of exclusion on the grounds of the proper administration of justice. The discretion to exclude the public must be exercised cautiously and only as circumstances demand: *R. v. Warawuk* (1978), 42 C.C.C. (2d) 121, [1978] 5 W.W.R. 389 (Alta. S.C. App. Div.).

The fact that witnesses having to testify as to sexual behaviour may be embarrassed is not alone sufficient to warrant exclusion of the public: *R. v. Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.).

An order excluding the public may properly be made where the complainant in a sexual offence would otherwise be too nervous to give evidence. In such circumstances the order is necessary for the proper administration of justice: *R. v. Lefebvre* (1984), 17 C.C.C. (3d) 277 (Que. C.A.).

A provincial court judge has no power under this section to order a newspaper reporter to be excluded from Court so as to prevent him from publishing the names of witnesses (in this case the inmates of a bawdy-house). Such an order is a misuse of the section in attempting to prevent conduct that is not unlawful, interfering with freedom of the press; and it could not be justified on the basis of the proper administration of justice: *Re F.P. Publications (Western) Ltd. and The Queen* (1979), 51 C.C.C. (2d) 110, [1980] 1 W.W.R. 504 (Man. C.A.) (4:1).

It was held in *R. v. Musitano et al.* (1985), 24 C.C.C. (3d) 65, 25 D.L.R. (4th) 299 (Ont. C.A.), that the trial judge properly exercised his discretion in excluding the public in the interest of the proper administration of justice when conducting an inquiry in the course of the trial to determine the impartiality of several jurors.

**Requirement of reasons in sexual offence cases [subsec. (2)]** – The fact that the Judge is required to give reasons does not enlarge the grounds, set out in subsec. (1), for excluding the public: *R. v. Brint* (1979), 45 C.C.C. (2d) 560, 6 C.R. (3d) 377 (Alta. S.C. App. Div.).

**Complainant testifying outside court or behind screen [subsec. (2.1)] / When order**

**should be made** – The trial judge properly exercised his discretion to permit the child, who was the 10 year old granddaughter of the accused, shy by nature and who would be required to testify to intimate matters, to testify outside the court-room: *R. v. R.(M.E.)* (1989), 49 C.C.C. (3d) 475, 71 C.R. (3d) 113, 90 N.S.R. (2d) 439 (C.A.). Similarly, see *R. v. H.(D.)* (1990), 55 C.C.C. (3d) 343 (N.B.Q.B.).

The circumstances under which a judge may make an order under this subsection do not require that exceptional and inordinate stress be caused to the child. The trial judge has a substantial latitude in deciding whether the use of the screen should be permitted and the evidence in support of the application need not take any particular form. In exercising the discretion under this subsection, the trial judge may consider evidence of the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case. It may well be that the trial judge may also consider the fact that the accused is unrepresented in determining whether or not to permit the use of the screen: *R. v. Levogiannis* (1991), 85 C.C.C. (3d) 327, 25 C.R. (4th) 325, 160 N.R. 371 (S.C.C.) (9:00).

Before permitting the witness to testify outside of court, the trial judge may hold a *voir dire* to determine whether such an order is necessary to obtain a full and candid account. On that *voir dire*, however, the Crown may not ask witnesses who are not qualified as experts to give their opinion on that issue: *R. v. H. (B.C.)* (1990), 58 C.C.C. (3d), 79 C.R. (3d) 119, 66 Man. R. (2d) 174 (C.A.).

The trial judge is not empowered to form the requisite opinion that a screen is necessary unless there is an evidential base relating to the standard of necessity set out in this subsection. The necessary evidential base was lacking, where there was merely testimony from the complainant that she did not feel comfortable talking in front of a lot of people and the accused, that she would find it easier if people were excluded from the courtroom: *R. v. M. (P.)* (1990), 1 O.R. (3d) 341, 42 O.A.C. 153 (C.A.).

**Constitutional considerations** – Subsection (2.1) violates neither ss. 7 nor 11(d) of the Charter: *R. v. Levogiannis*, *supra*.

**Procedure** – Ordinarily, the trial judge should instruct the jury to the effect that the use of the screen is a procedure that is allowed in cases of this kind by reason of the youth of the witness and that, since it has nothing to do with the guilt or innocence of the accused, the jury must not draw any inference of any kind from its use, and, in particular, that no adverse inference should be drawn against the accused because of the screen: *R. v. Levogiannis*, *supra*.

It was held in *R. v. H. (B.C.)*, *supra*, that the trial judge erred in requiring the unrepresented accused to pose his questions to the complainant through an intermediary. The right to cross-examine is fundamental and is a right not only to frame questions but to phrase and express the questions in the manner of the examiner's choice. Even assuming that this subsection contemplates the procedure of using an intermediary, it was not shown that such a procedure was necessary in this case.

**Ban on publication of identity of complainant or witness [subsecs. (3), (4)]** – It was held under the predecessor to this section that the order (which was mandatory upon application by the prosecutor) must be made, at the latest, at the time the complainant begins her testimony: *R. v. Calabrese and Renard (No. 3)* (1981), 64 C.C.C. (2d) 71 (Que. S.C.).

While subsec. (4) infringes freedom of expression as guaranteed under s. 2(b) of the Charter of Rights and Freedoms it constitutes a reasonable limit on that freedom and is valid. Accordingly the order prohibiting publication of the identity of the complainant must be made upon application by her or by the prosecutor: *Canadian Newspapers Co. v. Canada (Attorney-General)* (1988), 43 C.C.C. (3d) 24, 65 C.R. (3d) 50, [1988] 1 S.C.R. 122 (6:0). [Note: This provision has since been amended to provide that the making of the order is also mandatory upon application of a witness under the age of 18 years. As well, the court left open the question whether in a proper case the accused's right to a

fair trial as guaranteed by s. 11(d) of the Charter would require that the complainant's name be published.]

However, where the complainant or the prosecutor wishes to obtain a more specific order prohibiting the naming of the accused or other persons or places on the ground that such information would disclose the identity of the complainant, evidence must be provided to support the application. The order cannot properly be made merely with the consent of the prosecutor and the complainant and without any supporting evidence. However, such evidence can be supplied either by *viva voce* evidence, affidavit or submissions of counsel and the discretion of a judge to make a non-publication order beyond an order as to the name of the complainant is not restricted to a limited category of cases such as those of incest and other familial crimes. On the other hand, great weight should always be given by judges in the exercise of their discretion to the tradition of openness of the courts to the public and the constitutional guarantee of freedom of the media in s. 2(b) of the Charter of Rights and Freedoms: *R. v. Southam Inc.* (1989), 47 C.C.C. (3d) 21, 69 C.R. (3d) 229, 32 O.A.C. 274 (Ont. C.A.).

A court may not unilaterally revoke an order under this section. If, however, both the Crown and the complainant consent to a revocation of the order, then the circumstances which make the publication ban mandatory are no longer present, and, subject to any rights that the accused may have under subsec. (3), the trial judge can revoke the order: *R. v. Adams* (1995), 103 C.C.C. (3d) 262 (S.C.C.). See also *R. v. K.(V.)* (1991), 68 C.C.C. (3d) 18, 4 C.R. (4th) 338 (B.C.C.A.) holding that a publication ban continues in effect during appellate proceedings.

**Publication bans other than pursuant to statute** – A trial judge has jurisdiction to prohibit the publication of the names of certain witnesses where the circumstances are sufficiently compelling as where the witnesses are prison inmates who justifiably fear for their safety should their identity be disclosed: *R. v. McArthur* (1984), 13 C.C.C. (3d) 152, 10 C.R.R. 220 (Ont. H.C.J.).

The superior court has an inherent jurisdiction to make an order prohibiting publication of the identity of the accused where such an order is necessary to protect a trial which is then being conducted before it. As well, the superior court has power under its inherent jurisdiction to render assistance to inferior courts to enable them to administer justice fully and effectively: *Re Regina and Unnamed Person* (1985), 22 C.C.C. (3d) 284 (Ont. C.A.).

A person seeking a publication ban in the context of criminal proceedings under a judge's common law or legislated discretionary authority must apply to the trial judge if one has been appointed or to a judge in the court at the level the case will be heard if the level of court can be established definitively by reference to the appropriate statutory provisions. Otherwise, the request should be made to a superior court judge as the highest court that could hear the case. To seek or challenge a ban on appeal, the Crown and the accused must follow the regular avenues of appeal available to them through the Criminal Code. For a third party, such as the media, who has been affected by the publication ban, where the ban has been imposed by a provincial court judge then the third party may apply to the superior court by way of *certiorari* and may then follow the appellate routes prescribed in the Criminal Code. When the order has been made by a superior court judge, then the third party may apply for leave to appeal to the Supreme Court of Canada under s. 40 of the Supreme Court Act. The judge hearing the application for a ban has the discretion to direct that third parties, such as the media, be given notice in accordance with the provincial rules of criminal procedure and has the discretion to grant standing to interested third parties and determine what rights the third parties should have on the hearing of the application. A judge has the discretion at common law to impose a ban on publication to protect the fairness of the trial only where: (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the



salutary effects of the publication ban outweigh the deleterious: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269.

The rights of an adult accused to equality as protected by s. 15 of the Charter are not infringed, notwithstanding that the judge may make an order prohibiting publication of the identity of the complainant or an accused young offender. Further, s. 7 of the Charter does not give the accused a right to privacy which may be enforced by a ban on publication of his identity: *R. v. D. (G.)* (1991), 63 C.C.C. (3d) 134, 4 C.R. (4th) 172, 2 O.R. (3d) 498 (C.A.).

A trial judge, presiding at a retrial following the accused's successful appeal, has an inherent power to make an order prohibiting publication of aspects of the previous proceedings which could prejudice the jury hearing the retrial. Such an order does not violate the right to freedom of the press in s. 2(b) of the Charter of Rights and Freedoms: *R. v. Barrow* (1989), 48 C.C.C. (3d) 308, 91 N.S.R. (2d) 176 (S.C.).

**Violation of publication ban [subsec. (5)]** – An accused may be cited for contempt of court in the superior court for violation of an order made under this section, notwithstanding the availability of the punishment under subsec. (5): *Quebec (Procureur Général) v. Publications Photo-Police Inc.* (1990), 54 C.C.C. (3d) 576n, [1990] 1 S.C.R. 851 (7:0).

#### INFORMATION FOR SEARCH WARRANT / Endorsement of search warrant / Form / Effect of endorsement.

**487. (1)** A justice who is satisfied by information on oath in Form 1 that there are reasonable grounds to believe that there is in a building, receptacle or place

- (a) anything on or in respect of which any offence against this Act or any other Act of Parliament has been or is suspected to have been committed,
- (b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence, or will reveal the whereabouts of a person who is believed to have committed an offence, against this Act or any other Act of Parliament, or
- (c) anything that there are reasonable grounds to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant,

may at any time issue a warrant under his hand authorizing a person named therein or a peace officer

- (d) to search the building, receptacle or place for any such thing and to seize it, and
- (e) subject to any other Act of Parliament, to, as soon as practicable, bring the thing seized before, or make a report in respect thereof to, the justice or some other justice for the same territorial division in accordance with section 489.1.

**(2)** Where the building, receptacle, or place in which anything mentioned in subsection (1) is believed to be in any other territorial division, the justice may issue his warrant in like form modified according to the circumstances, and the warrant may be executed in the other territorial division after it has been endorsed, in Form 28, by a justice having jurisdiction in that territorial division.

**(3)** A search warrant issued under this section may be in the form set out as Form 5 in Part XXVIII, varied to suit the case.

**(4)** An endorsement that is made on a warrant as provided for in subsection (2) is sufficient authority to the peace officers or the persons to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with section 489.1 or as otherwise provided by law. R.S., c. C-34, s. 443; R.S.C. 1985, c. 27 (1st Supp.), s. 68; 1994, c. 44, s. 36.

## CROSS-REFERENCES

The terms "justice", "peace officer" and "territorial division" are defined in s. 2. Provision for granting of a telewarrant is made in s. 487.1. Restriction on publicity, see s. 487.2. A search warrant is executed in accordance with s. 488. Execution of a warrant to search a lawyer's office is governed by s. 488.1. Section 489 provides for seizure of things not named in the warrant but which the person executing the warrant believes on reasonable grounds have been obtained by or have been used in the commission of an offence. Section 489.1 sets out the procedure for restitution of goods to the lawful owner and s. 490 the procedure for detention of things which have been seized but not returned under s. 489.1. As to forfeiture of weapons and contraband, see ss. 491 and 491.1. Section 491.2 makes provision for use of photographic evidence in lieu of the actual property so that the property itself may be returned to the lawful owner. For notes on other search or seizure powers, see s. 487. Other search or seizure powers: ss. 101 to 103, search and seizure re weapons; s. 164, *in rem* proceedings re obscene publications and crime comics; ss. 185 to 188, authorization to intercept private communications; ss. 254, 256 and 257, demand for breath and blood samples, warrant for blood sample; s. 199, disorderly house search warrant; s. 320, *in rem* proceedings re hate propaganda; s. 395, precious metals etc.; s. 462, seizure of counterfeit money, tokens and instruments for use in making counterfeit; s. 462.32, proceeds of crimes; s. 492, seizure of explosives. Also see s. 487.01 which allows for the obtaining of a "general" warrant in circumstances where a warrantless search or seizure would violate s. 8 of the Charter; s. 492.1, warrant to use tracking device; and s. 492.2, warrant to use telephone number recorder or obtain records of telephone calls.

Note s. 31(1) of the Interpretation Act, R.S.C. 1985, c. I-21 which provides that where anything is required or authorized to be done by or before, *inter alia*, a justice of the peace it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

With respect to protection of persons executing warrants, see ss. 25 to 27. Also note s. 29(1) which imposes a duty on a person executing a warrant to have it with him, where it is feasible to do so, and produce it when requested.

Also see notes under s. 8 of the Charter.

## SYNOPSIS

This section sets out the procedure that must be followed to obtain a search warrant.

Subsection (1) makes it clear that the justice must be *satisfied that there are reasonable grounds to believe* that the prescribed items will be found in a building, receptacle or place. The items being searched for may include anything in respect of which an offence against an Act of Parliament *has been*, or is *suspected of having been committed*, anything that there is *reasonable ground to believe* will afford evidence of an offence against an Act of Parliament, anything that will reveal the whereabouts of a person believed to have committed an offence, or anything that there are *reasonable grounds to believe* is intended to be used for the purpose of committing an offence against the person, for which a person may be arrested without a warrant. The justice may only be satisfied of the preceding if the information that comes before him is on oath and in Form 1.

The justice may issue a warrant authorizing a person named in that warrant, or a peace officer to search the building, receptacle or place for the specified items and to seize such items. The warrant will also require that the items seized be brought before a justice or that a report be made as soon as practicable.

Subsection (2) makes it clear that if the building, receptacle or place in which the items sought are believed to be located is in another territorial division, the justice may issue the warrant in a form modified to fit the circumstances. This warrant must then be endorsed in Form 28, by a justice having jurisdiction, before it can be executed. This endorsement is sufficient authority to the person to whom the warrant was originally directed and to all peace officers within the new territorial division to execute the warrant.

## ANNOTATIONS

**Constitutional requirements generally** – Where it is feasible to obtain prior authorization, such authorization, usually in the form of a warrant issued by a person able to act judicially and to assess the evidence as to whether the appropriate standard has been met in an entirely neutral and impartial manner, is a precondition for a valid search and seizure in conformity with s. 8 of the Charter of Rights and Freedoms. The person seeking to justify a warrantless search must rebut the presumption that such search is unreasonable in violation of s. 8: *Hunter et al. v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, 41 C.R. (3d) 97, [1984] 2 S.C.R. 145 (8:0).

This section complies with s. 8 of the Canadian Charter of Rights and Freedoms: *Re Times Square Book Store and The Queen* (1985), 21 C.C.C. (3d) 503, 48 C.R. (3d) 132 (Ont. C.A.).

Generally speaking, conformity to law is an essential component of reasonableness, although mere minor or technical defects in the warrant would not necessarily make an ensuing search or seizure unreasonable in violation of s. 8 of the Charter of Rights. However, a search or seizure conducted under a search warrant that is invalid in substance because it was issued upon information that did not set out facts upon which a justice acting judicially could be satisfied that there were grounds for issuing the warrant under para. (1)(b), or did not meet the minimum requirements of particularity respecting the things to be searched for, is unreasonable under s. 8: *R. v. Harris and Lighthouse Video Centres Ltd.* (1987), 35 C.C.C. (3d) 1, 57 C.R. (3d) 356 (Ont. C.A.), leave to appeal to S.C.C. refused December 7, 1987.

In considering the validity of a search warrant, facts obtained as a result of an unreasonable search must be excised. The court must then determine whether the warrant would have been issued without the improperly obtained facts: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 (9:0).

**Grounds for issuing warrant** – Information supplied by a reliable informer, even though it is hearsay, may in some circumstances provide the necessary ground to justify granting of a search warrant. However, the mere statement by the informant that he was told by a reliable informer that a certain person is carrying on criminal activity or that contraband would be found at a certain place would be insufficient basis for granting a warrant. The underlying circumstances disclosed by the informer for his conclusion must be set out thus enabling the justice to satisfy himself that the requisite reasonable grounds exist: *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120 (Ont. C.A.). A further appeal by the accused to the Supreme Court of Canada was dismissed 52 C.C.C. (3d) 193, 73 C.R. (3d) 129 (S.C.C.) (5:0). The court agreed that the appropriate standard to establish reasonable grounds for a search is one of “reasonable probability” and, in making this determination, the court must have regard to the totality of the circumstances. The court also held that the suspect’s criminal record and reputation could be taken into account provided that, *inter alia*, the reputation is related to the ostensible reasons for the search. Where the police rely on information from an informer, it is not necessary for the police to confirm each detail in the informer’s tip, so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. On the other hand, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater.

Information from unnamed confidential sources was not a sufficient basis for issuing the warrant where there was no evidence to substantiate the veracity of the informers, no information as to how the informers acquired this knowledge and no independent evidence to support the story of the informers: *R. v. Berger* (1989), 48 C.C.C. (3d) 185, 74 Sask. R. 198 (C.A.).

Before granting the warrant the justice must be satisfied, *inter alia*, that the grounds stated for obtaining the warrant are current and that there is a nexus between the grounds for believing an offence has been committed and that evidence of the commis-



sion of the offence will be found on the premises to be searched: *R. v. Turcotte* (1987), 39 C.C.C. (3d) 193, [1982] 2 W.W.R. 97 (Sask. C.A.).

**Things for which warrant may be obtained** – A search warrant may authorize the removal and seizure of fixtures such as doors and windows: *Re Spitzer and The Queen et al.* (1984), 15 C.C.C. (3d) 98 (Sask. Q.B.). *Contra*: *R. v. Munn* (No. 1) (1938), 71 C.C.C. 139, [1938] 3 D.L.R. 772, 13 M.P.R. 81 (P.E.I.S.C.).

A search warrant is not available under this section to seize funds deposited in a savings account at a bank. A credit balance in a bank account is an intangible, merely proof that the bank has certain sums on deposit, and such funds are not segregated from the bank's other assets: *Re Banque Royale Du Canada and The Queen* (1985), 18 C.C.C. (3d) 98, 44 C.R. (3d) 387 (Que. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.* [However, now see s. 462.33.]

A search warrant cannot issue to forcibly remove and seize hair samples from the accused's person: *R. v. Legere* (1988), 43 C.C.C. (3d) 502, 89 N.B.R. (2d) 361 (N.B.C.A.). Nor can a warrant issue to seize a bandage wrapped around the accused's apparently injured hand: *R. v. Miller* (1987), 38 C.C.C. (3d) 252, 62 O.R. (2d) 97 (C.A.). However, it was held that the bandage could be seized under the common law power to search and seize as an incident to the arrest: *R. v. Miller*, *supra*.

A search warrant may not issue under this section to take a blood sample from an accused: *R. v. Tomaso* (1989), 70 C.R. (3d) 152, 33 O.A.C. 106, 14 M.V.R. (2d) 10. [Note: In the case of motor vehicle offences, now see s. 256, *supra*.]

**Seizure of hospital records** – It was held in *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.), *affd* on other grounds 47 C.C.C. (2d) 411, [1980] 1 S.C.R. 158, that in order to obtain hospital records the provincial legislation which brought those records into existence and safeguards their use must be complied with, even where the records are sought in criminal proceedings. Thus, see *R. v. Lyons* (1981), 64 C.C.C. (2d) 73 (Ont. H.C.J.), where an order was made within the terms of the provincial legislation. Also see *R. v. Coon* (1992), 74 C.C.C. (3d) 146 (Ont. Ct. (Gen. Div.)) noted under s. 698.

In *Re Waterford Hospital and The Queen* (1983), 6 C.C.C. (3d) 481, 35 C.R. (3d) 348 (Nfld. C.A.), a search warrant to obtain hospital records made during a remand of the accused under s. 537(1)(c) was quashed, *inter alia*, because the Department of Justice could have applied under the provincial legislation to examine the records.

Where the applicable provincial legislation contained no code of procedure for obtaining medical records, a search warrant issued under this section was available to obtain the relevant records. The duty of confidentiality, which the hospital and staff owed to the accused, was not breached as the records were required to be released by law pursuant to the order of the justice: *R. v. Worth* (1989), 54 C.C.C. (3d) 215 (Ont. H.C.J.), *affd* 54 C.C.C. (3d) 223n (C.A.).

**Jurisdiction of justice** – A justice of the peace appointed in and for the province has jurisdiction to issue a search warrant to be executed in one county although at the time the justice is sitting in another county, and such a warrant need not be endorsed pursuant to subsec. (2): *R. v. Haley* (1986), 27 C.C.C. (3d) 454, 51 C.R. (3d) 363 (Ont. C.A.). *Contra*: *Re Ciment Independant Inc., Ciment St-Laurent Inc. and The Queen* (1985), 21 C.C.C. (3d) 429, 47 C.R. (3d) 83 (Que. C.A.).

A justice of the peace had jurisdiction to issue a search warrant to seize documents from a federal government department containing confidential information acquired under the Old Age Security Act (Can.) which was sought as evidence in relation to a fraud on provincial welfare authorities. The Act itself and the Privacy Act (Can.) created an exemption to the privilege and duty of non-disclosure in such circumstances. It was still open to the federal Minister to object to disclosure but this must be done under s. 37 of the Canada Evidence Act. On the other hand, in view of the confidential nature of the material sought, it would have been prudent for the justice of the peace to impose condi-

tions and restrictions on the manner in which the warrant was executed: *Canada (Procurer General) v. Belanger* (1987), 42 C.C.C. (3d) 82, 61 C.R. (3d) 388 (Que. C.A.).

**Search of persons/search incident of arrest** – A warrant to search premises does not authorize the police to search an occupant of those premises and in the absence of some statutory or other power, such a search is unlawful and unreasonable: *R. v. Mutch* (1986), 26 C.C.C. (3d) 477, 22 C.R.R. 310 (Sask. Q.B.).

Police officers have the power to search an accused as an incident to a lawful arrest and to seize anything in his possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the accused's escape or provide evidence against him. The existence of reasonable and probable grounds to believe that the accused is in possession of weapons or evidence is not a prerequisite to the existence of the power to search, provided, however, that the search is for a valid objective and not unrelated to the objectives of the proper administration of justice. Proper objectives are to prevent the accused evading arrest and to collect evidence. Accordingly, a search done for weapons or other dangerous articles is necessary as an elementary precaution to preclude the possibility of their use against the police, the nearby public or the accused himself. A search is also proper to collect evidence that can be used in establishing the guilt of the accused. Further, the search must not be conducted in an abusive fashion and the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation. A "frisk" or pat down search is a relatively non-intrusive procedure and, if done for valid reasons, is not a disproportionate interference with the freedom of persons lawfully arrested: *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257, 74 C.R. (3d) 316, [1990] 1 S.C.R. 158 (7:0).

**Search and right to counsel** – As a general rule, police proceeding to search are not obligated to suspend the search and give a person the opportunity to retain and instruct counsel, as, for example, when the search is of a home pursuant to a search warrant. Where a person is detained for a search, as in the case of a body search incident to arrest, then, immediately upon detention, the detainee has the right to be informed of the right to counsel under s. 10(b) of the Charter of Rights and Freedoms. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. The police are, however, required to suspend the search where the lawfulness of the search is dependent on the detainee's consent or where the statute gives a person a right to seek review of the decision to search: *R. v. Debot* (1989), 52 C.C.C. (3d) 193, [1989] 2 S.C.R. 1140, 73 C.R. (3d) 129.

Once the police have the situation clearly under control in the course of execution of a search warrant then they are required to afford an occupant of the premises, who has been arrested, an opportunity to exercise his rights under s. 10(b) of the Charter: *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87, [1989] 1 W.W.R. 385 (7:0).

**Execution of warrant [Also see notes under s. 488]** – A police officer may have the assistance of persons, who are neither named in the warrant nor peace officers, provided that the police officer remains in control of and accountable for the search: *R. v. B.(J.E.)* (1989), 52 C.C.C. (3d) 224 (N.S.C.A.).

An officer executing a search warrant is required to have the warrant with her [see s. 29]. However, where the officer forgot to bring the warrant through inadvertence and the accused consented to the search commencing while the warrant was being brought to his home, then it was not shown that the search was unlawful: *R. v. B.(J.E.)* (1989), 52 C.C.C. (3d) 224 (N.S.C.A.).

**Contents of warrant** – The person whose premises are being searched is entitled to know from examination of the search warrant for what reason the search is taking place and the seizing officer must know in relation to what offence or circumstances the articles are to be seized. The failure, therefore, to describe the offence sufficiently in the

search warrant is fatal to the validity of the warrant. A warrant merely setting out a conspiracy to defraud certain named companies "and other financial institutions" and not alleging the means of fraud nor what the victims were defrauded of was held to be defective and was quashed and the items seized ordered to be returned: *Re Alder and The Queen* (1977), 37 C.C.C. (2d) 234, [1977] 5 W.W.R. 132 (Alta.S.C.T.D.).

In determining the degree of specificity required of things to be searched for, regard must be had to the nature of the offence alleged in the information to obtain the search warrant. In this case the court was required to consider the size and sophisticated nature of the target of the search as well as the continuing nature of the alleged offences and the lengthy period of time during which they were alleged to have been committed. Thus a warrant authorizing search and seizure of broad classes of documents was justified. Even where the informant did not allege the precise nexus between a thing to be searched for and an alleged offence, the justice of the peace who issued the warrant was entitled to draw reasonable inferences of such nexus from the allegations in the information. Where, by the very nature of the things to be searched for, it is not possible to describe them with precision or great particularity, it is inevitable that the executing officers will have to exercise some discretion in determining whether things found on the premises fall within the description of the things or classes of things described in the warrant: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh et al. and The Queen* (1987), 31 C.C.C. (3d) 449 (C.A.).

The offence for which the items are sought need not be set out in the warrant with the same precision as would be required for an indictment, provided that the person in charge of the premises is reasonably informed from the warrant as to the nature of the offence and the object of the search: *Re PSI Mind Development Institute Ltd et al. and The Queen* (1977), 37 C.C.C. (2d) 263 (Ont.H.C.J.).

**Religious privilege / freedom of religion** – While it is not the function of the court to pass on the validity of religious beliefs sincerely held by any organization, the mere fact that an organization claims to be a religion does not bar the Crown or any other litigant from seeking the assistance of the courts in the determination of either criminal or civil wrong, including resort to the investigative tool of a search warrant: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh et al. and The Queen* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.).

There is no recognized class privilege accorded to the priest penitent relationship and so while s. 2(a) of the Charter of Rights and Freedoms may have enhanced the claim that communications made in the course of that relationship may have to be afforded privilege, its applicability must be determined on a case by case basis. The justice would have jurisdiction to issue a warrant to seize files which allegedly contained priest penitent communications where the information to obtain the warrant discloses a *prima facie* case of criminality and that no reasonable alternative source of obtaining the information was available: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh et al. and The Queen* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.).

The Canadian Charter of Rights and Freedoms does not require the application of a strict test such as the test of scrupulous exactitude in the assessment of the particularity of the search warrant, notwithstanding that the search allegedly involved intrusion into areas of protected freedoms such as freedom of religion: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh and The Queen*, *supra*.

**Freedom of expression (media)** – Even where the minimum requirements set out in this section have been met, the justice has a discretion whether or not to issue the warrant and, if so, whether to attach conditions to its execution. In the case of the media and in light of the guarantee to freedom of expression in s. 2(b) of the Charter, there must be a careful consideration as to whether the warrant should issue and also the conditions which might be imposed. Ordinarily, the information to obtain the warrant should disclose whether there are alternative sources from which the information may reasonably



be obtained and if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted. If a search will impede the media from fulfilling its functions of news gatherer and disseminator, then a warrant should only be issued where a compelling state interest is demonstrated. The fact that the information sought has already been disseminated in whole or in part, to the public by the media will ordinarily favour the granting of the warrant: *C.B.C. v. New Brunswick (Attorney General)* (1991), 67 C.C.C. (3d) 544, 85 D.L.R. (4th) 57, 130 N.R. 362 (S.C.C.) (6:1); *C.B.C. v. Lessard* (1991), 67 C.C.C. (3d) 517, 130 N.R. 321 (S.C.C.) (6:1).

**Obscene material [Also see notes under s. 164]** – Where a search warrant is sought in relation to allegedly obscene magazines, it is not sufficient that the justice of the peace is satisfied that the items sought could be of assistance in establishing the commission of an offence. Rather, the justice must be satisfied on reasonable and probable grounds that the magazines to be seized are obscene and can be found at the specified premises. Further, the warrant should be reasonably specific when dealing with books and magazines since sexually explicit material, however distasteful it may be, so long as it is not obscene, is entitled to the same protection as other forms of expression. On the other hand, neither the material presented in support of the application for a warrant nor the warrant itself need specify the title of each magazine or book sought to be seized: *Re Times Square Book Store and The Queen* (1985), 21 C.C.C. (3d) 503, 48 C.R. (3d) 132 (Ont. C.A.); *R. v. Comic Legends* (1987), 40 C.C.C. (3d) 203, 56 Alta. L.R. (2d) 170 (Q.B.).

**Access to information (sealing orders)** – Where a search warrant is executed and nothing is found then the public has no right to see either the warrant or the information. Where, however, the search warrant has been executed, and objects found as a result of the search are brought before a Justice pursuant to s. 490, then any member of the public is entitled to inspect the warrant and the information upon which it has been issued pursuant to this section, unless it is established that the ends of justice would be subverted by disclosure or that the judicial documents might be used for an improper purpose. Finally, the public has no right to attend the hearing at which application is made for the issuance of a search warrant. That hearing may be held *in camera*: *A.-G. N.S. et al. v. MacIntyre* (1982), 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, [1982] 1 S.C.R. 175 (5:4).

A provincial court judge may make an order refusing access to the information where clear and convincing evidence or argument is adduced to establish that access ought to be denied in favour of a countervailing interest. An order denying access may be conditional requiring, for example, that the information be sealed only until a specific event occurs: *Re A.-G. Ont. and Yanover et al.* (1982), 68 C.C.C. (2d) 151, 26 C.R. (3d) 216 *sub nom. Re Yanover et al.*; *Re Hill* (Ont. Prov. Ct.). There is even power to order that an information be sealed against an interested party: *Re Gerol and The Queen* (1982), 69 C.C.C. (2d) 232 (Ont. Prov. Ct.).

However, it was held in *Re Rideout and The Queen* (1986), 31 C.C.C. (3d) 211, 61 Nfld. & P.E.I.R. 160 (Nfld. S.C.T.D.), that a judge may refuse access to the information only where the ends of justice would be subverted by disclosure or where judicial documents might be used for an improper purpose.

Although nothing is seized during the search the accused who was the object of the investigation, as an interested party, is entitled to inspect the information, the warrant and the related documentation: *Re Jany and The Queen* (1983), 9 C.C.C. (3d) 349 (B.C.S.C.).

An application to the Superior Court to gain access to documents relating to execution of a search warrant is premature while an application is pending in the provincial Court to have the documents sealed: *Re Henderson and Jolicouer* (1983), 9 C.C.C. (3d) 79 (Ont. H.C.J.).

The trial judge has jurisdiction to set aside an order made by the justice, who issued

the warrant, sealing the information to obtain the warrant: *R. v. Tanner* (1989), 46 C.C.C. (3d) 513 (Alta. C.A.).

An application to remove an order prohibiting access to the information should be made to the trial judge rather than to the superior court: *R. v. Watson* (1990), 58 C.C.C. (3d) 208 (Man. Q.B.).

In *British Columbia (Attorney-General) v. Pacific Press Ltd.*, [1988] 6 W.W.R. 536, 28 B.C.L.R. (2d) 127 (S.C.), it was held that as the justice would have been justified in making a sealing order the court would issue an injunction to restrain publication of material contained in the information. While anyone denying access to court records carries the burden that access should be restricted that burden was met in view of evidence that Crown officers believed that its publication and disclosure might impede an ongoing murder investigation resulting in a potential loss of further evidence and the destruction or hiding of other physical evidence. Also relevant was that publication of much of the material would tend to prejudice a fair trial and thus amount to contempt of court.

**Disclosure of identity of confidential informers** – Where an accused seeks to attack the lawfulness and reasonableness of a search of his home on the basis that there were not sufficient grounds, in the information, for the issuance of the warrant then there should be reasonable disclosure made of the information which was used to obtain the search warrant, if it is needed and requested, despite the fact that it may disclose the identity of an informer. However, upon receipt of such a request, the trial judge should review the information with the object of deleting all references to the identity of the informer. The information so edited should then be made available to the accused. If, at the conclusion of the editing procedure, the Crown still believes that the informer would become known to the accused upon production of the information, then a decision would have to be made by the Crown. The informer might by this time be willing to consent to being identified. Alternatively, the informer's identity might have become so notorious in the community or become so well known to the accused that his identification would no longer be a significant issue. If the Crown is of the view that to produce the informer would be prejudicial to the administration of justice the Crown may elect not to proceed with the evidence or to proceed on the basis of a warrantless search. In those circumstances, the trial Judge will have to consider the application of s. 24(2) of the Charter: *R. v. Hunter* (1987), 34 C.C.C. (3d) 14, 57 C.R. (3d) 1, 59 O.R. (2d) 364 (Ont. C.A.).

In *R. v. Collins* (1989), 48 C.C.C. (3d) 343, 69 C.R. (3d) 235, 32 O.A.C. 296, the court considered the related problem of disclosure of the identity of a confidential informer who is not named in the information to obtain the search warrant but whose information was the basis, at least in part, for obtaining the search warrant. It was held that the common law rules of evidence, which prohibit judicial disclosure of a police informer's identity by police officers who have learned the informer's identity in the course of their duties, were applicable. There is only one exception to this principle and that is where disclosure of the identity of the informer is necessary to demonstrate the innocence of the accused. That was not the case here, since no evidence was adduced on the *voir dire* either by affidavit evidence or by way of *viva voce* evidence which would indicate that the secret informer had any knowledge of or was involved in any way in the crime which might tend to demonstrate the innocence of the accused. To the contrary, the evidence adduced on the *voir dire* through the police officers indicated that the testimony of the secret informer could only tend to demonstrate the guilt rather than the innocence of the accused.

An objection, pursuant to s. 37 of the Canada Evidence Act, R.S.C. 1985, c. C-5 to disclosure of the identity of a police informer referred to in an information to obtain a search warrant, was properly upheld, although the accused sought the informer's identity to explore for evidence of an unreasonable seizure in violation of s. 8 of the Charter. The right to explore for such evidence must be exercised in accordance with the rules of evidence, including the rule prohibiting disclosure of the identity of a police informer: *R. v. Archer* (1989), 47 C.C.C. (3d) 567, 94 A.R. 323 (C.A.).

**Review of sufficiency of warrant / When review application should be brought –**

Where the sole purpose for attacking the validity of the search warrant issued by a justice of the peace is to lay a foundation for exclusion of evidence, obtained as a result of its execution, pursuant to ss. 8 and 24(2) of the Charter of Rights and Freedoms, then the issue should be determined at trial and not by way of an application to the superior court prior to trial. The rule against collateral attack of orders of a superior court does not extend to the orders of an inferior court: *Re Zevallos and The Queen* (1987), 37 C.C.C. (3d) 79, 59 C.R. (3d) 153 (Ont. C.A.); *R. v. Williams* (1987), 38 C.C.C. (3d) 319, 17 B.C.L.R. (2d) 223 (Y.T.C.A.); *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287, 90 N.S.R. (2d) 164 (C.A.); *R. v. Bailey* (1988), 87 N.S.R. (2d) 245, 39 C.R.R. 378 (C.A.). *Contra: R. v. Komadowski* (1986), 27 C.C.C. (3d) 319, [1986] 3 W.W.R. 657, 39 Man. R. (2d) 282 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 44 Man. R. (2d) 79.

**Scope of review –** On an application to quash a search warrant the superior court judge may not substitute his opinion as to the sufficiency of the evidence. Rather he is limited to determining whether or not there is evidence upon which the justice acting judicially could determine that a warrant should be issued and whether the warrant contained sufficient particulars of the items to be seized so that it could not be said that the discretion of the officer was substituted for that of the justice as to the items to be seized: *Re Times Square Book Store and The Queen*, *supra*; *A.-G. Que. v. Mathieu* (1986), 50 C.R. (3d) 156 (Que. C.A.); *R. v. Turcotte*, [1988] 2 W.W.R. 97 (Sask. C.A.). The enactment of the Canadian Charter of Rights has not altered the scope of review which is limited to jurisdictional error: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh et al. and The Queen*, *supra*.

In determining the validity of an information or search warrant the Court is not entitled to look at the results of the search: *Re Liberal Party Of Quebec and Mierzwinski et al.* (1978), 46 C.C.C. (2d) 119 (Que. S.C.).

The obtaining of a new search warrant to replace an existing warrant that is contemporaneously the subject of a motion to quash is an abuse of the process: *Shumiatcher v A.-G. Of Saskatchewan, Bence, J.P. and Mathews* (1960), 129 C.C.C. 270, 34 C.R. 154 (Sask. Q.B.).

Where there is an inadvertent error in the information to obtain the warrant, the issue to be determined is whether, with the erroneous part deleted, the information could have provided sufficient evidence to permit the warrant to be issued. On the other hand, where the justice of the peace has been intentionally misled, the search warrant cannot stand. Cases not clearly in the category of inadvertent error nor deliberately misleading must be considered individually to decide whether the case is one where, if the information in support of the warrant is clearly sufficient, without the erroneous part, the search warrant should be allowed to stand: *R. v. Sismey* (1990), 55 C.C.C. (3d) 281 (B.C.C.A.).

**Procedure on review –** While the judge hearing an application to quash a search warrant has jurisdiction to permit cross-examination of the informant, such procedure is not available in every case merely on the basis of a claim that the allegations in the information to obtain the warrant are untrue. Rather, the applicant must first pass a threshold test of establishing a *prima facie* case of deliberate falsehood or omission or reckless disregard for the truth. Further, where the judge determines that cross-examination should take place, he may properly limit that cross-examination to matters which would have a bearing on the informant's alleged fraud or reckless disregard for the truth. In particular it would not be appropriate to allow informants to be cross-examined as to their knowledge or opinion of whether the justice of the peace had read all the material placed before him before issuing the warrant. If on an application to quash a search warrant, perjury or reckless disregard for the truth or material gross negligence are found to exist, then this would be tantamount to fraud and result in the quashing of the warrant, or such portion of it as may be affected by the fraud, if the fraud were not so serious as to amount to an abuse of the process of the court. However, for the informant's misstatements and omis-



sions in the information to obtain the warrant to constitute a reckless disregard for the truth, there must be a flagrant lack of concern for the truth or accuracy of statements made which approaches fraudulent behaviour. The lack of concern must be of an unconscionable nature which approaches, although is not deliberate, misstatement or omission. It does not include mere error of judgment or ordinary negligence or carelessness: *R. v. Church of Scientology*; *R. v. Walsh, supra*. Folld: *R. v. Titan Industries Ltd.* (1986), 31 C.C.C. (3d) 442 (B.C.S.C.). [It is unclear whether the strict threshold for cross-examination is appropriate in light of its rejection in the wire-tap area. See *R. v. Garofoli* (1990), 60 C.C.C. (3d) 161, [1990] 2 S.C.R. 1421, 80 C.R. (3d) 317.

While in the result the court did not find it necessary to decide the point, some doubt was expressed as to whether a justice of the peace was a compellable witness to testify with respect to his mental processes in exercising the judicial function whether or not to grant a search warrant: *R. v. Moran* (1987), 36 C.C.C. (3d) 225, 21 O.A.C. 257 (C.A.), leave to appeal to S.C.C. refused [1988] 1 S.C.R. xi. [And now see: *MacKeigan v. Hickman* (1989), 50 C.C.C. (3d) 449, 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796].

There is a presumption of validity with respect to a search warrant and the sworn information supporting it. Thus, where it is sought to adduce evidence from the informant or other witnesses in support of an application to set aside a search warrant, there must be allegations of deliberate falsehood or omission or a reckless disregard for the truth with respect to the material used to obtain the issuance of the warrant. Such allegations must be made out, as to the facts, to the extent of a *prima facie* case which may be established by inspection of the material or by affidavit, except in the most exceptional circumstances. The deliberate falsity, omission or reckless disregard alleged must be that of the affiant of the information and not that of an informer who has provided him with the alleged facts: *R. v. Collins, supra*.

**Standing** – In the absence of showing some possessory or proprietary interest either in the things seized or the premises, a third person has no standing to attempt to quash the search warrant even where the items seized relate to transactions by the applicant: *R. v. Model Power* (1979), 21 C.R. (3d) at p. 196 (Ont. H.C.J.), affd C.R. *loc. cit.* p. 195 (C.A.), leave to appeal to S.C.C. refused C.R. *loc. cit.*, 32 N.R. 487n.

**Severance of warrant** – Where a search warrant is defective in part that part only may be severed: *R. v. Johnson & Franklin Wholesale Distributors Ltd.* (1971), 3 C.C.C. (2d) 484, 16 C.R.N.S. 107 (B.C.C.A.).

Although on an application to quash a search warrant the superior court has power to sever off bad parts of a warrant there is no authority to permit the court on a *certiorari* application to amend the warrant by, for example, narrowing the time period of the alleged offence to conform with the evidence disclosed in the information to obtain the warrant: *R. v. Dobney Holdings* (1985), 18 C.C.C. (3d) 238 (B.C.C.A.).

**Return of items seized** – Where the search warrant had a fatal defect it was wrong for the Judge on *certiorari* to allow the Crown to decide which documents should be retained, and an order will be made directing that all documents and copies be returned to the applicant: *Bergeron v. Deschamps* (1977), 33 C.C.C. (2d) 461, 14 N.R. 83 (9:0) (S.C.C.). The court without passing on the correctness of *R. v. Black* (1973), 13 C.C.C. (2d) 446, 24 C.R.N.S. 203 (B.C.S.C.), where it had been held that an order should go returning the seized goods provided they were not required as evidence, distinguished the case on the basis that in *R. v. Black* there was not the same fatal frailties as existed in this case. In *R. v. Black* the warrant was quashed because of failure of the person signing it to indicate he was a Justice of the Peace.

Even where charges have been laid and the items seized under the invalid warrant are required as evidence, the court, in quashing the warrant, has a discretion to order the items returned. This power existed prior to the Charter of Rights and Freedoms and exists as a remedy under s. 24(1): *R. v. Chapman* (1984), 12 C.C.C. (3d) 1, 9 D.L.R. (4th) 244, 46 O.R. (2d) 65 (C.A.).

In determining whether or not to make an order returning items seized after the warrant has been quashed the court will have regard to the conduct of the prosecuting authorities in relation to the search and seizure, the seriousness of the offence, the degree of potential cogency of the things seized in proving the charge, the nature of the defect in the warrant and the potential prejudice to the owner in being kept out of possession. In proper circumstances the court may give the authorities an opportunity to obtain a new warrant before ordering the return of the items seized: *R. v. Dobney Foundry Ltd.* (No. 2) (1985), 19 C.C.C. (3d) 465, [1985] 3 W.W.R. 626 (B.C.C.A.).

The court, having quashed the warrant, may in appropriate circumstances provide that the items are to be returned within a specified number of days unless the Crown obtains a fresh search warrant within that time: *R. v. Dobney Foundry Ltd.* (No. 3) (1986), 29 C.C.C. (3d) 285, [1987] 1 W.W.R. 281 (B.C.C.A.).

The Superior Court's inherent jurisdiction to order the return of items wrongfully seized under an invalid search warrant and which are not required as evidence also extends to items seized without a search warrant and which are wrongfully held by the police: *Butler and Butler v. Canada (Solicitor General)* (1981), 61 C.C.C. (2d) 512 (B.C.S.C.).

**Application to other statutes** – Although the Bankruptcy Act, R.S.C. 1970, c. B-3, contains its own search and seizure provisions, the authorities may also resort to this section to obtain evidence in relation to an offence under that Act. The addition of the words “or any other Act of Parliament” unambiguously show that every Act of Parliament could fall within the ambit of subsec. (1)(a) and (b): *R. v. Multiform Manufacturing Co.* (1990), 58 C.C.C. (3d) 257, [1990] 2 S.C.R. 624, 79 C.R. (3d) 390 (7:0).

A search warrant may be obtained under this section to search for narcotics. In such a case, however, the authorities are not entitled to rely upon the broad powers in s. 12 of the Narcotic Control Act for execution of the warrant: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1.

The Narcotic Control Act does not require that any return be made when a search warrant is issued under that Act to search a dwelling house. Thus, where the police resort to a search warrant under this section to search commercial premises for narcotics then there is no need to include a direction as set out in subsec. (1)(e): *R. v. Arason* (1992), 78 C.C.C. (3d) 1, 13 C.R.R. (2d) 248, 37 W.A.C. 20 (B.C.C.A.).

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**INFORMATION FOR GENERAL WARRANT / Limitation / Search or seizure to be reasonable / Video surveillance / Other provisions to apply / Provisions to apply.**

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**487.01 (1)** A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

- (a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;
- (b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and
- (c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

**(2)** Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

(3) A warrant issued under subsection (1) shall contain such terms and conditions as the judge considers advisable to ensure that any search or seizure authorized by the warrant is reasonable in the circumstances.

(4) A warrant issued under subsection (1) that authorizes a peace officer to observe, by means of a television camera or other similar electronic device, any person who is engaged in activity in circumstances in which the person has a reasonable expectation of privacy shall contain such terms and conditions as the judge considers advisable to ensure that the privacy of the person or of any other person is respected as much as possible.

(5) The definition "offence" in section 183 and sections 183.1, 184.2, 184.3, 185 to 188.2, 190, 193 and 194 to 196 apply, with such modifications as the circumstances require, to a warrant referred to in subsection (4) as though references in those provisions to interceptions of private communications were read as references to observations by peace officers by means of television cameras or similar electronic devices of activities in circumstances in which persons had reasonable expectations of privacy.

(6) Subsections 487(2) and (4) apply, with such modifications as the circumstances require, to a warrant issued under subsection (1). 1993, c. 40, s. 15.

#### CROSS-REFERENCES

This section is part of a more or less comprehensive scheme relating to search and seizure. Interception of private communications are dealt with in Part VI. Use of telephone number recorders is regulated under s. 492.2 and use of tracking devices is regulated under s. 492.1. Section 487 deals with the granting of ordinary search warrants to seize tangible things. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.

The terms "peace officer", "provincial court judge" and "superior court judge" are defined in s. 2.

#### SYNOPSIS

This section allows for the obtaining of a warrant in circumstances where a warrantless search or seizure would violate s. 8 of the Charter. In effect, it fills a gap noted by various courts. For example, the Supreme Court had held in *R. v. Wong* (1990), 60 C.C.C. (3d) 460, [1990] 3 S.C.R. 36, 1 C.R. (4th) 1 that warrantless surreptitious video surveillance by agents of the state in circumstances where the target has a reasonable expectation of privacy is a violation of s. 8 and yet no provision was made for obtaining a warrant or court authorization. A warrant for such surveillance could now be obtained under this section.

The warrant may be issued for any device or investigative technique or procedure or "any thing" except, pursuant to subsec. (2), anything which would interfere with the bodily integrity of any person. Subsection (3) permits the judge to impose appropriate conditions.

Subsection (5) makes special provision for video surveillance in circumstances where persons have a reasonable expectation of privacy. The effect of this subsection is that the authorization procedure under Part VI applies with the necessary modifications. In other words, a general warrant for this type of surveillance can only be obtained in the same circumstances as where an authorization to intercept private communications may be obtained. Thus, while a general warrant under subsec. (1) may be obtained in relation to any federal offence, a warrant in relation to video surveillance in circumstances where persons have a reasonable expectation of privacy can only be obtained for the offences listed in s. 183. To obtain the warrant, the police must meet the tests set out in Part VI rather than the test in subsec. (1) of this section. As well, the prohibition on disclosure of information from such surveillance in s. 193 is incorporated, as is the notice to targets



provision in s. 196. However, there is no statutory requirement of notice of intention to introduce into evidence as required for intercepted private communications under s. 189(5). The general disclosure obligation as outlined in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 9 C.R. (4th) 277, 68 C.C.C. (3d) 1, [1992] 1 W.W.R. 97 would, of course, apply in any event.

Subsection (4) requires the judge to impose conditions to protect the privacy of the targeted person and others in a case where the warrant is issued to authorize video surveillance in circumstances where persons have a reasonable expectation of privacy.

Subsection (6) makes applicable the provisions of s. 487 for “backing” the warrant if it is to be executed in another territorial division. Note that if the warrant is to be executed in another province and the investigative technique requires entry into private property or an assistance order under s. 487.02 then the warrant must be confirmed by a judge of the other province.

## ANNOTATIONS

A general warrant was validly issued under this section requiring employees of the Canada Post Corporation to photocopy the outside of envelopes and packages of mailable material after it was delivered to certain post office boxes. Compliance with the warrant would not require the employees to contravene the Canada Post Corporation Act: *Canada Post Corp. v. Canada (Attorney General)* (1995), 95 C.C.C. (3d) 568 (Ont. Ct. (Gen. Div.)).

This section does not contemplate an anticipatory search warrant authorizing a physical search of a specified location for specified property unassociated with the use of any “specified device” or “investigative technique or procedure”. The term “any thing” must be read as being qualified by the preceding specific enumeration of “device” and “investigative technique or procedure” and in the context of the entire section as well as related amendments to the Criminal Code concerning various forms of electronic surveillance devices. A warrant for a search of a specified location for specified property unassociated with the use of any specified “device” or “investigative technique or procedure” may be issued under s. 487 of the Criminal Code which does not authorize anticipatory search warrants: *R. v. Noseworthy* (1995), 101 C.C.C. (3d) 447 (Ont. Ct. (Gen. Div.)).

## ASSISTANCE ORDER.

**487.02** Where an authorization is given under section 184.2, 184.3, 186 or 188, a warrant is issued under section 487.01 or 492.1 or subsection 492.2(1) or an order is made under subsection 492.2(2), the judge or justice who gives the authorization, issues the warrant or makes the order may order any person to provide assistance where the person’s assistance may reasonably be considered to be required to give effect to the authorization, warrant or order. 1993, c. 40, s. 15.

## CROSS-REFERENCES

Although violation of an order under this section is not specifically made an offence, presumably the failure to comply could be punished under s. 127.

## SYNOPSIS

This section provides for the making of an order requiring persons to assist in the execution of various authorizations and warrants. For example, the assistance of the telephone company may be required to implement an authorization under s. 186 to intercept private communications or to install a telephone number recorder under s. 492.2.

## ANNOTATIONS

An assistance order could be validly made under this section requiring employees of the Canada Post Corporation to photocopy the outside of envelopes and packages of mailable material after it was delivered to certain post office boxes and requiring the employees

not to divulge the existence of the warrant and the order. *Canada Post Corp. v. Canada (Attorney General)* (1995), 95 C.C.C. (3d) 568 (Ont. Ct. (Gen. Div.)).

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**EXECUTION IN ANOTHER PROVINCE.****487.03 Where**

- (a) a warrant is issued under section 487.01, 487.05 or 492.1 or subsection 492.2(1) in one province,
- (b) it may reasonably be expected that the warrant is to be executed in another province, and
- (c) the execution of the warrant would require entry into or on the property of any person in the other province or would require that an order be made under section 487.02 with respect to any person in that other province,

a judge or justice, as the case may be, in the other province may, on application, endorse the warrant and the warrant, after being so endorsed, has the same force in that other province as though it had originally been issued in that other province. 1993, c. 40, s. 15; 1995, c. 27, s. 1.

**SYNOPSIS**

This section provides that a warrant may be confirmed where it is to be executed in another province. Such confirmation is in addition to the backing procedure set out in s. 487(2) [applicable to a general warrant issued under s. 487.01] and is required where it will be necessary to enter private premises or where an assistance order is made under s. 487.02.

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**Editor's Note: Chap. 27: FORENSIC DNA ANALYSIS**

Sections 487.04 to 487.09 create a new legislative scheme for obtaining a search warrant to seize a bodily substance for the purpose of forensic DNA analysis. The general warrant power in s. 487.01 allows a judge to issue a warrant to conduct various investigative techniques except where the technique would interfere with the "bodily integrity" of any person. Sections 487.04 to 487.09 now permit the issuance of a warrant in limited circumstances although the seizure may interfere with bodily integrity. These provisions thus fill an important gap in the legislative scheme and provide a lawful means to obtain highly probative evidence. Attempts to rely upon common law powers of search, such as consent and search incident to arrest, to obtain samples for DNA analysis have proved increasingly less useful as a result of a series of cases under s. 8 of the Charter of Rights and Freedoms.

The forensic DNA warrant is issued by a provincial court judge (not a justice of the peace) and can only be issued in relation to designated offences as listed in s. 487.04. The designated offences are, generally speaking, serious personal injury offences in which it is likely that DNA analysis may prove useful. Section 487.05 sets out the circumstances in which the judge may issue the warrant. The judge must not only be satisfied that there are reasonable grounds to believe that evidence will be obtained as a result of the seizure and subsequent DNA analysis, but must also be satisfied that issuance of the warrant is in the best interests of the administration of justice. The judge is specifically directed to consider the nature of the offence for which the warrant is sought and the circumstances of its commission. It is suggested that this will require the judge to, *inter alia*, weigh the seriousness of the offence, the likelihood that evidence will be obtained and the intrusive nature of the seizure being authorized.

Section 487.06 defines the investigative procedures which can be authorized in the warrant. These procedures are limited to plucking of individual hairs (presumably scalp and pubic hairs), taking of buccal swabs (swabbing the inside of the mouth) and taking small quantities of blood. Section 487.07 imposes special informational duties upon the police officer when executing the warrant. Section 487.07 does not specifically require

the officer to inform the suspect of the right to counsel under s. 10(b) of the Charter of Rights and Freedoms, except in the case of a young person. It is suggested, however, that since the suspect will be detained within the meaning of s. 10 of the Charter while the warrant is being executed, the officer is obliged to inform the suspect of the rights under s. 10. Execution of the warrant does not depend upon the consent of the suspect and, pursuant to s. 25 of the Code, the officer will be entitled to use as much force as is necessary to obtain the samples.

Sections 487.08 and 487.09 attempt to carefully circumscribe the use of evidence obtained under this scheme and reasonably protect the individual's right to privacy. Thus, the bodily substances may only be used in the course of an investigation of the designated offence and the forensic DNA evidence obtained from the analysis of the substances can only be used in connection with the investigation of designated offences. Provision is made for destruction of the samples and the results of the analysis where it is established that the person from whom the substances were seized was not the perpetrator of the offence. This will occur either as a result of the analysis itself or the eventual dismissal of the charges against the suspect (by way of acquittal, discharge at preliminary inquiry or some other similar disposition). Section 487.09(2) does, however, give a judge the power to make an order that neither the substances nor the results of the analysis be destroyed for whatever period the judge considers appropriate if the material may reasonably be required for investigation or prosecution of another designated offence. For example, although the suspect was acquitted there may be reasonable grounds to believe that he or she was involved in another designated offence. Alternatively, the evidence may be necessary to prove at the trial of someone else that the suspect was not involved in the designated offence.

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### *Forensic DNA Analysis*

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**DEFINITIONS** / “Adult” / “Designated offence” / “DNA” / “Forensic DNA analysis” / “Provincial court judge” / “Young person”.

**487.04.** In this section and sections 487.05 to 487.09,

“adult” has the meaning assigned by subsection 2(1) of the *Young Offenders Act*;

“designated offence” means

- (a) an offence under any of the following provisions of this Act, namely,
  - (i) section 75 (piratical acts),
  - (ii) section 76 (hijacking),
  - (iii) section 77 (endangering safety of aircraft or airport),
  - (iv) section 78.1 (seizing control of ship or fixed platform),
  - (v) paragraph 81(2)(a) (using explosives),
  - (vi) section 151 (sexual interference),
  - (vii) section 152 (invitation to sexual touching),
  - (viii) section 153 (sexual exploitation),
  - (ix) section 155 (incest),
  - (x) subsection 212(4) (offence in relation to juvenile prostitution),
  - (xi) section 220 (causing death by criminal negligence),
  - (xii) section 221 (causing bodily harm by criminal negligence),
  - (xiii) section 231 (murder),
  - (xiv) section 236 (manslaughter),
  - (xv) section 244 (causing bodily harm with intent),
  - (xvi) section 252 (failure to stop at scene of accident),
  - (xvii) section 266 (assault),
  - (xviii) section 267 (assault with a weapon or causing bodily harm),
  - (xix) section 268 (aggravated assault),



- (xx) section 269 (unlawfully causing bodily harm),
- (xxi) section 269.1 (torture),
- (xxii) paragraph 270(1)(a) (assaulting a peace officer),
- (xxiii) section 271 (sexual assault),
- (xxiv) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm),
- (xxv) section 273 (aggravated sexual assault),
- (xxvi) section 279 (kidnapping),
- (xxvii) section 279.1 (hostage taking),
- (xxviii) section 344 (robbery),
- (xxix) subsection 348(1) (breaking and entering with intent, committing offence or breaking out),
- (xxx) subsection 430(2) (mischief that causes actual danger to life),
- (xxxi) section 433 (arson – disregard for human life), and
- (xxxii) section 434.1 (arson – own property),
- (b) an offence under any of the following provisions of the *Criminal Code*, as they read from time to time before July 1, 1990, namely,
  - (i) section 433 (arson), and
  - (ii) section 434 (setting fire to other substance),
- (c) an offence under the following provision of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read from time to time before January 1, 1988, namely, paragraph 153(1)(a) (sexual intercourse with step-daughter, etc.),
- (d) an offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read from time to time before January 4, 1983, namely,
  - (i) section 144 (rape),
  - (ii) section 146 (sexual intercourse with female under fourteen and between fourteen and sixteen), and
  - (iii) section 148 (sexual intercourse with feeble-minded, etc.), and
- (e) an attempt to commit an offence referred to in any of paragraphs (a) to (d);

“DNA” means deoxyribonucleic acid;

“forensic DNA analysis”, in relation to a bodily substance that is obtained in execution of a warrant, means forensic DNA analysis of the bodily substance and the comparison of the results of that analysis with the results of the analysis of the DNA in the bodily substance referred to in paragraph 487.05(1)(b) and includes any incidental tests associated with that analysis;

“provincial court judge”, in relation to a young person, includes a youth court judge within the meaning of subsection 2(1) of the *Young Offenders Act*;

“young person” has the meaning assigned by subsection 2(1) of the *Young Offenders Act*, 1995, c. 27, s. 1.

#### INFORMATION FOR WARRANT TO OBTAIN BODILY SUBSTANCES FOR FORENSIC DNA ANALYSIS / Criteria.

487.05. (1) A provincial court judge who on *ex parte* application is satisfied by information on oath that there are reasonable grounds to believe

- (a) that a designated offence has been committed,
- (b) that a bodily substance has been found
  - (i) at the place where the offence was committed,
  - (ii) on or within the body of the victim of the offence,
  - (iii) on anything worn or carried by the victim at the time when the offence was committed, or

- (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
  - (c) that a person was a party to the offence, and
  - (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person
- and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis.
- (2) In considering whether to issue the warrant, the provincial court judge shall have regard to all relevant matters, including
- (a) the nature of the designated offence and the circumstances of its commission; and
  - (b) whether there is
    - (i) a peace officer who is able, by virtue of training or experience, to obtain a bodily substance from the person, by means of an investigative procedure described in subsection 487.06(1), or
    - (ii) another person who is able, by virtue of training or experience, to obtain under the direction of a peace officer a bodily substance from the person, by means of such an investigative procedure. 1995, c. 27, s. 1.

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#### INVESTIGATIVE PROCEDURES / Terms and conditions.

- 487.06. (1) The warrant authorizes a peace officer or another person under the direction of a peace officer to obtain and seize a bodily substance from the person by means of
- (a) the plucking of individual hairs from the person, including the root sheath;
  - (b) the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth to collect epithelial cells; or
  - (c) the taking of blood by pricking the skin surface with a sterile lancet.
- (2) The warrant shall include any terms and conditions that the provincial court judge considers advisable to ensure that the seizure of a bodily substance authorized by the warrant is reasonable in the circumstances. 1995, c. 27, s. 1.

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#### EXECUTION OF WARRANT / Detention of person under warrant / Respect of privacy / Execution of warrant against young person / Waiver of rights of young person.

- 487.07. (1) Before executing a warrant, a peace officer shall inform the person against whom it is to be executed of
- (a) the contents of the warrant;
  - (b) the nature of the investigative procedure by means of which a bodily substance is to be obtained from that person;
  - (c) the purpose of obtaining a bodily substance from that person;
  - (d) the possibility that the results of forensic DNA analysis may be used in evidence;
  - (e) the authority of the peace officer and any other person under the direction of the peace officer to use as much force as is necessary for the purpose of executing the warrant; and
  - (f) in the case of a young person, the rights of the young person under subsection (4).
- (2) A person against whom a warrant is executed

- (a) may be detained for the purpose of executing the warrant for a period that is reasonable in the circumstances for the purpose of obtaining a bodily substance from the person; and
  - (b) may be required by the peace officer who executes the warrant to accompany the peace officer.
- (3) A peace officer who executes a warrant against a person or a person who obtains a bodily substance from the person under the direction of the peace officer shall ensure that the privacy of that person is respected in a manner that is reasonable in the circumstances.
- (4) A young person against whom a warrant is executed has, in addition to any other rights arising from his or her detention under the warrant,
- (a) the right to a reasonable opportunity to consult with, and
  - (b) the right to have the warrant executed in the presence of counsel or a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.

**NOTE:** Section 487.07(4) re-enacted by 1995, c. 27, s. 3 (to come into force when 1995, c. 19, s. 35(3) comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Execution of warrant against young person.*

- (4) *A young person against whom a warrant is executed has, in addition to any other rights arising from his or her detention under the warrant,*
- (a) the right to a reasonable opportunity to consult with, and*
  - (b) the right to have the warrant executed in the presence of counsel and a parent or, in the absence of a parent, an adult relative or, in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person.*
- (5) A young person may waive his or her rights under subsection (4) but any such waiver
- (a) must be recorded on audio tape or video tape or otherwise; or
  - (b) must be made in writing and contain a statement signed by the young person that he or she has been informed of the right being waived. 1995, c. 27, s. 1.

#### LIMITATIONS ON USE OF BODILY SUBSTANCES / Limitations on use of results of forensic DNA analysis / Offence.

487.08. (1) No person shall use a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence for the purpose of forensic DNA analysis.

(2) No person shall use the results of forensic DNA analysis of a bodily substance that is obtained in execution of a warrant except in the course of an investigation of the designated offence or any other designated offence in respect of which a warrant was issued or a bodily substance found in the circumstances described in paragraph 487.05(1)(b) or in any proceeding for such an offence.

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence punishable on summary conviction. 1995, c. 27, s. 1.

#### DESTRUCTION OF BODILY SUBSTANCES, ETC. / Exception.

487.09. (1) A bodily substance that is obtained from a person in execution of a warrant and the results of forensic DNA analysis shall be destroyed forthwith after

- (a) the results of that analysis establish that the bodily substance referred to in paragraph 487.05(1)(b) was not from that person;



- (b) the person is finally acquitted of the designated offence and any other offence in respect of the same transaction otherwise than by reason of a verdict of not criminally responsible on account of mental disorder; or
- (c) the expiration of one year after
  - (i) the person is discharged after a preliminary inquiry into the designated offence or any other offence in respect of the same transaction,
  - (ii) the dismissal, for any reason other than acquittal, or the withdrawal of any information charging the person with the designated offence or any other offence in respect of the same transaction, or
  - (iii) any proceeding against the person for the offence or any other offence in respect of the same transaction is stayed under section 579 or under that section as applied by section 572 or 795,

unless during that year a new information is laid or an indictment is preferred charging the person with the designated offence or any other offence in respect of the same transaction or the proceeding is recommenced.

(2) Notwithstanding subsection (1), a provincial court judge may order that a bodily substance that is obtained from a person and the results of forensic DNA analysis not be destroyed during any period that the provincial court judge considers appropriate if the provincial court judge is satisfied that the bodily substance or results might reasonably be required in an investigation or prosecution of the person for another designated offence or of another person for the designated offence or any other offence in respect of the same transaction. 1995, c. 27, s. 1.

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*Other Provisions respecting Search Warrants*  
1995, c. 27, s. 1.

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TELEWARRANTS / Information submitted by telephone / Information submitted by other means of telecommunication / Administration of oath / Alternative to oath / Contents of information / Issuing warrant / Formalities respecting warrant and facsimiles / Issuance of warrant where telecommunication produces writing / Providing facsimile / Affixing facsimile / Report of peace officer / Bringing before justice / Proof of authorization / Duplicates and facsimiles acceptable.

487.1 (1) Where a peace officer believes that an indictable offence has been committed and that it would be impracticable to appear personally before a justice to make application for a warrant in accordance with section 256 or 487, the peace officer may submit an information on oath by telephone or other means of telecommunication to a justice designated for the purpose by the chief judge of the provincial court having jurisdiction in the matter.

(2) An information submitted by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing, shall be on oath and shall be recorded verbatim by the justice, who shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the record or a transcription of it, certified by the justice as to time, date and contents.

(2.1) The justice who receives an information submitted by a means of telecommunication that produces a writing shall, as soon as practicable, cause to be filed, with the clerk of the court for the territorial division in which the warrant is intended for execution, the information certified by the justice as to time and date of receipt.

(3) For the purposes of subsection (2), an oath may be administered by telephone or other means of telecommunication.

(3.1) A peace officer who uses a means of telecommunication referred to in subsec-

tion (2.1) may, instead of swearing an oath, make a statement in writing stating that all matters contained in the information are true to his or her knowledge and belief and such a statement is deemed to be a statement made under oath.

(4) An information submitted by telephone or other means of telecommunication shall include

- (a) a statement of the circumstances that make it impracticable for the peace officer to appear personally before a justice;
- (b) a statement of the indictable offence alleged, the place or premises to be searched and the items alleged to be liable to seizure;
- (c) a statement of the peace officer's grounds for believing that items liable to seizure in respect of the offence alleged will be found in the place of premises to be searched; and
- (d) a statement as to any prior application for a warrant under this section or any other search warrant, in respect of the same matter, of which the peace officer has knowledge.

(5) A justice referred to in subsection (1) who is satisfied that an information submitted by telephone or other means of telecommunication

- (a) is in respect of an indictable offence and conforms to the requirements of subsection (4),
- (b) discloses reasonable grounds for dispensing with an information presented personally and in writing, and
- (c) discloses reasonable grounds, in accordance with subsection 256(1) or paragraph 487(1)(a), (b) or (c), as the case may be, for the issuance of a warrant in respect of an indictable offence,

may issue a warrant to a peace officer conferring the same authority respecting search and seizure as may be conferred by a warrant issued by a justice before whom the peace officer appears personally pursuant to subsection 256(1) or 487(1), as the case may be, and may require that the warrant be executed within such time period as the justice may order.

(6) Where a justice issues a warrant by telephone or other means of telecommunication, other than a means of telecommunication that produces a writing,

- (a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;
- (b) the peace officer, on the direction of the justice, shall complete, in duplicate, a facsimile of the warrant in Form 5.1, noting on its face the name of the issuing justice and the time, date and place of issuance; and
- (c) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(6.1) Where a justice issues a warrant by a means of telecommunication that produces a writing,

- (a) the justice shall complete and sign the warrant in Form 5.1, noting on its face the time, date and place of issuance;
- (b) the justice shall transmit the warrant by the means of telecommunication to the peace officer who submitted the information and the copy of the warrant received by the peace officer is deemed to be a facsimile within the meaning of paragraph (6)(b);
- (c) the peace officer shall procure another facsimile of the warrant; and
- (d) the justice shall, as soon as practicable after the warrant has been issued, cause the warrant to be filed with the clerk of the court for the territorial division in which the warrant is intended for execution.

(7) A peace officer who executes a warrant issued by telephone or other means of

telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, before entering the place or premises to be searched or as soon as practicable thereafter, give a facsimile of the warrant to any person present and ostensibly in control of the place or premises.

(8) A peace officer who, in any unoccupied place or premises, executes a warrant issued by telephone or other means of telecommunication, other than a warrant issued pursuant to subsection 256(1), shall, on entering the place or premises or as soon as practicable thereafter, cause a facsimile of the warrant to be suitably affixed in a prominent place within the place or premises.

(9) A peace officer to whom a warrant is issued by telephone or other means of telecommunication shall file a written report with the clerk of the court for the territorial division in which the warrant was intended for execution as soon as practicable but within a period not exceeding seven days after the warrant has been executed, which report shall include

- (a) a statement of the time and date the warrant was executed or, if the warrant was not executed, a statement of the reasons why it was not executed;
- (b) a statement of the things, if any, that were seized pursuant to the warrant and the location where they are being held; and
- (c) a statement of the things, if any, that were seized in addition to the things mentioned in the warrant and the location where they are being held, together with a statement of the peace officer's grounds for believing that those additional things had been obtained by, or used in, the commission of an offence.

(10) The clerk of the court shall, as soon as practicable, cause the report, together with the information and the warrant to which it pertains, to be brought before a justice to be dealt with, in respect of the things seized referred to in the report, in the same manner as if the things were seized pursuant to a warrant issued, on an information presented personally by a peace officer, by that justice or another justice for the same territorial division.

(11) In any proceeding in which it is material for a court to be satisfied that a search or seizure was authorized by a warrant issued by telephone or other means of telecommunication, the absence of the information or warrant, signed by the justice and carrying on its face a notation of the time, date and place of issuance, is, in the absence of evidence to the contrary, proof that the search or seizure was not authorized by a warrant issued by telephone or other means of telecommunication.

(12) A duplicate or a facsimile of an information or a warrant has the same probative force as the original for the purposes of subsection (11). R.S.C. 1985, c. 27 (1st Supp.), s. 69; 1992, c. 1, ss. 58, 59; 1994, c. 44, s. 37.

#### CROSS-REFERENCES

The terms “clerk of the court”, “justice”, “peace officer” and “territorial division” are defined in s. 2. The term “telecommunication” is defined in s. 35(1) of the Interpretation Act, R.S.C. 1985, c. I-21. The usual provision for granting of a warrant is in s. 487 and note that, unlike s. 487, this section is restricted to cases involving allegations of commission of an indictable offence, which would, however, include a hybrid offence by virtue of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21. Restriction on publicity, see s. 487.2. A search warrant is executed in accordance with s. 488. Execution of a warrant to search a lawyer's office is governed by s. 488.1. Section 489 provides for seizure of things not named in the warrant but which the person executing the warrant believes on reasonable grounds have been obtained by or have been used in the commission of an offence. Section 489.1 sets out the procedure for restitution of goods to the lawful owner and s. 490 sets out the procedure for detention of things which have been seized but not returned under s. 489.1. As to forfeiture of weapons and contraband, see ss. 491 and 491.1. Section 491.2 makes



provision for use of photographic evidence in lieu of the actual property so that the property itself may be returned to the lawful owner. For notes on other search or seizure powers, see s. 487.

Note s. 31(1) of the Interpretation Act, R.S.C. 1985, c. I-21 which provides that where anything is required or authorized to be done by or before, *inter alia*, a justice of the peace, it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

Also see notes under s. 8 of the Charter.

## SYNOPSIS

This section sets out the requirements that must be met when a peace officer wishes to obtain a telewarrant.

Subsection (1) requires that the peace officer believe that an indictable offence has been committed and it is impracticable to appear personally before the justice to apply for the warrant. Under such circumstances, the peace officer may submit his sworn information by telephone or other means of telecommunication to a justice. This justice must have been designated for this purpose by the chief judge of the provincial court.

Subsection (2) states that the information referred to in subsec. (1) must be on oath, recorded verbatim by the justice, and filed with the clerk of the court having territorial jurisdiction as soon as practicable. The justice must certify the record of this information as to time, date and contents.

Subsections (2.1), (3.1) and (6.1) allow for receiving the information by use of a "fax" machine.

Subsection (4) sets out the requirements for an information or oath submitted by telephone or other means of telecommunication. Where the justice is satisfied that the requirements described in subsec. (5) have been met, that justice may issue a warrant to the peace officer authorizing the same powers as were found in ss. 256(1) or 487(1). The justice may also require that the warrant be executed within a specific time period.

Subsection (6) sets out specific obligations upon the justice and the peace officer who are involved in the application for telewarrants.

Subsection (7) requires that a peace officer who executes a telewarrant (other than a warrant under subsec. 256(1)) must give a facsimile of the warrant to any person present and apparently in control of the premises before entering. If the premises are unoccupied and the telewarrant does not relate to subsec. 256(1), the peace officer must affix the facsimile in a prominent place upon entering the premises or as soon as practicable thereafter.

Subsection (9) requires a peace officer who has executed a telewarrant to file a written report with the clerk of the court for the territorial jurisdiction in which the warrant was executed within seven days of the execution of the warrant. The report must include the things set out in paras. (a) to (c) in subsec. (9).

Subsection (10) makes it clear that the clerk of the court must place before a justice the report referred to in subsec. (9) along with the information and the warrant. There is no difference in the treatment of these items and that of similar documents produced upon personal applications for warrants.

Subsection (11) states that in any proceeding challenging a search authorized by telewarrant, the absence of a transcribed and certified information on oath or warrant is, unless there is evidence to the contrary, proof that the search and seizure was not authorized by a warrant.

## ANNOTATIONS

The term "facsimile" in para. (6)(b) means a reasonable copy, being one without significant and misleading errors. Since the two documents are prepared in two different locations by two different persons, there will inevitably be differences, but if they are not significant nor misleading and could not have prejudiced the accused, then the statutory requirement has been fulfilled. Further, the failure of the officer to file the written report as required by subsec. (9) did not invalidate the warrant nor render inadmissible

the results of analysis of a blood sample taken pursuant to the warrant: *R. v. Skin* (1988), 13 M.V.R. (2d) 130 (B.C. Co. Ct.).

#### RESTRICTION ON PUBLICITY / Definition of “newspaper”.

487.2 (1) Where a search warrant is issued under section 487 or 487.1 or a search is made under such a warrant, every one who publishes in any newspaper or broadcasts any information with respect to

(a) the location of the place searched or to be searched, or

(b) the identity of any person who is or appears to occupy or be in possession or control of that place or who is suspected of being involved in any offence in relation to which the warrant was issued,

without the consent of every person referred to in paragraph (b) is, unless a charge has been laid in respect of any offence in relation to which the warrant was issued, guilty of an offence punishable on summary conviction.

(2) In this section, “newspaper” has the same meaning as in section 297. R.S.C. 1985, c. 27 (1st Supp.), s. 69.

#### ANNOTATIONS

It has now been held that this section is of no force and effect in view of the unreasonable restrictions it places on freedom of expression as guaranteed by s. 2(b) of the Charter of Rights and Freedoms: *Canadian Newspapers Co. Ltd. v. A.-G. Can.* (1986), 28 C.C.C. (3d) 379, [1987] 1 W.W.R. 262, 31 D.L.R. (4th) 601 (Man. Q.B.); *Canadian Newspapers Co. Ltd. v. A.-G. Can. and two other actions* (1986), 29 C.C.C. (3d) 109, 53 C.R. (3d) 203, 32 D.L.R. (4th) 292 (Ont. H.C.J.).

#### EXECUTION OF SEARCH WARRANT.

488. A warrant issued under section 487 or 487.1 shall be executed by day, unless the justice, by the warrant, authorizes execution of it by night. R.S., c. C-34, s. 444; R.S.C. 1985, c. 27 (1st Supp.), s. 70.

#### CROSS-REFERENCES

The terms “justice”, “day” and “night” are defined in s. 2. With respect to protection of persons executing warrants, see ss. 25 to 27. Also note s. 29(1) which imposes a duty on a person executing a warrant to have it with him, where it is feasible to do so, and produce it when requested.

#### ANNOTATIONS

Once the warrant has expired with the completion of the search the officers’ right to be on the premises is terminated and they become trespassers if they remain on, or return to the premises: *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.).

In appropriate circumstances a search warrant may be issued for an extended period of time and its execution delayed for the purpose of apprehending a suspect who is at the premises only at certain times: *R. v. Coull and Dawe* (1986), 33 C.C.C. (3d) 186 (B.C.C.A.).

Where there is a risk of loss or destruction of evidence so that rapid action is required or where there is a real threat of violent behaviour whether directed at the police or third parties then the police may be justified in using special procedures in executing the warrant. However, the consideration of the possibility of violence must be carefully limited and should not amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour. The greater the departure from the standards of behaviour required by the common law and the Charter of Rights and Freedoms, then the heavier the onus on the police to show why they thought it necessary to use force in the execution of the warrant: *R. v. Genest* (1989), 45 C.C.C. (3d) 385, 91 N.R. 161 (S.C.C.) (7:0).

DEFINITIONS / "custodian" / "document" / "judge" / "lawyer" / "officer" / Examination or seizure of certain documents where privilege claimed / Application to judge / Disposition of application / Privilege continues / Order to custodian to deliver / Application to another judge / Prohibition / Authority to make copies / Hearing in private / Exception.

488.1 (1) In this section,

"custodian" means a person in whose custody a package is placed pursuant to subsection (2);

"document", for the purposes of this section, has the same meaning as in section 321;

"judge" means a judge of a superior court of criminal jurisdiction of the province where the seizure was made;

"lawyer" means, in the Province of Quebec, an advocate, lawyer or notary and, in any other province, a barrister or solicitor;

"officer" means a peace officer or public officer.

(2) Where an officer acting under the authority of this or any other Act of Parliament is about to examine, copy or seize a document in the possession of a lawyer who claims that a named client of his has a solicitor-client privilege in respect of that document, the officer shall, without examining or making copies of the document,

- (a) seize the document and place it in a package and suitably seal and identify the package; and
- (b) place the package in the custody of the sheriff of the district or county in which the seizure was made or, if there is agreement in writing that a specified person act as custodian, in the custody of that person.

(3) Where a document has been seized and placed in custody under subsection (2), the Attorney General or the client or the lawyer on behalf of the client, may

- (a) within fourteen days from the day the document was so placed in custody, apply, on two days notice of motion to all other persons entitled to make application, to a judge for an order
    - (i) appointing a place and a day, not later than twenty-one days after the date of the order, for the determination of the question whether the document should be disclosed, and
    - (ii) requiring the custodian to produce the document to the judge at that time and place;
  - (b) serve a copy of the order on all other persons entitled to make application and on the custodian within six days of the date on which it was made; and
  - (c) if he has proceeded as authorized by paragraph (b), apply, at the appointed time and place, for an order determining the question.
- (4) On an application under paragraph (3)(c), the judge
- (a) may, if the judge considers it necessary to determine the question whether the document should be disclosed, inspect the document;
  - (b) where the judge is of the opinion that it would materially assist him in deciding whether or not the document is privileged, may allow the Attorney General to inspect the document;
  - (c) shall allow the Attorney General and the person who objects to the disclosure of the document to make representations; and
  - (d) shall determine the question summarily and,
    - (i) if the judge is of the opinion that the document should not be disclosed, ensure that it is repackaged and resealed and order the custodian to deliver



the document to the lawyer who claimed the solicitor-client privilege or to the client, or

- (ii) if the judge is of the opinion that the document should be disclosed, order the custodian to deliver the document to the officer who seized the document or some other person designated by the Attorney General, subject to such restrictions or conditions as the judge deems appropriate, and shall, at the same time, deliver concise reasons for the determination in which the nature of the document is described without divulging the details thereof.

(5) Where the judge determines pursuant to paragraph (4)(d) that a solicitor-client privilege exists in respect of a document, whether or not the judge has, pursuant to paragraph (4)(b), allowed the Attorney General to inspect the document, the document remains privileged and inadmissible as evidence unless the client consents to its admission in evidence or the privilege is otherwise lost.

(6) Where a document has been seized and placed in custody under subsection (2) and a judge, on the application of the Attorney General, is satisfied that no application has been made under paragraph (3)(a) or that following such an application no further application has been made under paragraph (3)(c), the judge shall order the custodian to deliver the document to the officer who seized the document or to some other person designated by the Attorney General.

(7) Where the judge to whom an application has been made under paragraph (3)(c) cannot act or continue to act under this section for any reason, subsequent applications under that paragraph may be made to another judge.

(8) No officer shall examine, make copies of or seize any document without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under subsection (2).

(9) At any time while a document is in the custody of a custodian under this section, a judge may, on an *ex parte* application of a person claiming a solicitor-client privilege under this section, authorize that person to examine the document or make a copy of it in the presence of the custodian or the judge, but any such authorization shall contain provisions to ensure that the document is repackaged and that the package is resealed without alteration or damage.

(10) An application under paragraph (3)(c) shall be heard in private.

(11) This section does not apply in circumstances where a claim of solicitor-client privilege may be made under the *Income Tax Act*. R.S.C. 1985, c. 27 (1st Supp.), s. 71.

#### CROSS-REFERENCES

The terms “peace officer”, “public officer”, “superior court of criminal jurisdiction” and “Attorney General” are defined in s. 2. With respect to protection of persons executing warrants, see ss. 25 to 27. Also note s. 29(1) which imposes a duty on a person executing a warrant to have it with him, where it is feasible to do so, and produce it when requested.

For notes on other search powers see s. 487.

#### SYNOPSIS

This section sets out a procedure for determining a claim of solicitor-client privilege in relation to documents in the possession of a lawyer.

Subsection (2) states that where a peace officer or public officer is about to examine, copy or seize a document in the possession of a lawyer who makes a claim of solicitor-client privilege, that officer must place the document in a sealed and identified package and

place the package in the custody of the sheriff of the relevant district or county or another person who, by written agreement, is empowered to act as custodian.

When documents have been dealt with in accordance with subsec. (1), the Attorney General, the client or the lawyer on behalf of the client may apply within 14 days and upon two days' notice to all other parties, to a judge for an order that would deal with the documents. The judge may make an order that a date and place for the determination of the issue of privilege be set within not more than 21 days. The judge may also order that the custodian produce the documents to the judge on the date and at the location fixed for determining the issue. Paragraph (b) provides for service of the order on all parties while para. (c) authorizes the application for an order determining the issue.

Subsection (4) describes the procedure on an application for an order determining the issue.

Subsection (5) provides that when the judge decides that a document is privileged, it will remain inadmissible as evidence unless the client consents to its admission, or the privilege is otherwise lost. This is so even if the document has been inspected by the Attorney General.

Subsection (6) states that upon determination that no claim of privilege is being pursued the custodian must deliver it to the Attorney General, a designate or the seizing officer.

Subsection (7) authorizes another judge to hear applications under subsec. (3)(c) where the original judge cannot act or continue to act.

Subsection (8) makes it clear that the authorized officer must give a reasonable opportunity for a claim of solicitor-client privilege to be made before seizing or copying documents. A person claiming privilege may make an *ex parte* application to a judge to examine or make copies of documents that are in the custody of a custodian. Any such order must contain provisions to ensure that no damage or alteration to the documents occurs during an examination of this sort. Furthermore, the documents may only be examined under this subsection in the presence of the custodian or judge.

Subsection (10) provides that an application under subsec. (3)(c) shall be heard in private.

Subsection (11) specifically exempts any claim of solicitor-client privilege in relation to proceedings under the Income Tax Act from this section.

## ANNOTATIONS

Prior to the enactment of this section, the Supreme Court of Canada in *Descoteaux et al. v. Mierzwinski and A.-G. Que. et al.* (1982), 70 C.C.C. (2d) 385, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289 (7:0) considered at length the relationship between solicitor-client privilege and the execution of a search warrant at a solicitor's office. The holding by the Court may be summarized as follows: Although solicitor-client privilege was originally a rule of evidence, it is not necessary to wait for the trial or preliminary inquiry at which the communication is to be adduced in evidence before raising its confidentiality. The confidentiality of communications between solicitor and client may be raised in any circumstance where such communications are likely to be disclosed without the client's consent. A justice of the peace must be more demanding before authorizing the search of a lawyer's office or one of his files and, where necessary, should set out special procedures for the execution of the warrant in order to limit to what is absolutely inevitable the breach of confidentiality. Further, where the documents sought would in fact be inadmissible in evidence by reason of the solicitor-client privilege then the justice of the peace would have no jurisdiction to authorize the search pursuant to s. 443(1)(b) [now s. 487(1)(b)] of this section. In any case where the justice of the peace has the necessary jurisdiction to authorize the search because, for example, the documents, while originally subject to solicitor-client privilege, have lost that privilege as they would fall within an exception to the rule, nevertheless, the search should be limited to what is absolutely necessary in order to seize the things for which the search was authorized. Moreover, a

justice of the peace has a discretion to refuse a warrant even where the conditions set out in this section have been met. Thus, where the search would interfere with rights as fundamental as freedom of the press or a solicitor's client's right to confidentiality, a justice of the peace may and should refuse to issue the warrant unless there is material to show (a) whether a reasonable alternative source of obtaining the information is or is not available, and (b) if available, that reasonable steps have been taken to obtain it from that alternative source. Where what is sought is evidence, then even where the justice of the peace is satisfied that there is such evidence on the premises of the lawyer, he should only allow a lawyer's office to be searched if, in addition, he is satisfied that there is no reasonable alternative to a search.

However, in a subsequent case, *Re Bloski and The Queen* (1987), 39 C.C.C. (3d) 248, 48 D.L.R. (4th) 69, 60 Sask. R. 275 (Q.B.), it was held that this section was now a complete code of procedure respecting the issuing and execution of search warrants to search a law office and in particular there was no requirement that the justice first be satisfied that alternative methods of obtaining the information had been canvassed and attempted.

*R. v. Bloski*, *supra*, was followed in *Joly v. Bourdeau* (1989), 51 C.C.C. (3d) 394 (Que. S.C.).

No appeal lies from the determination under this section by the superior court judge as to whether the documents should be disclosed despite the claim of solicitor client privilege: *R. v. King* (1992), 74 C.C.C. (3d) 191 (P.E.I.C.A.).

## SEIZURE OF THINGS NOT SPECIFIED.

489. Every person who executes a warrant issued under section 462.32, 487, 487.01 or 487.1 may seize, in addition to the things mentioned in the warrant, anything that the person believes on reasonable grounds has been obtained by or has been used in the commission of an offence. R.S., c. c-34, s. 445; R.S.C. 1985, c. 27 (1st Supp.), s. 72; c. 42 (4th Supp.), s. 3; 1993, c. 40, s. 16.

## CROSS-REFERENCES

For other notes on search powers, see s. 487. With respect to protection of persons executing warrants, see ss. 25 to 27. Also note s. 29(1) which imposes a duty on a person executing a warrant to have it with him, where it is feasible to do so, and produce it when requested.

## SYNOPSIS

This section authorizes the seizure of items not specified in a warrant issued under ss. 462.32, 487, 487.01 or 487.1. Where a person executing such a warrant *believes on reasonable grounds* that a thing, not mentioned in the warrant, has been obtained by, or has been used in the commission of an offence, he may seize that thing.

## RESTITUTION OF PROPERTY OR REPORT BY PEACE OFFICER / Idem / Form.

489.1 (1) Subject to this or any other Act of Parliament, where a peace officer has seized anything under a warrant issued under section 258, 487, 487.01 or 487.1 or under section 489 or otherwise in the execution of duties under this or any other Act of Parliament, the peace officer shall, as soon as practicable,

- (a) where the peace officer is satisfied,
  - (i) that there is no dispute as to who is lawfully entitled to possession of the thing seized, and
  - (ii) that the continued detention of the thing seized is not required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding,

return the thing seized, on being issued a receipt therefor, to the person lawfully entitled to its possession and report to the justice who issued the warrant



or some other justice for the same territorial division or, if no warrant was issued, a justice having jurisdiction in respect of the matter, that he has done so; or

(b) where the peace officer is not satisfied as described in subparagraphs (a)(i) and (ii),

(i) bring the thing seized before the justice referred to in paragraph (a), or

(ii) report to the justice that he has seized the thing and is detaining it or causing it to be detained

to be dealt with by the justice in accordance with subsection 490(1).

(2) Subject to this or any other Act of Parliament, where a person, other than a peace officer, has seized anything under a warrant issued under section 487, 487.01 or otherwise in the execution of duties under this or any other Act of Parliament, that person shall, as soon as practicable,

(a) bring the thing seized before the justice who issued the warrant or some other justice for the same territorial division or, if no warrant was issued, before a justice having jurisdiction in respect of the matter, or

(b) report to the justice referred to in paragraph (a) that he has seized the thing and is detaining it or causing it to be detained,

to be dealt with by the justice in accordance with subsection 490(1).

(3) A report to a justice under this section shall be in the form set out as Form 5.2 in Part XXVIII, varied to suit the case and shall include, in the case of a report in respect of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9). R.S.C. 1985, c. 27 (1st Supp.), s. 72; 1993, c. 40, s. 17.

#### CROSS-REFERENCES

The terms "justice", "peace officer" and "territorial division" are defined in s. 2.

In the case of property which is not returned to the person lawfully entitled to its possession, then the provisions of s. 490 must be complied with respecting continued detention. Under s. 491.2, before any property that would otherwise be required to be used in evidence under proceedings for offences under ss. 334, 344, 348, 354, 362 or 380 is returned or otherwise dealt with under this section, a peace officer or other person under the direction of a peace officer may take and retain a photograph for use in evidence. With respect to restitution or forfeiture of contraband, see ss. 491, 491.1 and 492.

Note that the reference in this section to "section 258" is obviously in error. The reference should be to s. 256.

#### SYNOPSIS

This section deals with the disposition of property that has been seized by a peace officer either under a warrant issued pursuant to ss. 258, 487, 487.01, 487.1, or 489, or otherwise as a result of the execution of the peace officer's duties under any Act of Parliament.

Subsection (1)(a) provides that where the peace officer is satisfied that lawful possession is not in issue and the continued detention of the thing seized is not required for the purposes of any investigation or court proceedings, the peace officer shall, as soon as practicable, return the item seized to the person lawfully entitled to it. The peace officer must obtain a receipt for the returned item and make a report to a justice having jurisdiction.

Subsection (1)(b) states that where the peace officer is not satisfied as required in para. (a), he must bring the item seized to a justice having jurisdiction or report to the justice that the thing has been seized and is detained. The justice must then deal with the item in accordance with s. 490(1).

Subsection (2) provides a scheme for the disposition of items seized by a person other than a peace officer either under a warrant issued pursuant to ss. 487 or 489 or otherwise

in the execution of that person's duties under any Act of Parliament. That person is required, as soon as practicable, to bring the items seized before a justice having jurisdiction or make a report to such a justice indicating that the item has been seized and is detained.

Any report made under this section must be in accordance with Form 5.2 in Part XXVIII, varied to suit the case. When a report is made in respect of a telewarrant, it must include the statements referred to in s. 487.1(9).

**DETENTION OF THINGS SEIZED / Further detention / Idem / When accused ordered to stand trial / Where continued detention no longer required / Idem / Application for order of return / Exception / Disposal of things seized / Exception / Application by lawful owner / Order / Detention pending appeal, etc. / Copies of documents returned / Probative force / Access to anything seized / Conditions / Appeal.**

490. (1) Subject to this or any other Act of Parliament, where, pursuant to paragraph 489.1(1)(b) or subsection 489.1(2), anything that has been seized is brought before a justice or a report in respect of anything seized is made to a justice, the justice shall,

- (a) where the lawful owner or person who is lawfully entitled to possession of the thing seized is known, order it to be returned to that owner or person, unless the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the detention of the thing seized is required for the purposes of any investigation or a preliminary inquiry, trial or other proceeding; or
- (b) where the prosecutor, or the peace officer or other person having custody of the thing seized, satisfies the justice that the thing seized should be detained for a reason set out in paragraph (a), detain the thing seized or order that it be detained, taking reasonable care to ensure that it is preserved until the conclusion of any investigation or until it is required to be produced for the purposes of a preliminary inquiry, trial or other proceeding.

(2) Nothing shall be detained under the authority of paragraph (1)(b) for a period of more than three months after the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless

- (a) a justice, on the making of a summary application to him after three clear days' notice thereof to the person from whom the thing detained was seized, is satisfied that, having regard to the nature of the investigation, its further detention for a specified period is warranted and the justice so orders; or
- (b) proceedings are instituted in which the thing detained may be required.

(3) More than one order for further detention may be made under paragraph (2)(a) but the cumulative period of detention shall not exceed one year from the day of the seizure, or any longer period that ends when an application made under paragraph (a) is decided, unless

- (a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, on the making of a summary application to him after three clear days' notice thereof to the person from whom the thing detained was seized, is satisfied, having regard to the complex nature of the investigation, that the further detention of the thing seized is warranted for a specified period and subject to such other conditions as the judge considers just, and he so orders; or
- (b) proceedings are instituted in which the thing detained may be required.

(4) When an accused has been ordered to stand trial, the justice shall forward anything detained pursuant to subsections (1) to (3) to the clerk of the court to which the accused has been ordered to stand trial to be detained by the clerk of the court and disposed of as the court directs.

(5) Where at any time before the expiration of the periods of detention provided for

or ordered under subsections (1) to (3) in respect of anything seized, the prosecutor, or the peace officer or other person having custody of the thing seized, determines that the continued detention of the thing seized is no longer required for any purpose mentioned in subsection (1) or (4), the prosecutor, peace officer or other person shall apply to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered its detention under subsection (3), or

(b) a justice, in any other case,

who shall, after affording the person from whom the thing was seized or the person who claims to be the lawful owner thereof or person entitled to its possession, if known, an opportunity to establish that he is lawfully entitled to the possession thereof, make an order in respect of the property under subsection (9).

(6) Where the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required, the prosecutor, peace officer or other person shall apply to a judge or justice referred to in paragraph 5(a) or (b) in the circumstances set out in that paragraph, for an order in respect of the property under subsection (9) or (9.1).

(7) A person from whom anything has been seized may, after the expiration of the periods of detention provided for or ordered under subsections (1) to (3) and on three clear days notice to the Attorney General, apply summarily to

(a) a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or

(b) a justice, in any other case,

for an order under paragraph (9)(c) that the thing seized be returned to the applicant.

(8) A judge of a superior court of criminal jurisdiction or a judge as defined in section 552, where a judge ordered the detention of the thing seized under subsection (3), or a justice, in any other case, may allow an application to be made under subsection (7) prior to the expiration of the periods referred to therein where he is satisfied that hardship will result unless the application is so allowed.

(9) Subject to this or any other Act of Parliament, if

(a) a judge referred to in subsection (7), where a judge ordered the detention of anything seized under subsection (3), or

(b) a justice, in any other case,

is satisfied that the periods of detention provided for or ordered under subsections (1) to (3) in respect of anything seized have expired and proceedings have not been instituted in which the thing detained may be required or, where those periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4), he shall

(c) if possession of it by the person from whom it was seized is lawful, order it to be returned to that person; or

(d) if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is known, order it to be returned to the lawful owner or to the person who is lawfully entitled to its possession,

and may, if possession of it by the person from whom it was seized is unlawful and the lawful owner or person who is lawfully entitled to its possession is not known, order it to be forfeited to Her Majesty, to be disposed of as the Attorney General directs, or otherwise dealt with in accordance with the law.

(9.1) Notwithstanding subsection (9), a judge or justice referred to in paragraph (9)(a) or (b) may, if the periods of detention provided for or ordered under subsections (1)



to (3) in respect of a thing seized have expired but proceedings have not been instituted in which the thing may be required, order that the thing continue to be detained for such period as the judge or justice considers necessary if the judge or justice is satisfied

- (a) that the continued detention of the thing might reasonably be required for a purpose mentioned in subsection (1) or (4); and
- (b) that it is in the interests of justice to do so.

(10) Subject to this or any other Act of Parliament, a person, other than a person who may make an application under subsection (7), who claims to be the lawful owner or person lawfully entitled to possession of anything seized and brought before or reported to a justice under section 489.1 may, at any time, on three clear days notice to the Attorney General and the person from whom the thing was seized, apply summarily to

- (a) a judge referred to in subsection (7), where a judge ordered the detention of the thing seized under subsection (3), or
- (b) a justice, in any other case,

for an order that the thing detained be returned to the applicant.

(11) Subject to this or any other Act of Parliament, on an application under subsection (10), where a judge or justice is satisfied that

- (a) the applicant is the lawful owner or lawfully entitled to possession of the thing seized, and
- (b) the periods of detention provided for or ordered under subsections (1) to (3) in respect of the thing seized have expired and proceedings have not been instituted in which the thing detained may be required or, where such periods have not expired, that the continued detention of the thing seized will not be required for any purpose mentioned in subsection (1) or (4),

the judge or justice shall order that

- (c) the thing seized be returned to the applicant; or
- (d) except as otherwise provided by law, where, pursuant to subsection (9), the thing seized was forfeited, sold or otherwise dealt with in such a manner that it cannot be returned to the applicant, the applicant be paid the proceeds of sale or the value of the thing seized.

(12) Notwithstanding anything in this section, nothing shall be returned, forfeited or disposed of under this section pending any application made, or appeal taken, thereunder in respect of the thing or proceeding in which the right of seizure thereof is questioned or within thirty days after an order in respect of the thing is made under this section.

(13) The Attorney General, the prosecutor or the peace officer or other person having custody of a document seized may, before bringing it before a justice or complying with an order that the document be returned, forfeited or otherwise dealt with under subsection (1), (9) or (11), make or cause to be made, and may retain, a copy of the document.

(14) Every copy made under subsection (13) that is certified as a true copy by the Attorney General, the person who made the copy or the person in whose presence the copy was made is admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the original document would have if it had been proved in the ordinary way.

(15) Where anything is detained pursuant to subsections (1) to (3), a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may, on summary application on behalf of a person who has an interest in what is detained, after

three clear days notice to the Attorney General, order that the person by or on whose behalf the application is made be permitted to examine anything so detained.

(16) An order that is made under subsection (15) shall be made on such terms as appear to the judge to be necessary or desirable to ensure that anything in respect of which the order is made is safeguarded and preserved for any purpose for which it may subsequently be required.

(17) A person who feels aggrieved by an order made under subsection (8), (9), (9.1) or (11) may appeal from the order to the appeal court, as defined in section 812, and for the purposes of the appeal the provisions of sections 814 to 828 apply with such modifications as the circumstances require. R.S., c. C-34, s. 446; R.S.C. 1985, c. 27 (1st Supp.), s. 73; 1994, c. 44, s. 38.

#### CROSS-REFERENCES

The terms "Attorney General", "superior court of criminal jurisdiction", "justice", "peace officer" and "prosecutor" are defined in s. 2. Calculation of a period of months is determined in accordance with s. 28 of the Interpretation Act, R.S.C. 1985, c. I-21. As to calculation of "clear days" notice, see s. 27(1) of the Interpretation Act.

Under s. 491.2, before any property that would otherwise be required to be used in evidence under proceedings for offences under ss. 334, 344, 348, 354, 362 or 380 is forfeited or otherwise dealt with under this section, a peace officer or other person under the direction of a peace officer may take and retain a photograph for use in evidence. With respect to restitution or forfeiture of contraband, see ss. 491, 491.1 and 492.

#### SYNOPSIS

This section provides a comprehensive scheme that governs procedure when seized items are brought before a justice or a report is made and further detention of these items is requested.

Subsection (1) stipulates that the justice must return the goods to the lawfully entitled owner, if such information is available, unless the prosecutor satisfies the justice that their detention is required for the purposes of any investigation or proceedings. When the prosecutor satisfies this burden, the justice must order the detention of the seized items, taking care to ensure their preservation until the conclusion of the investigation or until they are required for further proceedings.

Subsection (2) makes it clear that any order under subsec. (1) must have a maximum life of three months from the day of the seizure unless the justice is satisfied upon a summary application that further detention for a specified period is required or that proceedings have been initiated which may require the detained items. Three clear days' notice to the person from whom the items were seized is necessary before such an application may be made.

Subsection (3) states that more than one order under subsec. (2) may be made but that the cumulative period of detention cannot exceed one year from the date of seizure except in two circumstances. If an application on three days' notice is brought before a judge of a superior court of criminal jurisdiction or a judge as defined in s. 552, and that judge is satisfied that further detention is required due to the complex nature of the investigation, an order may be made detaining the seized items for a specified period, subject to such conditions as the judge may impose. If proceedings have been instituted in which the thing detained may be required, the cumulative period of detention may exceed one year.

Subsection (4) provides that when an accused person has been ordered to stand trial, the justice shall forward the detained items to the clerk of the court having jurisdiction. The clerk will then detain the items and dispose of them as the court directs.

Subsection (5) states that when a prosecutor determines that the detained items are no

longer required for the purposes described in subsec. (1) or (4), an application to the appropriate judge or justice shall be made. The judge or justice must give any person claiming to be the lawful owner of the items an opportunity to establish this claim. An order with respect to the items will be made in accordance with subsec. (9).

Subsection (6) provides for an application by the prosecutor for an order under subsec. (9) where the period of detention has expired and proceedings have not been instituted.

Subsection (7) likewise allows a person from whom anything has been seized to make an application, on three days' notice to the Attorney General, for the return of those items after the expiration of the period of detention. A judge or a justice may allow an application under subsec. (7) to be made prior to the expiration of the ordered period of detention where he has been satisfied that hardship will result if such an application is not allowed.

Subsection (9) states that if a judge or a justice is satisfied that the detention period has expired or that the continued detention of seized goods will not be required for any of the purposes referred to in the section, he shall order those goods returned to their lawful owner. If the lawful owner cannot be determined, the judge or justice may order the seized goods to be forfeited to Her Majesty, to be disposed of as directed by the Attorney General or in accordance with law. An order under subsec. (9) is subject to the other provisions in the Code or any other Act of Parliament.

Subsection (10) sets out the requirements for an application for the return of detained goods by a person, other than the person from whom these items were seized, who claims to be the lawful owner. The judge or justice who hears this application shall, if the requirements of subsec. (1) are met, order the return of the seized items to the applicant, or where those items have been sold and cannot be returned to the applicant, order the proceeds of such sale to be paid to the applicant.

Subsection (12) states that nothing shall be returned, forfeited or disposed of under this section pending any application or appeal of the seizure or within 30 days after an order is made.

Subsections (13) and (14) grant to the Attorney General, the prosecutor, peace officer or custodian of the documents the right to make copies of documents ordered to be returned or forfeited and if such copies are certified as true copies by the Attorney General, they are admissible in evidence with the same probative force, absent evidence to the contrary, as the original document.

Subsection (15) makes provision for an application by a person who has interest in seized property to examine the detained items. Such an examination must be regulated according to subsec. (16) in such a way as to safeguard and preserve the detained items.

Subsection (17) sets out the rights of appeal for any person who is not content with an order made under subssecs. (8), (9) or (11).

## ANNOTATIONS

**Subsec. (1) –** The initial detention order made under this subsection is not an extension of the initial judicial process authorizing a search warrant and ss. 7 and 8 of the Charter of Rights and Freedoms are not applicable. Accordingly, the hearing may be held *ex parte* without notice to the owner of the goods. This is the case under the former legislation: *Re Church of Scientology et al. and The Queen* (No. 6); *Re Walsh et al. and The Queen* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.) and the present legislation: *Re Barnable P.C.f. and The Queen* (1986), 27 C.C.C. (3d) 565 (Nfld. S.C.T.D.).

Where articles have been brought before the justice pursuant to s. 489.1 having been seized in the execution of a warrant, the justice must determine whether or not the article falls within the description contained in the warrant of things which may be searched for and seized and whether it is potentially relevant to the offence set out in the warrant. On the other hand, there is no requirement in the provisions that the justice give reasons for making the detention order under this subsection and until the contrary is shown, a



superior court is not entitled to infer that the justice did not decide the issues that were confided to him for determination: *Re Famous Players Ltd. et al. v. Director of Investigation and Research* (1986), 29 C.C.C. (3d) 251, 11 C.P.R. (3d) 161 (Ont. H.C.J.); *Radok v. Joubert* (1988), 44 C.C.C. (3d) 317 (B.C.S.C.).

Whether the court is proceeding under this subsection or subsec. (9), the person from whom the money was seized need only show that he was in lawful possession of the money. Upon such proof, the applicant's right to possession is presumed and the onus is then on the Crown to prove beyond a reasonable doubt that applicant is not lawfully entitled to the money by, for example, proof that the possession is tainted: *R. v. Mac* (1995), 97 C.C.C. (3d) 115, 80 O.A.C. 26 (C.A.).

**Subsec. (2)** – It is sufficient that the application for further detention is made within three months, there is no requirement that the detention order itself be made within three months: *R. v. Papalia* (1987), 38 C.C.C. (3d) 37 (B.C.S.C.). *Contra: Canada (Attorney General) v. Mandate Erectors and Welding Ltd.* (1995), 99 C.C.C. (3d) 187, 163 N.B.R. (2d) 206 (C.A.).

A justice has no jurisdiction to make an order requiring the police to make photocopies of the detained documents. Jurisdiction to deal with the items seized after their further detention has been authorized is given to a judge, as under subsec. (15): *Filion v. Savard* (1988), 42 C.C.C. (3d) 182 (Que. C.A.).

Where the items seized have been held by the police, but under seal pending the determination of an application in the superior court to quash the warrant, then the owner is not entitled to the return of the items although no extension was obtained after expiration of the original three month detention order. In the circumstances, the owner must be taken to have acquiesced to the continued detention, and the terms of subsec. (2) would not appear to contemplate a case where the reason for the delay is an application by the owner testing the validity of the seizure: *Société Radio-Canada v. Québec (Procureur-Général)* (1992), 78 C.C.C. (3d) 175, [1993] R.J.Q. 15 (C.A.), leave to appeal to S.C.C. refused 89 C.C.C. (3d) vi, 57 Q.A.C. 29n.

**Subsec. (3)** – An investigation is not “complex” within the meaning of this subsection merely because a large volume of documents were seized and a larger number of suspects have been identified than was initially thought to be the case. Had the authorities dedicated greater resources to the case, the investigation could have been completed within one year: *Moyer (Re)* (1994), 95 C.C.C. (3d) 174 (Ont. Ct. (Gen. Div.)).

**Subsec. (7)** – Where, prior to an application for return of moneys seized from the accused, the police have returned the moneys to the insurers of the victims of a robbery which the accused were suspected of having committed (although the charge was stayed), then the judge should decline to make an order either under this section or pursuant to the superior court's inherent jurisdiction. In such circumstances the conflicting claims are most appropriately resolved by the civil courts: *R. v. Taylor* (1986), 31 C.C.C. (3d) 21 (B.C.S.C.).

**Subsec. (9)** – The Crown may seek an order of forfeiture under this subsection of moneys alleged to be the proceeds of crime. It is not restricted to the procedure set out in Part XII.2. Further, a conviction is not a condition precedent to an order under this subsection: *British Columbia (Attorney General) v. Forseth* (1995), 99 C.C.C. (3d) 296, 99 W.A.C. 310 (B.C.C.A.), leave to appeal to S.C.C. refused March 21, 1996.

**Subsec. (15)** – It was held in relation to the predecessor to this subsection that there is no appeal from a decision made under this subsection: *R. v. Stewart*, [1970] 3 C.C.C. 428, 71 W.W.R. 768 (Sask.C.A.).

It was held that the word “examine” in the predecessor to this subsection includes making copies. Accordingly, a judge may order that the applicant be permitted to visually examine and make copies of documents under seizure: *R. v. Sutherland* (1977), 38

C.C.C. (2d) 252 (Ont. Co. Ct.). *Contra: R. v. Labrador Tool Supply Ltd.* (1982), 3 C.C.C. (3d) 269, 41 Nfld. & P.E.I.R. 126 (Nfld. S.C.T.D.).

**Subsec. (17)** – An appeal lies to the court of appeal with leave pursuant to s. 839(1) from a decision under this subsection: *R. v. Church of Scientology of Toronto* (1991), 63 C.C.C. (3d) 328 (Ont. C.A.).

The Attorney General may appeal an order made under this section returning goods to the person from whom they were seized: *British Columbia (Attorney General) v. Forseth*, *supra*.

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**FORFEITURE OF WEAPONS AND AMMUNITION / Return to lawful owners / Application of proceeds.**

**491. (1)** Subject to subsection (2), where it is determined by a court that a weapon or ammunition was used in the commission of an offence or that a person has committed an offence under section 91 with respect to a restricted weapon, and the weapon or ammunition has been seized and detained, the weapon or ammunition is forfeited and may be dealt with as the court that makes the determination directs.

(2) If the court by which a determination referred to in subsection (1) is made is satisfied that the lawful owner of the weapon or ammunition was not a party to the offence and had no reason to believe that the weapon or ammunition would or might be used in the commission of an offence, the court shall order the weapon or ammunition returned to the lawful owner thereof or the proceeds of any sale thereof to be paid to that owner.

(3) Where any weapon or ammunition in respect of which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General or, where an order is made under subsection (2), to the person who was, immediately prior to the sale, the lawful owner of the weapon or ammunition. 1972, c. 13, s. 37; 1991, c. 40, s. 30.

**NOTE:** Replaced 1995, c. 39, s. 152 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*FORFEITURE OF WEAPONS AND AMMUNITION / Return to lawful owner / Application of proceeds.*

*491. (1) Subject to subsection (2), where it is determined by a court that*

- (a) a weapon, an imitation firearm, a prohibited device, any ammunition, any prohibited ammunition or an explosive substance was used in the commission of an offence and that thing has been seized and detained, or*
- (b) that a person has committed an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance and any such thing has been seized and detained,*

*the thing so seized and detained is forfeited to Her Majesty and shall be disposed of as the Attorney General directs.*

*(2) If the court by which a determination referred to in subsection (1) is made is satisfied that the lawful owner of any thing that is or may be forfeited to Her Majesty under subsection (1) was not a party to the offence and had no reasonable grounds to believe that the thing would or might be used in the commission of an offence, the court shall order that the thing be returned to that lawful owner, that the proceeds of any sale of the thing be paid to that lawful owner or, if the thing was destroyed, that an amount equal to the value of the thing be paid to the owner.*

*(3) Where any thing in respect of which this section applies is sold, the proceeds of the sale shall*

*be paid to the Attorney General or, where an order is made under subsection (2), to the person who was, immediately prior to the sale, the lawful owner of the thing.*

#### CROSS-REFERENCES

The terms "weapon" and "Attorney General" are defined in s. 2. Liability of a person as a party to an offence is defined in ss. 21 and 22. For other provisions respecting forfeiture of contraband, see ss. 491.1 and 492. For special provision for search and seizure of weapons, see ss. 101 to 103. Section 91 sets out the offence of unlawful possession of restricted weapons.

#### SYNOPSIS

This section sets out a special code for dealing with forfeiture of weapons and ammunition and their subsequent disposal.

Subsection (1) states that where a court determines that a weapon was used in the commission of an offence or the offence under s. 91 was committed and it has been seized and detained, that weapon or ammunition is forfeited and will be dealt with as the court directs. This determination is subject to the provisions of subsec. (2).

Subsection (2) provides that where the court determines that the lawful owner of the weapon or ammunition referred to in subsec. (1) was not a party to the offence and had no reason to believe that the weapon or ammunition would be so used, the court shall order the weapon returned to that person. Where the weapon or ammunition has been sold, the proceeds will be paid, either to the Attorney General, or the lawful owner described in subsec. (2).

#### ANNOTATIONS

Unless the lawful owner of the firearm was not a party to the offence, the trial Judge has no discretion to refuse to order forfeiture of a weapon used in the commission of an offence such as the offence of careless use of a firearm contrary to s. 86: *R. v. Martins* (1981), 58 C.C.C. (2d) 382 (N.W.T.S.C.).

The requirement that the weapon be "used" refers to something actively having been done with the weapon. Thus the court has no power to order forfeiture of a firearm upon a conviction for careless storage of a firearm under s. 86: *R. v. Annas* (1985), 17 C.C.C. (3d) 383 (Alta. Q.B.).

#### ORDER FOR RESTITUTION OR FORFEITURE OF PROPERTY OBTAINED BY CRIME / Idem / When certain orders not to be made / By whom order executed.

**491.1 (1)** Where an accused or defendant is tried for an offence and the court determines that an offence has been committed, whether or not the accused has been convicted or discharged under section 736 of the offence, and at the time of the trial any property obtained by the commission of the offence

(a) is before the court or has been detained so that it can be immediately dealt with, and

(b) will not be required as evidence in any other proceedings,  
section 490 does not apply in respect of the property and the court shall make an order under subsection (2) in respect of the property.

**(2)** In the circumstances referred to in subsection (1), the court shall order, in respect of any property,

(a) if the lawful owner or person lawfully entitled to possession of the property is known, that it be returned to that person; and

(b) if the lawful owner or person lawfully entitled to possession of the property is not known, that it be forfeited to Her Majesty, to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

**(3)** An order shall not be made under subsection (2)

(a) in the case of proceedings against a trustee, banker, merchant, attorney, fac-



tor, broker or other agent entrusted with the possession of goods or documents of title to goods, for an offence under section 330, 331, 332 or 336; or

**(b) in respect of**

- (i) property to which a person acting in good faith and without notice has acquired lawful title for valuable consideration,
- (ii) a valuable security that has been paid or discharged in good faith by a person who was liable to pay or discharge it,
- (iii) a negotiable instrument that has, in good faith, been taken or received by transfer or delivery for valuable consideration by a person who had no notice and no reasonable cause to suspect that an offence had been committed, or
- (iv) property in respect of which there is a dispute as to ownership or right of possession by claimants other than the accused or defendant.

**(4) An order made under this section shall, on the direction of the court, be executed by the peace officers by whom the process of the court is ordinarily executed. R.S.C. 1985, c. 27 (1st Supp.), s. 74.**

#### CROSS-REFERENCES

The terms “Attorney General”, “valuable security”, “document of title”, “peace officer” and “property” are defined in s. 2.

#### SYNOPSIS

This section deals with the disposition of property which has been obtained by crime.

Subsection (1) describes the situation where, during the trial of an accused or defendant, the court determines that an offence has been committed and any property obtained by the commission of the offence is before the court or detained and will not be required as evidence in any other proceedings. Under such circumstances, s. 490 will not apply in respect of this property, but the court will make an order under subsec. (2) to dispose of it.

Subsection (2) states that the court shall order that the property be returned to the lawful owner, if such person is known. If the identity of the lawful owner is not known, the property will be ordered forfeit to Her Majesty, to be dealt with as the Attorney General directs or otherwise in accordance with the law.

Subsection (3) sets out the circumstances in which an order under subsec. (2) will not be made.

Subsection (4) provides that an order made under this section shall be executed, on the direction of the court, by such peace officers as normally execute process of the court.

#### ANNOTATIONS

It was held in *R. v. Kolstad* (1959), 123 C.C.C. 170, 30 C.R. 176 (Alta. C.A.), affd 125 C.C.C. 254 (S.C.C.) that money paid by the accused for the purpose of bribery and filed as an exhibit at his trial should not be paid out to the accused, but rather held in Court until further order.

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**PHOTOGRAPHIC EVIDENCE / Certified photograph admissible in evidence / Statements made in certificate / Secondary evidence of peace officer / Notice of intention to produce certified photograph / Attendance for examination / Production of property in court / Definition of “photograph”.**

**491.2. (1) Before any property that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceeding in respect of an offence under section 334, 344, 348, 354, 362 or 380 is returned or ordered to be returned, forfeited or otherwise dealt with under section 489.1 or 490 or is otherwise**

returned, a peace officer or any person under the direction of a peace officer may take and retain a photograph of the property.

(2) Every photograph of property taken under subsection (1), accompanied by a certificate of a person containing the statements referred to in subsection (3), shall be admissible in evidence and, in the absence of evidence to the contrary, shall have the same probative force as the property would have had if it had been proved in the ordinary way.

(3) For the purposes of subsection (2), a certificate of a person stating that

- (a) the person took the photograph under the authority of subsection (1),
- (b) the person is a peace officer or took the photograph under the direction of a peace officer, and
- (c) the photograph is a true photograph

shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the certificate without proof of the signature of the person appearing to have signed the certificate.

(4) An affidavit or solemn declaration of a peace officer or other person stating that the person has seized property and detained it or caused it to be detained from the time that person took possession of the property until a photograph of the property was taken under subsection (1) and that the property was not altered in any manner before the photograph was taken shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature or official character of the person appearing to have signed the affidavit or solemn declaration.

(5) Unless the court orders otherwise, no photograph, certificate, affidavit or solemn declaration shall be received in evidence at a trial or other proceeding pursuant to subsection (2), (3) or (4) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy thereof and reasonable notice of intention to produce it in evidence.

(6) Notwithstanding subsection (3) or (4), the court may require the person who appears to have signed a certificate, an affidavit or a solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the facts contained in the certificate, affidavit or solemn declaration.

(7) A court may order any property seized and returned pursuant to section 489.1 or 490 to be produced in court or made available for examination by all parties to a proceeding at a reasonable time and place, notwithstanding that a photograph of the property has been received in evidence pursuant to subsection (2), where the court is satisfied that the interests of justice so require and that it is possible and practicable to do so in the circumstances.

(8) In this section, "photograph" includes a still photograph, a photographic film or plate, a microphotographic film, a photostatic negative, an X-ray film, a motion picture and a videotape. R.S.C. 1985, c. 23 (4th Supp.), s. 2; 1992, c. 1, s. 58.

#### CROSS-REFERENCES

The terms "prosecutor", "peace officer" and "property" are defined in s. 2. "Prosecutor" is also defined in s. 785 for the purpose of summary conviction proceedings. Section 4(6) provides that service of any document may be proved by oral evidence or by way of affidavit.

#### SEIZURE OF EXPLOSIVES / Forfeiture / Application of proceeds.

492. (1) Every person who executes a warrant issued under section 487 or 487.1 may seize any explosive substance that he suspects is intended to be used for an unlawful

purpose, and shall, as soon as possible, remove to a place of safety anything that he seizes by virtue of this section and detain it until he is ordered by a judge of a superior court to deliver it to some other person or an order is made pursuant to subsection (2).

(2) Where an accused is convicted of an offence in respect of anything seized by virtue of subsection (1), it is forfeited and shall be dealt with as the court that makes the conviction may direct.

(3) Where anything to which this section applies is sold, the proceeds of the sale shall be paid to the Attorney General. R.S., c. C-34, s. 447; R.S.C. 1985, c. 27 (1st Supp.), s. 70.

#### CROSS-REFERENCES

The terms “explosive substance” and “Attorney General” are defined in s. 2. For other provisions respecting forfeiture of contraband, see ss. 491 and 491.1.

#### SYNOPSIS

This section sets out special provisions for seizing and disposing of explosives.

Subsection (1) provides that a person who executes a warrant under s. 487 may seize any explosives which are suspected to be held for an unlawful purpose. Such person must, as soon as possible, put these explosives in a safe place and hold them there until ordered by a judge of a superior court to deliver them to another person, or in accordance with subsec. (2).

Subsection (2) states that where a person is convicted of an offence in relation to the seized explosives, such explosives are forfeited and will be dealt with in accordance with the direction of the court that imposed the conviction.

Subsection (3) ensures that the proceeds from the sale of any explosives seized under this section will be paid to the Attorney General.

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#### INFORMATION FOR TRACKING WARRANT / Time limit for warrant / Further warrants / Definition of “tracking device”.

**492.1 (1)** A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that is relevant to the commission of that offence, including the whereabouts of any person, can be obtained through the use of a tracking device, may at any time issue a warrant authorizing a person named therein or a peace officer

- (a) to install, maintain and remove a tracking device in or on any thing, including a thing carried, used or worn by any person; and
- (b) to monitor, or to have monitored, a tracking device installed in or on any thing.

(2) A warrant issued under subsection (1) is valid for the period, not exceeding sixty days, mentioned in it.

(3) A justice may issue further warrants under this section.

(4) For the purposes of this section, “tracking device” means any device that, when installed in or on any thing, may be used to help ascertain, by electronic or other means, the location of any thing or person. 1993, c. 40, s. 18.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. This section is part of a more or less comprehensive scheme relating to surreptitious electronic surveillance. Interception of private communications are dealt with in Part VI. Use of telephone number recorders as regulated under s. 492.2 and s. 487.01 would cover the use of other electronic devices such as video cameras. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.



**SYNOPSIS**

This section provides for the granting of a warrant to authorize the use of "tracking devices", defined in subsec. (4). No doubt because of the perceived diminished expectation of privacy, the grounds for granting the warrant differ somewhat from the traditional grounds for authorizing a search or seizure in that the justice need only be satisfied that there are grounds to "suspect" that an offence has been or will be committed and that relevant evidence "can" be obtained. Enactment of this section follows the decision of the Supreme Court of Canada in *R. v. Wise* (1992), 70 C.C.C. (3d) 193, 11 C.R. (4th) 253, [1992] 1 S.C.R. 527 holding that the warrantless installation and monitoring of such a device in a suspect's car was a search for the purposes of s. 8 of the Charter.

The warrant may be valid for a period not exceeding 60 days, but further warrants may be issued under this section.

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**INFORMATION RE NUMBER RECORDER / Order re telephone records / Other provisions to apply / Definition of "number recorder".**

**492.2 (1)** A justice who is satisfied by information on oath in writing that there are reasonable grounds to suspect that an offence under this or any other Act of Parliament has been or will be committed and that information that would assist in the investigation of that offence could be obtained through the use of a number recorder, may at any time issue a warrant authorizing a person named in it or a peace officer

- (a) to install, maintain and remove a number recorder in relation to any telephone or telephone line; and
- (b) to monitor, or to have monitored, the number recorder.

(2) When the circumstances referred to in subsection (1) exist, a justice may order that any person or body that lawfully possesses records of telephone calls originated from, or received or intended to be received at, any telephone give the records, or a copy of the records, to a person named in the order.

(3) Subsections 492.1(2) and (3) apply to warrants and orders issued under this section, with such modifications as the circumstances require.

(4) For the purposes of this section, "number recorder" means any device that can be used to record or identify the telephone number or location of the telephone from which a telephone call originates, or at which it is received or is intended to be received. 1993, c. 40, s. 18.

**CROSS-REFERENCES**

The term "justice" is defined in s. 2. This section is part of a more or less comprehensive scheme relating to surreptitious electronic surveillance. Interception of private communications are dealt with in Part VI. Use of tracking devices as regulated under s. 492.1 and s. 487.01 would cover the use of other electronic devices such as video cameras. Provision is made in s. 487.02 for the making of an assistance order to require persons to co-operate in the carrying out of orders made under this section.

**SYNOPSIS**

This section provides for the granting of a warrant to authorize the use of a "number recorder" defined in subsec. (4) and sometimes referred to as dial number recorders. No doubt because of the perceived diminished expectation of privacy, the grounds for granting the warrant differ somewhat from the traditional grounds for authorizing a search or seizure in that the justice need only be satisfied that there are grounds to "suspect" that an offence has been or will be committed and that relevant evidence "can" be obtained. Enactment of this section follows some decisions holding that the use of such devices was a search or seizure for the purposes of s. 8 of the Charter. Prior to the enactment of this

section, there did not appear to be any means by which a warrant could be obtained for the use of such a device.

This section actually envisages two different types of orders. Subsection (1) provides for a warrant to install and monitor the number recorder. Subsection (2) provides that the justice may order that a person in possession of records of telephone calls turn those records over to the person named in the order.

The warrant may be valid for a period not exceeding 60 days, but further warrants may be issued under the section.

## Part XVI / COMPELLING APPEARANCE OF ACCUSED BEFORE A JUSTICE AND INTERIM RELEASE

### *Interpretation*

**DEFINITIONS** / “accused” / “appearance notice” / “judge” / “officer in charge” / “promise to appear” / “recognizance” / “summons” / “undertaking” / “warrant”.

**493. In this Part,**

“accused” includes

- (a) a person to whom a peace officer has issued an appearance notice under section 496, and
- (b) a person arrested for a criminal offence;

“appearance notice” means a notice in Form 9 issued by a peace officer;

“judge” means

- (a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,
- (b) in the Province of Quebec, a judge of the superior court of criminal jurisdiction of the province or three judges of the Court of Quebec,
- (c) [*Repealed. 1992, c. 51, s. 37.*]
- (d) in the Provinces of Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, a judge of the superior court of criminal jurisdiction of the Province,
- (e) in the Yukon Territory and the Northwest Territories, a judge of the Supreme Court;

**NOTE:** Definition “judge” amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting para. (e). The text of para. (e), which is not yet in force and therefore printed in *lightface italics*, reads as follows:

- (e) *in the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court;*

“officer in charge” means the officer for the time being in command of the police force responsible for the lock-up or other place to which an accused is taken after arrest or a peace officer designated by him for the purposes of this Part who is in charge of that place at the time an accused is taken to that place to be detained in custody;

“promise to appear” means a promise in Form 10;

“recognizance”, when used in relation to a recognizance entered into before an officer in charge, or other peace officer, means a recognizance in Form 11, and when used in relation to a recognizance entered into before a justice or judge, means a recognizance in Form 32;

“summons” means a summons in Form 6 issued by a justice or a judge;

“undertaking” means an undertaking in Form 11.1 or 12;

“warrant”, when used in relation to a warrant for the arrest of a person, means a warrant in Form 7 and, when used in relation to a warrant for the committal of a person, means a warrant in Form 8. R.S., c. C-34, s. 448; R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 17, s. 3; 1974-75-76, c. 48, s. 25(1); 1978-79, c. 11, s. 10; R.S.C. 1985, c. 11 (1st Supp.), s. 2; c. 27 (2nd Supp.), s. 10; c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 5; 1990, c. 17, s. 12; 1992, c. 51, s. 37; 1994, c. 44, s. 39.

#### CROSS-REFERENCES

The terms “peace officer”, “property”, “justice”, “superior court of criminal jurisdiction” and “Attorney General” are defined in s. 2. In addition to the definition in this section see s. 2 and notes to that section. Section 841 provides that forms varied to suit the case and forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided. Also note s. 841(3) requiring preprinted portions of forms to be printed in both official languages.

#### ANNOTATIONS

“Officer in charge” – This definition contemplates a delegation of authority by the officer for the time being in command of the police force to a police officer who is at the time in charge of the place of detention. The officer in charge of such place does not have the powers conferred and imposed under this Part unless and until he has been designated for such purposes: *R. v. Gendron* (1985), 22 C.C.C. (3d) 312 (Ont. C.A.).

### *Arrest Without Warrant and Release from Custody*

**ARREST WITHOUT WARRANT BY ANY PERSON / Arrest by owner, etc. of property / Delivery to peace officer.**

#### 494. (1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence; or

(b) a person who, on reasonable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

#### (2) Any one who is

(a) the owner or a person in lawful possession of property, or

(b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

(3) Any one other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer. R.S., c. C-34, s. 449; R.S., c. 2 (2nd Supp.), s. 5.

#### CROSS-REFERENCES

The term “peace officer” is defined in s. 2. Indictable offence includes a hybrid offence by virtue of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21. See *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.). With respect to protection of persons acting in the administration or enforcement of the law see ss. 25 to 27. Also note s. 29(2) which imposes a duty on a person making an arrest to give notice of the reason for the arrest. An additional power of arrest is given under s. 30 with



respect to breach of the peace. The additional powers of arrest by peace officers are dealt with in ss. 31 and 495.

## SYNOPSIS

This section describes the power of any person, whether or not he is a peace officer, to arrest another person without a warrant.

Subsection (1) grants to every person the authority to arrest without warrant another person in two sets of circumstances. If a person is found committing an indictable offence, he may be arrested without a warrant by any other person. A person who is not a peace officer may also arrest without a warrant another person whom the individual making the arrest has reasonable grounds to believe has committed a criminal offence and has escaped from, and is being freshly pursued by persons with the lawful authority to make the arrest.

Subsection (2) states that anyone who is either the owner of, in lawful possession of, or has been authorized by the owner of the person in lawful possession of property, may arrest without a warrant a person whom he finds committing a criminal offence in relation to or on that property.

Subsection (3) requires that any person, other than a peace officer, who arrests another person without a warrant, must deliver the arrested person *forthwith* to a peace officer.

## ANNOTATIONS

**Constitutional considerations** – The arrest of a citizen by another private citizen is a governmental function to which the Charter of Rights applies and thus a search incident to that arrest must comply with s. 8 of the Charter: *R. v. Lerke* (1986), 24 C.C.C. (3d) 129, 49 C.R. (3d) 324, 25 D.L.R. (4th) 403 (Alta. C.A.).

**Meaning of “forthwith” [subsec. (3)]** – “Forthwith” does not mean instantly but merely as soon as is reasonably practicable under all the circumstances: *R. v. Cunningham and Ritchie* (1979), 49 C.C.C. (2d) 390 (Man. Co. Ct.).

## ARREST WITHOUT WARRANT BY PEACE OFFICER / Limitation / Consequences of arrest without warrant.

### 495. (1) A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence;
- (b) a person whom he finds committing a criminal offence; or
- (c) a person in respect of whom he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVIII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

### (2) A peace officer shall not arrest a person without warrant for

- (a) an indictable offence mentioned in section 553,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
- (c) an offence punishable on summary conviction,

### in any case where

- (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to
  - (i) establish the identity of the person,
  - (ii) secure or preserve evidence of or relating to the offence, or
  - (iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2). R.S., c. C-34, s. 450; R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 75.

#### CROSS-REFERENCES

The term "peace officer" is defined in s. 2. Indictable offence includes a hybrid offence by virtue of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21. See *R. v. Huff* (1979), 50 C.C.C. (2d) 324 (Alta. C.A.). With respect to protection of persons acting in the administration or enforcement of the law see ss. 25 to 27. Section 28 protects the peace officer in case of arrest of the wrong person when executing a warrant. Also note s. 29(1), which requires the person executing the warrant to have it with him where feasible and produce it upon request, and s. 29(2) which imposes a duty on a person making an arrest to give notice of the warrant under which he makes the arrest and the reason for the arrest. An additional power of arrest is given under s. 31 with respect to breach of the peace. Section 10 of the Charter, as well, imposes duties with respect to reason for arrest and right to counsel and see notes under that section. A peace officer of course also may exercise the powers of arrest given to a private citizen under ss. 30 and 494.

**Note on the scheme for pre-trial release** – Where an officer does not arrest the person by virtue of s. 495(2) because the accused is alleged to have committed a hybrid offence, a summary conviction offence or an offence listed in s. 553 and there is not cause for arrest to, for example, establish identity, preserve evidence, prevent commission of an offence, or ensure attendance in court, then he shall issue an appearance notice under s. 496. Where the officer arrests the person but the person falls within the categories set out in s. 497(1) then he shall release him pursuant to s. 497 on an appearance notice (defined in s. 493), or with the intention of compelling his appearance by way of summons (defined in s. 493), once there is no cause for further detention. If the person is arrested and not released under s. 497 then he shall be released by the officer in charge (defined in s. 493) pursuant to s. 498 on a promise to appear or recognizance (defined in s. 493) once there is no cause for further detention. The officer in charge may release not only for the offences described in s. 495(2) but for any offence punishable by imprisonment for five years or less. While the provisions of ss. 495(2), 497 and 498 are stated in mandatory terms, in effect requiring the accused's release unless there is cause to further detain him where he is charged with one of the specified offences, s. 503(2) gives the peace officer and officer in charge a discretion to release an accused charged with other offences (except an offence listed in s. 469) on a promise to appear or recognizance, if the officer is satisfied that the accused "should be released from custody conditionally". The contents of the appearance notice, promise to appear and recognizance are described in s. 501 and may also require that the accused attend at a time and place stated therein for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1. Where the accused does not attend as required then a justice may issue a warrant for the accused's arrest pursuant to s. 502. In all cases where the accused is given process by the peace officer or officer in charge an information is to be laid before a justice as soon as practicable and, in any event, before the return date set out in the process pursuant to s. 505. The justice then will either confirm the process or cancel it pursuant to s. 508. Where the accused is not released by the peace officer or officer in charge then he must be taken before a justice pursuant to s. 503, usually within 24 hours. The justice will then deal with release pursuant to s. 515 unless the accused is charged with an offence listed in s. 469 such as murder. In the latter case the justice will order that the accused be detained in custody and the onus is upon the accused to bring an application under s. 522 to a judge of the superior court of criminal jurisdiction (defined

in s. 2) for release pending trial. Section 503 also makes special provision for an accused who is arrested for an offence alleged to have been committed in another province.

Where the accused is not released on a form of process by a peace officer or officer in charge then an information will be laid before the justice pursuant to s. 504. Where the accused has not yet been arrested then the justice may issue a summons or warrant [both defined in s. 493] pursuant to s. 507. The contents of the summons is described in s. 509 and served in accordance with s. 509(2) and may also require that the accused attend at a time and place stated therein for the purposes of the Identification of Criminals Act. Where the accused does not attend as required then a justice may issue a warrant for the accused's arrest pursuant to s. 510. Once the person is arrested on a warrant then again he will be taken before a justice pursuant to s. 503, unless the warrant has been endorsed permitting the officer in charge to release under s. 499. The contents of the warrant are described in ss. 511 and 513. The warrant is executed pursuant to s. 513. The duties of a peace officer executing an arrest warrant are described in ss. 29 and 10 of the Charter. Further, under s. 512, notwithstanding that an accused has been released on a form of process by a peace officer or officer in charge, or a summons has been issued, a justice may issue a summons or warrant where he believes on reasonable and probable grounds that this action is necessary in the public interest. The information laid under s. 504 or s. 505 may be in Form 2 pursuant to s. 506.

Failure to attend court as required, comply with conditions in a recognizance or undertaking or attend for the purposes of the Identification of Criminals Act is an offence under s. 145. A warrant may issue under s. 512 where the accused fails to appear for court as required.

A warrant, summons, appearance notice, promise to appear, undertaking or recognizance may be issued, executed, given or entered into on a holiday by virtue of s. 20.

## SYNOPSIS

This section specifies the powers of a peace officer to arrest without a warrant, and the limitations thereon.

Subsection (1) states that a peace officer may arrest without warrant any person whom he finds committing a criminal offence, any person whom he believes on reasonable grounds has committed or is about to commit an indictable offence, or any person whom he reasonably believes is the subject of a warrant of arrest or committal.

Subsection (2) limits the powers of arrest without warrant available to a peace officer. A peace officer shall not arrest a person without warrant for an indictable offence within the absolute jurisdiction of a provincial court judge, for a Crown election offence, or for a summary conviction offence, in any of the circumstances set out in subsec. 2(d) and (e). In other words, the peace officer should arrest without warrant persons committing the offences listed in paras. (a), (b) or (c) only where it is necessary to establish the identity of the person, to preserve evidence of the offence, to prevent the continuation of or repetition of the offence, or to secure the attendance of the accused in court.

Subsection (3) makes it clear that a peace officer, acting under subsec. (1), is deemed to be acting lawfully and in the execution of his duty for the purposes of any Act of Parliament, notwithstanding subsec. (2). This deeming provision also extends to any other proceedings, unless it is established that the peace officer did not comply with subsec. (2).

## ANNOTATIONS

**Meaning of “reasonable grounds”** [para. (1)(a)] – In *Kennedy v. Tomlinson et al.* (1959), 126 C.C.C. 175, 20 D.L.R. (2d) 273 (Ont. C.A.) it was held that there is “a prodigious difference” between a case in which a policeman acts on his own initiative and one where he acts upon the complaint of a citizen. In the latter situation he is under a duty to make inquiry first.

For an arrest to be valid on the basis of reasonable and probable grounds, it is not sufficient for the police officer to subjectively believe that he has reasonable and probable grounds to make an arrest. Rather, it must also be shown that a reasonable person, standing in the shoes of the officer, would have believed that reasonable and probable



grounds existed to make the arrest. However, the police need not go further and establish a *prima facie* case. An arrest which is lawfully made does not become unlawful simply because the police intend to continue their investigation after the arrest, nor does the arrest thereby constitute a violation of s. 9 of the Charter: *R. v. Storrey* (1990), 53 C.C.C. (3d) 316, [1990] 1 S.C.R. 241, 75 C.R. (3d) 1 (7:0).

For a peace officer to have reasonable and probable grounds his belief in the person's guilt must take into account all the information available to him. He is entitled to disregard only what he has good reason for believing is not reliable: *Chartier v. A.-G. Que.* (1979), 48 C.C.C. (2d) 34, [1979] 2 S.C.R. 474, 9 C.R. (3d) 97.

**Finds committing criminal offence [para. (1)(b)]** – Where a peace officer makes an arrest under para. (b), the validity of the arrest does not depend upon a subsequent conviction for the commission of that offence, but rather upon the circumstances which were apparent to the officer at the time: *R. v. Biron* (1975), 23 C.C.C. (2d) 513, 30 C.R.N.S. 109 (5:3) (S.C.C.) and *R. v. Fuhr*, [1975] 4 W.W.R. 403 (Alta. S.C. App. Div.).

In *R. v. Stevens* (1976), 33 C.C.C. (2d) 429, 18 N.S.R. (2d) 96 (S.C. App. Div.) the Court, considering *R. v. Biron*, *supra*, held that in order to arrest a person without a warrant for a summary conviction offence it is not sufficient for the arresting officer to show that he had reasonable and probable grounds to believe such offence had been, or was about to be, committed, rather he must go further and show that he found a situation in which a person was apparently committing an offence. Where the accused is acquitted on a charge of causing a disturbance on the basis that the accused was in a dwelling home at the time a charge of resisting an officer in the execution of his duty in attempting to arrest for that offence must also fail, the arrest being unlawful.

**Person for whom arrest warrant outstanding [para. (1)(c)]** – It is not necessary that the peace officer ascertain the nature of the offence for which the warrant is outstanding: *Gamracy v. The Queen* (1973), 12 C.C.C. (2d) 209, 22 C.R.N.S. 224 (S.C.C.) (3:2).

Where it was clearly feasible for a police officer to possess the warrant his failure to do so vitiated any lawful arrest: *Richard v. The Queen* (1974), 27 C.R.N.S. 337 (Que. S.C.).

**Right to enter premises to effect arrest** – The power of arrest without warrant in this paragraph may be exercised by entry on private premises without the consent of the occupier where the circumstances meet the requirements of this paragraph, and there are reasonable and probable grounds for the belief that the person sought is within the premises and proper announcement was made before entry. This latter requirement would appear to mean proper announcement of the officer's presence and purpose before entering: *R. v. Landry* (1986), 25 C.C.C. (3d) 1, 50 C.R. (3d) 55, [1986] 1 S.C.R. 145 (8:1). Also see: *R. v. Miller* (1986), 25 C.C.C. (3d) 554 (Sask. C.A.), *affd* 39 C.C.C. (3d) 288, 83 N.R. 239, 64 Sask. R. 320 (S.C.C.) (5:0).

However the officers were not required to make an announcement before entry where it was reasonable to infer that had they done so, evidence would have been destroyed or removed: *R. v. Wong* (1987), 34 C.C.C. (3d) 51, 56 C.R. (3d) 352 (Ont. C.A.).

The requirement of proper announcement before entry is not limited to a forcible entry and applies even where the officers enter private premises through an open door for the purpose of effecting an arrest, unless in the circumstances the open door can be construed as an invitation to enter: *R. v. Delong* (1989), 47 C.C.C. (3d) 402, 69 C.R. (3d) 147, 31 O.A.C. 339 (C.A.).

The police have the power to enter private premises to effect an arrest where they are in hot pursuit and they have a warrant for an arrest or have the power to make an arrest with warrant. This power to enter private premises to make an arrest while in hot pursuit is not limited to an arrest for an indictable offence. Nor is it necessary that the offence had been committed in the presence of the police. The essence of hot or fresh pursuit is that it must be continuous pursuit conducted with reasonable diligence so that the pursuit and capture along with the commission of the offence may be considered as

forming part of a single transaction: *R. v. Maccooh*, [1993] 2 S.C.R. 802, 82 C.C.C. (3d) 481, 22 C.R. (4th) 70.

**Search incident to arrest** – Police officers have the power to search an accused as an incident to a lawful arrest and to seize anything in his possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the accused's escape or provide evidence against him. The existence of reasonable and probable grounds to believe that the accused is in possession of weapons or evidence is not a prerequisite to the existence of the power to search, provided, however, that the search is for a valid objective and not unrelated to the objectives of the proper administration of justice. Accordingly, a search done for weapons or other dangerous articles is necessary as an elementary precaution to preclude the possibility of their use against the police, the nearby public or the accused himself. A search is also proper to collect evidence that can be used in establishing the guilt of the accused. Further, the search must not be conducted in an abusive fashion and the use of physical or psychological constraint should be proportionate to the objectives sought and the other circumstances of the situation. A "frisk" or pat down search is a relatively non-intrusive procedure and, if done for valid reasons, is not a disproportionate interference with the freedom of persons lawfully arrested: *Cloutier v. Langlois* (1990), 53 C.C.C. (3d) 257, [1990] 1 S.C.R. 158, 74 C.R. (3d) 316 (7:0).

**Right to counsel on arrest** – Where a person is detained for a search, as in the case of a body search incident to arrest, then, immediately upon detention, the detainee has the right to be informed of the right to counsel under s. 10(b) of the Charter. However, the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel. The police are, however, required to suspend the search where the lawfulness of the search is dependent on the detainee's consent or where the statute gives a person a right to seek review of the decision to search: *R. v. Debot* (1989), 52 C.C.C. (3d) 193, [1989] 2 S.C.R. 1140, 73 C.R. (3d) 129.

**Arrest to establish identity** – It was held in *Moore v. The Queen* (1978), 43 C.C.C. (2d) 83, 90 D.L.R. (3d) 112, [1979] 1 S.C.R. 195 (5:2), which arose out of an arrest for a summary conviction provincial traffic offence for which these provisions are applicable by virtue of the provincial Summary Convictions Act, that as a constable has no power to arrest an accused for a summary conviction offence by virtue of this subsection unless, *inter alia*, the arrest was necessary to establish the person's identity, a constable in requesting that the person whom he finds committing such an offence identify himself is in the execution of his duty and the accused's refusal to accede to the request constitutes the offence of obstructing police under s. 129.

**Arrest and arbitrary detention under s. 9 of Charter** [Also see meaning of "reasonable grounds", *supra*] – It is not every unlawful arrest that will amount to a breach of the guarantee to protection against arbitrary detention in s. 9 of the Charter of Rights. Where the officer honestly but mistakenly believed that reasonable and probable grounds existed and there was some basis for that belief, then the arrest, although subsequently found to be unlawful, could not be said to be arbitrary: *R. v. Duguay, Murphy and Sevigny* (1985), 18 C.C.C. (3d) 289, 45 C.R. (3d) 140, 18 D.L.R. (4th) 32 (C.A.), *affd* on other grounds 46 C.C.C. (3d) 1, 67 C.R. (3d) 252, [1989] 1 S.C.R. 93. *R. v. Brown, supra*.

The fact that subsec. (3) deems the arrest to be unlawful is not determinative as to whether the arrest constitutes arbitrary detention within the meaning of s. 9 of the Charter of Rights and Freedoms. There was, however, no breach of s. 9 by the arrest, rather than mere detention, of an impaired driver for the purpose of complying with a breathalyzer demand where such arrest was a not unreasonable means to prevent continuation or repetition of the offence and thus authorized by para. (2)(a)(iii): *R. v. Cayer* (1988), 6 M.V.R. (2d) 1, 66 C.R. (3d) 30 (Ont. C.A.). *Folld*: *R. v. Baker* (1988), 9 M.V.R. (2d) 165, 88 N.S.R. (2d) 250 (C.A.). Similarly, *R. v. Faulkner* (1988), 9 M.V.R. (2d) 137

(B.C.C.A.), where it was held that while the arrest of an accused pursuant to a policy to arrest all suspected impaired drivers would probably be arbitrary conduct, that was not the case here where it was clear that the arrest was made for the accused's own safety. Also see *R. v. Scott* (1990), 24 M.V.R. (2d) 204 (B.C.C.A.) and the Note by R. Libman at 24 M.V.R. (2d) 211.

Also see *R. v. Keeling* (1988), 10 M.V.R. (2d) 57 (B.C.C.A.), where the accused was arrested only after he had been detained as a consequence of the breathalyzer demand. In those circumstances, the imposition of the arrest, even if pursuant to the police officer's policy that he arrests all impaired drivers, was inconsequential. At all times, the accused was lawfully detained for a legitimate reason. To a similar effect is: *R. v. Sieben* (1989), 51 C.C.C. (3d) 343, 73 C.R. (3d) 33, [1990] 2 W.W.R. 97 (C.A.).

It was held in *R. v. Fosseneuve* (1995), 101 C.C.C. (3d) 61, 43 C.R. (4th) 260, 104 Man. R. (2d) 272 (Q.B.), that subsec. (2)(d) of this section is invalid to the extent that it permits an arrest without warrant for the offences mentioned therein, solely on the ground of the "public interest". However, it is valid to the extent that it permits the arrest in a public interest, limited to the needs to establish identity, secure evidence, and prevent the continuation or repetition of the offence or the commission of another offence.

**Subsec. (3)** – Subsection (3) must be construed to mean that no reliance can be placed on a peace officer's failure to comply with subsec. (2) to support the argument that he was not acting in the execution of his duty in making an arrest: *R. v. Adams* (1972), 21 C.R.N.S. 257, [1973] 1 W.W.R. 371 (Sask.C.A.). Folld *R. v. McKibbin* (1973), 12 C.C.C. (2d) 66 (B.C.C.A.); *Re Bunn and The Queen* (1986), 29 C.C.C. (3d) 133 (Man. Q.B.).

This subsection had no application to charges of assault of police under s. 270 where there was no allegation of a failure to comply with subsec. (2) but, rather, it was alleged that the officers were not in execution of their duty because, when they attempted to arrest the accused at his home, they were trespassers and the arrest was illegal: *R. v. Delong* (1989), 47 C.C.C. (3d) 402, 69 C.R. (3d) 147, 31 O.A.C. 339.

#### ISSUE OF APPEARANCE NOTICE BY PEACE OFFICER.

**496.** Where, by virtue of subsection 495(2), a peace officer does not arrest a person, he may issue an appearance notice to the person if the offence is

- (a) an indictable offence mentioned in section 553;
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction; or
- (c) an offence punishable on summary conviction. R.S., c. C-34, s. 451; R.S., c. 2 (2nd Supp.), s. 5.

#### CROSS-REFERENCES

The term "peace officer" is defined in s. 2. The term "appearance notice" is defined in s. 493. An appearance notice may be issued or entered into on a holiday by virtue of s. 20. A warrant may issue under s. 512 where the accused fails to appear for court as required. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section authorizes a peace officer to issue an appearance notice where the officer decides not to arrest a person on the basis of subsec. 495(2).

#### RELEASE FROM CUSTODY BY PEACE OFFICER / Where subsection (1) does not apply / Consequences of non-release.

- 497.** (1) Where a peace officer arrests a person without warrant for
- (a) an indictable offence mentioned in section 553,



- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or
  - (c) an offence punishable on summary conviction,
- he shall, as soon as practicable,
- (d) release the person from custody with the intention of compelling his appearance by way of summons, or
  - (e) issue an appearance notice to the person and thereupon release him,
- unless
- (f) he believes on reasonable grounds that it is necessary in the public interest, having regard to all the circumstances including the need to
    - (i) establish the identity of the person,
    - (ii) secure or preserve evidence of or relating to the offence, or
    - (iii) prevent the continuation or repetition of the offence or the commission of another offence,that the person be detained in custody or that the matter of his release from custody be dealt with under another provision of this Part, or
  - (g) he believes on reasonable grounds that, if the person is released by him from custody, the person will fail to attend in court in order to be dealt with according to law.

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3).

(3) A peace officer who has arrested a person without warrant for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in paragraph (d) or (e) of that subsection shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

- (a) any proceedings under this or any other Act of Parliament; and
- (b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (1). R.S., c. C-34, s. 452; R.S., c. 2 (2nd Supp.), s. 5.

#### CROSS-REFERENCES

The term “peace officer” is defined in s. 2. The terms “appearance notice” and “summons” are defined in s. 493. The contents of the appearance notice are set out in s. 501. An appearance notice may be issued or entered into on a holiday by virtue of s. 20. A warrant may issue under s. 512 where the accused fails to appear for court as required. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section sets out the powers of a peace officer to release a person who has been arrested without a warrant.

Subsection (1) states that where a peace officer arrests a person without a warrant for an offence set out in subsec. 495(2), the officer must, subject to the provisions described in subsec. (2)(f) and (g), as soon as practicable, release the person from custody with the intention of issuing a summons. The peace officer may also decide to issue an appearance notice to the person and then release him.

Subsection (2) makes it clear that the requirements of subsec. (1) do not apply where a person has been arrested without warrant by a peace officer for an indictable offence alleged to have been committed in Canada but in a different province.

Subsection (3) states that a peace officer is deemed to be acting lawfully and in the execution of his duties even if he does not comply with subsec. (1)(d) and (e) for the pur-

poses set out in subsec. 3(a) and (b), unless it is established that the provisions of subsec. (1) were not complied with.

# ANNOTATIONS

The continued detention of a motorist, arrested for impaired driving, until he has sobered up is authorized by para. (1)(f) of this section and does not violate the guarantee against arbitrary detention in s. 9 of the Charter of Rights and Freedoms: *R. v. Williamson* (1986), 25 C.C.C. (3d) 139, 40 M.V.R. 15 (Alta. Q.B.). Similarly: *R. v. Pashovitz* (1987), 59 C.R. (3d) 396, 59 Sask. R. 165 (C.A.).

Where the alleged breach of the Charter does not give rise to a defence, did not lead to the obtaining of evidence and could not have had a bearing on the sentence, then it ought not to be the subject of inquiry at trial, as in this case where the alleged breach of s. 9 resulted from the continued detention of the motorist several hours after it was safe for him to go: *R. v. Cutforth*, (1987), 40 C.C.C. (3d) 253, 61 C.R. (3d) 187, [1988] 1 W.W.R. 274 (Alta. C.A.). However, compare *R. v. Davidson* (1988), 46 C.C.C. (3d) 403, 88 N.S.R. (2d) 271 (C.A.).

## RELEASE FROM CUSTODY BY OFFICER IN CHARGE / Where subsection (1) does not apply / Consequences of non-release.

**498.** (1) Where a person who has been arrested without warrant by a peace officer is taken into custody, or where a person who has been arrested without warrant and delivered to a peace officer under subsection 494(3) is detained in custody under subsection 503(1) for

- (a) an indictable offence mentioned in section 553,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- (c) an offence punishable on summary conviction, or
- (d) any other offence that is punishable by imprisonment for five years or less, and has not been taken before a justice or released from custody under any other provision of this Part, the officer in charge shall, as soon as practicable,
- (e) release the person with the intention of compelling his appearance by way of summons,
- (f) release the person on his giving his promise to appear,
- (g) release the person on his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hundred dollars as the officer in charge directs, but without deposit of money or other valuable security, or
- (h) if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, release the person on his entering into a recognizance before the officer in charge without sureties in such amount not exceeding five hundred dollars as the officer in charge directs and, if the officer in charge so directs, on his depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs,

unless

- (i) he believes on reasonable grounds that it is necessary in the public interest, having regard to all the circumstances including the need to
  - (i) establish the identity of the person,
  - (ii) secure or preserve evidence of or relating to the offence, or
  - (iii) prevent the continuation or repetition of the offence or the commission of another offence,
 that the person be detained in custody or that the matter of his release from custody be dealt with under another provision of this Part, or

(j) he believes on reasonable grounds that, if the person is released by him from custody, the person will fail to attend in court in order to be dealt with according to law.

(2) Subsection (1) does not apply in respect of a person who has been arrested without warrant by a peace officer for an offence described in subsection 503(3).

(3) An officer in charge who has the custody of a person taken into or detained in custody for an offence described in subsection (1) and who does not release the person from custody as soon as practicable in the manner described in paragraph (e), (f), (g) or (h) of that subsection shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; or

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the officer in charge did not comply with the requirements of subsection (1). R.S., c. C-34, s. 453; R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 186.

#### CROSS-REFERENCES

The terms “officer in charge”, “recognizance”, “summons” and “promise to appear” are defined in s. 493. The terms “peace officer”, “valuable security” and “justice” are defined in s. 2. Money or other valuable security deposited with the officer in charge is to be delivered to a justice under s. 500. The contents of the promise to appear and recognizance are set out in s. 501. A promise to appear or recognizance may be issued, given or entered into on a holiday by virtue of s. 20. A warrant may issue under s. 512 where the accused fails to appear for court as required. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section describes the powers of an officer in charge to effect the release of a person who has been arrested without warrant by a peace officer and who has been taken into custody or detained in custody under s. 503(1) for an offence described in paras. (a), (b), (c) or (d) of subsec. (1).

Subsection (1) states that if such a person has not been taken before a justice, or released from custody under any other provision in Part XVI, the officer in charge must, subject to certain specified exceptions, release that person as soon as practicable. Paragraphs (e), (f), (g) and (h) specify the forms of release that the officer in charge may use. Paragraphs (i) and (j) describe the circumstances in which the officer in charge may decide not to release the person.

Subsection (2) makes it clear that subsec. (1) does not apply where a person has been arrested without a warrant by a peace officer for an indictable offence alleged to have been committed in a different province.

Subsection (3) provides that an officer in charge is deemed to be acting lawfully and in the execution of his duties even if he does not release the person as soon as practicable and in accordance with paras. (e), (f), (g) or (h) for the purposes described in subsec. (3)(a) or (b), unless it is established that the officer did not comply with the requirements of subsec. (1).

#### RELEASE FROM CUSTODY BY OFFICER IN CHARGE WHERE ARREST MADE WITH WARRANT / Additional conditions / Application to justice.

499. (1) Where a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one mentioned in section 522, the officer in charge may, if the warrant has been endorsed by a justice under subsection 507(6),

(a) release the person on the person's giving a promise to appear;

(b) release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars



that the officer in charge directs, but without deposit of money or other valuable security; or

- (c) if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within two hundred kilometres of the place in which the person is in custody, release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in charge directs and, if the officer in charge so directs, on depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs.

(2) In addition to the conditions for release set out in paragraphs (1)(a), (b) and (c), the officer in charge may also require the person to enter into an undertaking in Form 11.1 in which the person, in order to be released, undertakes to do one or more of the following things:

- (a) to remain within a territorial jurisdiction specified in the undertaking;
- (b) to notify a peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;
- (c) to abstain from communicating with any witness or other person mentioned in the undertaking, or from going to a place mentioned in the undertaking, except in accordance with the conditions specified in the undertaking; and
- (d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking.

**Editor's Note:** While, by 1994, c. 44, s. 40, the above provision is limited to the imposition of four conditions, there are five conditions in Form 11.1. The first condition has not been provided for, but we understand that this will be corrected by future legislation.

(3) A person who has entered into an undertaking under subsection (2) may, at any time before or at his or her appearance pursuant to a promise to appear or recognizance, apply to a justice for an order under subsection 515(1) to replace his or her undertaking, and section 515 applies, with such modifications as the circumstances require, to such a person. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 186; 1994, c. 44, s. 40.

#### CROSS-REFERENCES

The terms "officer in charge", "recognizance" and "promise to appear" are defined in s. 493. The terms "valuable security", "peace officer" and "justice" are defined in s. 2. Money or other valuable security deposited with the officer in charge is to be delivered to a justice under s. 500. The contents of the promise to appear and recognizance are set out in s. 501. A warrant, summons, appearance notice, promise to appear, undertaking or recognizance may be issued, executed, given or entered into on a holiday by virtue of s. 20. A warrant may issue under s. 512 where the accused fails to appear for court as required. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section describes the powers of an officer in charge to release a person from custody when that person has been arrested with a warrant.

The provisions of this section apply only if the person arrested is in custody for: (a) an offence within the absolute jurisdiction of a provincial court judge; (b) a Crown election offence; (c) a summary conviction offence; or (d) any other indictable offence with a maximum term of five years' imprisonment.

The officer in charge may order the release of such a person on a promise to appear or a recognizance in accordance with the terms set out in paras. (e), (f) and (g) of the section.

**MONEY OR OTHER VALUABLE SECURITY TO BE DEPOSITED WITH JUSTICE.**

**500.** Where a person has, pursuant to paragraph 498(1)(h) or paragraph 499(g), deposited any sum of money or other valuable security with the officer in charge, the officer in charge shall, forthwith after the deposit thereof, cause the money or valuable security to be delivered to a justice for deposit with the justice. R.S., c. 2 (2nd Supp.), s. 5.

**Editor's Note:** We understand that s. 500 will be amended by future legislation by replacing the reference to para. 499 (g) with a reference to para. 499(1)(c).

**CROSS-REFERENCES**

The term "officer in charge" is defined in s. 493. The terms "valuable security", "peace officer" and "justice" are defined in s. 2.

**SYNOPSIS**

This section requires the officer in charge who has received a deposit of money or valuable security from a person pursuant to s. 498(1)(h) to ensure that such money or security is delivered forthwith to a justice for deposit.

**CONTENTS OF APPEARANCE NOTICE, PROMISE TO APPEAR AND**

**RECOGNIZANCE / Idem / Attendance for purposes of *Identification of Criminals Act* / Signature of accused / Proof of issue of appearance notice.**

**501. (1)** An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge or another peace officer shall

- (a) set out the name of the accused;
- (b) set out the substance of the offence that the accused is alleged to have committed; and
- (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

**(2)** An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge or another peace officer shall set out the text of subsections 145(5) and (6) and section 502.

**(3)** An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge or another peace officer may, where the accused is alleged to have committed an indictable offence, require the accused to appear at a time and place stated in it for the purposes of the *Identification of Criminals Act*, and a person so appearing is deemed, for the purposes only of that Act, to be in lawful custody charged with an indictable offence.

**NOTE:** Subsec. (3) re-enacted by 1992, c. 47, s. 69 (to come into force by order of the Governor in Council), however, 1992, c. 47, s. 69 itself replaced by 1994, c. 44, s. 94 so that the re-enactment of subsec. (3), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*(3) An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before, an officer in charge or another peace officer may require the accused to appear at a time and place stated in it for the purposes of the Identification of Criminals Act, where the accused is alleged to have committed an indictable offence and, in the case of an offence designated as a contravention under the Contraventions Act, the Attorney General of Canada has not elected under section 50 of that Act that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket.*

**(4)** An accused shall be requested to sign in duplicate his appearance notice, promise

to appear or recognizance and, whether or not he complies with that request, one of the duplicates shall be given to the accused, but if the accused fails or refuses to sign, the lack of his signature does not invalidate the appearance notice, promise to appear or recognizance, as the case may be.

(5) The issue of an appearance notice by any peace officer may be proved by the oral evidence, given under oath, of the officer who issued it or by the officer's affidavit made before a justice or other person authorized to administer oaths or to take affidavits. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 76; 1994, c. 44, s. 41.

#### CROSS-REFERENCES

The terms "officer in charge", "appearance notice", "recognizance" and "promise to appear" are defined in s. 493. The terms "valuable security", "peace officer" and "justice" are defined in s. 2. Where the accused does not attend as required for the purpose of the Identification of Criminals Act, R.S.C. 1985, c. I-1, then a justice may issue a warrant for the accused's arrest pursuant to s. 502. A warrant may issue under s. 512 where the accused fails to appear for court as required. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section describes the required contents of an appearance notice, a promise to appear and a recognizance and deals with several related issues.

Subsection (1) states that an appearance notice, a promise to appear or a recognizance must set out the name of the accused, describe the substance of the offence alleged to have been committed, and require that the accused attend court at a time and place stated therein and attend thereafter as required by the court. These documents must also set out the text of ss. 145(5) and (6) and 502.

Subsection (3) provides that a promise to appear, and appearance notice or a recognizance may also require that the accused appear at the stated time and place for the purposes of the Identification of Criminals Act. This further requirement can be imposed only where the accused is alleged to have committed an indictable offence.

Subsection (4) requires that the accused be requested to sign in duplicate the appearance notice, the promise to appear or the recognizance. Even if the accused does not comply with this request, one of the duplicate copies must be given to him. If the accused fails, or refuses to sign, the lack of a signature does not invalidate the appearance notice, the promise to appear or the recognizance.

Subsection (5) allows the issuance of an appearance notice to be proved by the sworn oral evidence of the peace officer who issued it or by that officer's duly authorized, sworn affidavit.

#### ANNOTATIONS

**Subsec. (1)(b)** – An appearance notice that merely sets out for the substance of the offence a section and paragraph number without even identifying the statute does not meet the test of sufficiency: *Re Regina and Powers* (1973), 10 C.C.C. (2d) 395, 21 C.R.N.S. 116 (N.B.Q.B.).

**Subsec. (1)(c)** – The officer in charge has no jurisdiction to designate another territorial jurisdiction other than the county in which the accused was arrested as the place he is to appear before a justice to answer to the charge: *R. v. Simons* (1976), 30 C.C.C. (2d) 162, 34 C.R.N.S. 273 (Ont. C.A.).

To attend Court within the meaning of this paragraph involves making one's presence known to the presiding justice, and not simply being physically present in the courtroom: *Re Anderson and The Queen* (1983), 9 C.C.C. (3d) 539, 37 C.R. (3d) 67 (Alta. C.A.).



**Subsec. (2)** – The omission in a promise to appear to set out the complete text of s. 145(5) does not affect the Court’s jurisdiction to proceed with the trial where the accused appears, whether under protest or not: *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83n.

**Subsec. (3)** – The discretionary power to require an accused to attend for fingerprinting does not violate the principles of fundamental justice as guaranteed by s. 7 of the Charter of Rights and Freedoms: *R. v. Beare*; *R. v. Higgins* (1988), 45 C.C.C. (3d) 57, 66 C.R. (3d) 97, [1988] 2 S.C.R. 387.

A Crown option offence is deemed to be indictable until Crown counsel elects otherwise and thus an accused can be compelled to attend for fingerprinting in relation to such offence as provided for in the Identification of Criminals Act R.S.C. 1985, c. I-1. Moreover, it was open to the Crown to delay electing the mode of proceeding on a Crown option offence until the accused had complied with a condition in the appearance notice or promise to appear to attend for fingerprinting: *Re Abarca and The Queen* (1980), 57 C.C.C. (2d) 410 (Ont. C.A.); *R. v. Lavoie* (1990), 58 C.C.C. (3d) 246 (Que. S.C.).

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### FAILURE TO APPEAR.

**502.** Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged. R.S., c. 2 (2nd Supp.), s. 5.

**NOTE:** Section 502 re-enacted by 1992, c. 47, s. 70 (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated in it for the purposes of the Identification of Criminals Act does not appear at that time and place and, in the case of an offence designated as a contravention under the Contraventions Act, the Attorney General of Canada has not elected under section 50 of that Act that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which the accused is charged.*

### CROSS-REFERENCES

The terms “officer in charge”, “appearance notice”, “recognizance” and “promise to appear” are defined in s. 493. The term “justice” is defined in s. 2. A warrant may issue under s. 512 where the accused fails to appear for court as required.

### SYNOPSIS

This section describes the consequences of failing to appear for the purposes of the Identification of Criminals Act as required by a promise to appear, an appearance notice or a recognizance. Should the accused not appear at the time and place stipulated, a justice may issue a warrant for the arrest of the accused for the charged offence. The justice may only issue a warrant if the appearance notice, the promise to appear or the recognizance has been confirmed by a justice under s. 508.

### ANNOTATIONS

Once the Court has become *functus* with respect to the original charge because it has

been disposed of completely, the Justice has no power to issue a warrant under this section for failure of the accused to attend for fingerprinting as required by the appearance notice: *Re McHardy and The Queen* (1980), 53 C.C.C. (2d) 91, [1980] 5 W.W.R. 1 (Sask. Q.B.).

## Appearance of Accused Before Justice

**TAKING BEFORE JUSTICE / Conditional release / Undertaking / Application to justice / Remand in custody for return to province where offence alleged to have been committed / Interim release / Release of person about to commit indictable offence / Consequences of non-release.**

503. (1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 494(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely,

- (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
- (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

- (c) the peace officer or officer in charge releases the person under any other provision of this Part, or
- (d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

(2) Where a peace officer or an officer in charge is satisfied that a person described in subsection (1) should be released from custody conditionally, the officer may, unless the person is detained in custody for an offence mentioned in section 522, release that person on the person's giving a promise to appear or entering into a recognizance in accordance with paragraphs 498(1)(f) to (h) and subsection (2.1).

(2.1) In addition to the conditions referred to in subsection (2), the peace officer or officer in charge may, in order to release the person, require the person to enter into an undertaking in Form 11.1 in which the person undertakes to do one or more of the following things:

- (a) to remain within a territorial jurisdiction specified in the undertaking;
- (b) to notify the peace officer or another person mentioned in the undertaking of any change in his or her address, employment or occupation;
- (c) to abstain from communicating with any witness or other person mentioned in the undertaking, or from going to a place mentioned in the undertaking, except in accordance with the conditions specified in the undertaking; or
- (d) to deposit the person's passport with the peace officer or other person mentioned in the undertaking.

**Editor's Note:** While, by 1994, c. 44, s. 42, the above provision is limited to the imposition of four conditions, there are five conditions in Form 11.1. The first condition has not been provided for, but we understand that this will be corrected by future legislation.

(2.2) A person who has entered into an undertaking under subsection (2.1) may, at any time before or at his or her appearance pursuant to a promise to appear or recognizance, apply to a justice for an order under subsection 515(1) to replace his or her undertaking, and section 515 applies, with such modifications as the circumstances require, to such a person.

(3) Where a person has been arrested without warrant for an indictable offence alleged to have been committed in Canada outside the province in which he was arrested, he shall, within the time prescribed in paragraph (1)(a) or (b), be taken before a justice within whose jurisdiction he was arrested and the justice,

(a) if he is not satisfied that there are reasonable grounds to believe that the person arrested is the person alleged to have committed the offence, shall release him; or

(b) if he is satisfied that there are reasonable and probable grounds to believe that the person arrested is the person alleged to have committed the offence, may remand him to the custody of a peace officer to await execution of a warrant for his arrest in accordance with section 528, but if no warrant for his arrest is so executed within a period of six days after the time he is remanded to such custody, the person in whose custody he then is shall release him.

(3.1) Notwithstanding paragraph (3)(b), a justice may, with the consent of the prosecutor, order that the person referred to in subsection (3), pending the execution of a warrant for the arrest of that person, be released

(a) unconditionally; or

(b) on any of the following terms to which the prosecutor consents, namely,

(i) giving an undertaking, or

(ii) entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the justice considers desirable and to which the prosecutor consents.

(4) A peace officer or an officer in charge having the custody of a person who has been arrested without warrant as a person about to commit an indictable offence shall release that person unconditionally as soon as practicable after he is satisfied that the continued detention of that person in custody is no longer necessary in order to prevent the commission by him of an indictable offence.

(5) Notwithstanding subsection (4), a peace officer or an officer in charge having the custody of a person referred to in that subsection who does not release the person before the expiration of the time prescribed in paragraph (1)(a) or (b) for taking the person before the justice shall be deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament; or

(b) any other proceedings, unless in such proceedings it is alleged and established by the person making the allegation that the peace officer or officer in charge did not comply with the requirements of subsection (4). R.S., c. C-34, s. 454; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 46; R.S.C. 1985, c. 27 (1st Supp.), s. 77; 1994, c. 44, s. 42.

#### CROSS-REFERENCES

The terms “officer in charge”, “undertaking” and “recognizance” are defined in s. 493. The terms “peace officer”, “prosecutor” and “justice” are defined in s. 2. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section describes the requirements placed on a peace officer to ensure that a person



arrested with or without a warrant be brought before a justice to be dealt with according to law.

Subsection (1) states that where a justice is available within 24 hours of a person's arrest or delivery to a peace officer, that person shall be taken before the justice without unreasonable delay and, in any event, within that period. If a justice is not available within a period of 24 hours, the person shall be taken before a justice as soon as possible. These requirements apply unless, prior to the expiration of time periods described above, the peace officer or officer in charge releases the person under any other provision in Part XVI, under s. 503(4), or otherwise, conditionally or unconditionally.

Subsection (2) provides that where a peace officer or officer in charge is satisfied that a person described in subsec. (1) should be released upon conditions, that officer may make such a release in accordance with s. 498(1)(f) to (h). Subsection (2) may not be resorted to if the person is being held in custody pursuant to s. 522.

Subsection (3) deals with the situation in which a person has been arrested, without a warrant, for an indictable offence alleged to have been committed outside the province in which he has been apprehended. Such a person must be brought before a justice within the time periods described in subsec. (1)(a) or (b) above and the justice shall release him if there are no reasonable grounds to believe that that person committed the offence. If the justice is satisfied that there are reasonable grounds to believe that the arrested person is the person alleged to have committed the offence, the justice may remand the person in the custody of the peace officer to await the execution of an arrest warrant pursuant to s. 528. If no warrant is executed within six days of this remand, the accused person must be released.

Subsection (3.1) states that a justice may order the release of a person referred to in subsec. (3), with the consent of the prosecutor, pending the execution of the arrest warrant. Such a release may be unconditional or according to the terms set out in subsec. (3.1).

Subsection (4) states that a peace officer or officer in charge having custody of a person who has been arrested without a warrant as a person about to commit an indictable offence shall release that person unconditionally as soon as practicable after the officer is satisfied that the continued detention of that person is no longer necessary to prevent the commission of an indictable offence.

Subsection (5) makes it clear that a peace officer who has custody of a person referred to in subsec. (4) and who does not release that person within the time limits prescribed by subsec. (1)(a) and (b), is deemed to be acting lawfully and in the execution of his/her duty for the purposes specified in subsec. 5(a) and (b) unless it is established that the officer did not comply with the requirements of subsec. (4).

## ANNOTATIONS

An 18-hour delay, following the arrest of the accused before he was taken before a justice, so that a line-up could be arranged, did not infringe this section nor constitute a violation of s. 9 of the Charter: *R. v. Storrey* (1990), 53 C.C.C. (3d) 316, [1990] 1 S.C.R. 241, 75 C.R. (3d) 1 (7:0).

The breach of this section resulting in the accused's detention for 36 hours before being brought before a justice constituted a violation of s. 9 of the Charter of Rights: *R. v. Charles* (1987), 36 C.C.C. (3d) 286, 59 C.R. (3d) 94 (Sask. C.A.). See, however, *R. v. Tam* (1995), 100 C.C.C. (3d) 196, 100 W.A.C. 40 (B.C.C.A.) in which a delay of over 24 hours rendered the detention "unlawful" contrary to this section but not "arbitrary" within the meaning of s. 9 of the Charter.

An accused arrested on the strength of Telex information of a warrant outstanding elsewhere in the province must be brought before a Justice within twenty-four hours. The Court which issued the warrant does not have exclusive jurisdiction to deal with the matter of the accused's release. If the Crown because of a lack of information is unable to proceed with the show cause hearing at that time the proper course is to apply for an

adjournment for three days under s. 515 during which time the Crown can either transport the accused to the locale where the warrant was issued or obtain the necessary information: *R. v. Ragan* (1974), 21 C.C.C. (2d) 115, [1975] 2 W.W.R. 284 (B.C. Prov. Ct.).

The provisions of subsec. (3) are mandatory and require that the person arrested be personally brought before the justice for the identity hearing. On the hearing the onus is on the Crown. In calculating the six-day period in para. (b) neither the remand date nor the release date should be excluded. The remand order under para. (b) should provide for the accused's release unless a warrant is executed within that six-day period: *Re Marshall and The Queen* (1984), 13 C.C.C. (3d) 73 (Ont. H.C.J.).

## Information, Summons and Warrant

### IN WHAT CASES JUSTICE MAY RECEIVE INFORMATION.

**504.** Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

- (a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person
  - (i) is or is believed to be, or
  - (ii) resides or is believed to reside, within the territorial jurisdiction of the justice;
- (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;
- (c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or
- (d) that the person has in his possession stolen property within the territorial jurisdiction of the justice. R.S., c. C-34, s. 455; R.S., c. 2 (2nd Supp.), s. 5.

### CROSS-REFERENCES

The terms "justice", "property" and "steal" are defined in s. 2. Indictable offence includes a hybrid offence by virtue of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21. The determination as to whether process should issue is made in accordance with s. 507. Under s. 506 an information may be laid in Form 2. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

### SYNOPSIS

This section describes the process by which any person may lay an information before a justice that another person has committed an indictable offence.

The information must be in writing and under oath. The justice must receive the information if it contains any of the allegations set out in paras. (a) to (d).

### ANNOTATIONS

**Constitutional considerations** – This provision is *intra vires* Parliament, and provincial provisions such as those contained in the Youth Protection Act, 1977 (Que.), c. 20, which attempt to prevent anyone from laying an information unless the person has consent of a government official are inoperative: *A.-G. Que. et al. v. Lechasseur et al.* (1981), 63 C.C.C. (2d) 301, 128 D.L.R. (3d) 739 (S.C.C.) (9:0).

**Duty of justice** – The act of receiving an information is ministerial rather than judicial: *R. v. Jean Talon Fashion Center Inc.* (1975), 22 C.C.C. (2d) 223, 56 D.L.R. (3d) 296 (Que. Q.B.).

**When information laid** – In *R. v. Southwick, ex p. Gilbert Steel Ltd.*, [1968] 1 C.C.C.

356, 2 C.R.N.S. 46 (Ont. C.A.) it was held that on the swearing of the written complaint the information is "laid" and becomes the commencement of criminal proceedings.

**Separate informations outstanding** – It does not affect the validity of either information to have two separate informations charging the same offence outstanding at the same time: *R. v. Policha, ex p. Hrischuk*, [1970] 5 C.C.C. 165, 11 C.R.N.S. 99 *sub nom. Hrischuk v. Clark and Policha*. (Sask. Q.B.).

**Defects in jurat [Also see notes under s. 789]** – The cases are divided as to the effect of the failure to indicate the date in the jurat upon which the information may be sworn. In *Re Regina and Village of Bobcaygeon* (1974), 17 C.C.C. (2d) 236 (Ont. C.A.), the court left open whether such an omission was fatal to the validity of the information, but doubted whether the trial court's power to amend an information could extend to inserting the date in the jurat. The court upheld the refusal to issue *mandamus* in that case to require the judge to continue with the trial since by reason of the absence of the date when the information was sworn it did not disclose that it was sworn within the applicable limitation period. The defendant and the trial judge were entitled to know by perusing the information the components of the offence, the time and place of its commission and that the informant had laid the information within the prescribed time. The information, which failed to convey to them this information, was a nullity.

However, in *R. v. Government of Saskatchewan* (1982), 20 Sask. R. 213 (C.A.), the court refused to follow *Re Regina and Village of Bobcaygeon, supra*, and held that an information was not a nullity even though, by reason of the failure to complete the jurat, it was not clear whether the information was laid within the limitation period. The court held that whether or not the prosecution was commenced within the limitation period was a matter to be decided by the trial judge upon hearing evidence.

To a similar effect is *R. v. Dean* (1985), 17 C.C.C. (3d) 410 (Alta. Q.B.), where the validity of the information was upheld although the year that the information was sworn was missing from the jurat. In view of the five-year limitation period, there was no possibility that the information was laid outside the limitation period. *Contra: Platt v. The Queen; R. v. Cowan*, [1981] 4 W.W.R. 601, 9 Man. R. (2d) 75 (Q.B.).

And in *R. v. Akey* (1990), 11 W.C.B. (2d) 594 (Ont. Ct. (Gen. Div.)) it was held that the absence from the jurat, of the month in which the information was sworn, did not render the information invalid when it was apparent that the information, charging Crown option offences upon which the Crown elected to proceed by way of summary conviction, must have been sworn within six months of the offence.

**Illegibility of justice's signature** – The illegibility in the jurat of the signature of the justice of the peace who took the information does not render the information invalid where the identity of the person signing the information appears on the face of the information. Thus, in this case, below the illegible signature were the words "A justice of the peace in and for the Province of Ontario": *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.J.).

**Other defects** – In *Zastawny v. The Queen* (1970), 10 C.R.N.S. 155, 72 W.W.R. 537 (Sask. Q.B.) an information that failed to state on its face the site of the offence was quashed as not disclosing an offence within the territorial jurisdiction of the Magistrate.

Omission of the informant's name and occupation from the place indicated in Form 2 does not invalidate the information: *R. v. Eddy* (1982), 69 C.C.C. (2d) 568 (B.C.S.C.).

## TIME WITHIN WHICH INFORMATION TO BE LAID IN CERTAIN CASES.

### 505. Where

- (a) an appearance notice has been issued to an accused under section 496, or
  - (b) an accused has been released from custody under section 497 or 498,
- an information relating to the offence alleged to have been committed by the accused or relating to an included or other offence alleged to have been committed by him



shall be laid before a justice as soon as practicable thereafter and in any event before the time stated in the appearance notice, promise to appear or recognizance issued to or given or entered into by the accused for his attendance in court. R.S., c. 2 (2nd Supp.), s. 5.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. The terms “appearance notice”, “recognizance” and “promise to appear” are defined in s. 493. The determination as to whether process issued by the officer should be confirmed or cancelled is made in accordance with s. 508. Under s. 506 an information may be laid in Form 2. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

#### SYNOPSIS

This section sets out the time periods within which informations must be laid in specified cases.

The section requires that where an appearance notice has been issued under s. 496 or an accused has been released from custody under ss. 497 or 498, an information shall be laid before a justice as soon as practicable thereafter. The information must be laid, in any event, prior to the first appearance of the accused in court.

#### ANNOTATIONS

It was held in *R. v. Naylor* (1978), 42 C.C.C. (2d) 12 (Ont. C.A.) that this section sets out two time-limits both of which are mandatory, (1) that the information be laid as soon as practicable and (2) that it be laid before the time (meaning time of day) of the appearance in Court. However, where there is a failure to comply with these time-limits while no charge of fail to appear under s. 145(5) will lie and the Court has no power to issue a warrant under s. 512(2), if the accused does appear this is sufficient to give the Court jurisdiction. The failure to follow the procedure in this section does not invalidate the information nor result in a loss of jurisdiction over the offence and the accused’s appearance in Court gives the Court jurisdiction over the person. Folld: *R. v. Hrankowski* (1980), 54 C.C.C. (2d) 174, [1980] 5 W.W.R. 684 (Alta. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 26 A.R. 268n.

The Court has jurisdiction even if the accused appears under protest to the Court’s jurisdiction: *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83n.

Similarly a “conditional appearance” by counsel on the required date gives the Court jurisdiction. The criminal law does not recognize “conditional” appearances: *Re Harnish and The Queen* (1979), 49 C.C.C. (2d) 190 (N.S.S.C. App. Div.).

The laying of an information after the time stated in the appearance notice is only an administrative failure and while that information does not qualify as an information under this section it will qualify as an information under s. 507 so that the accused’s appearance in Court brings him within the Court’s jurisdiction: *Re Regina and Powers* (1973), 10 C.C.C. (2d) 395, 21 C.R.N.S. 116 (N.S.Q.B.). *Contra*: *Re Fleming and The Queen* (1979), 47 C.C.C. (2d) 406 (B.C.S.C.).

The fact that an appearance notice has been given to the accused does not preclude the officer, because the return date on the notice is wrong, from subsequently invoking the procedure under s. 507 by going before a Justice and laying an information and serving the accused with a summons: *R. v. Benteau* (1975), 24 C.C.C. (2d) 96 (Ont. H.C.J.).

#### FORM

**506.** An information laid under section 504 or 505 may be in Form 2. R.S., c. 2 (2nd Supp.), s. 5.

## CROSS-REFERENCES

Note that s. 788(1) requires that Form 2 be used to initiate summary conviction proceedings. Section 841 provides that forms varied to suit the case and forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided. Also note s. 841(3) requiring preprinted portions of forms to be printed in both official languages.

## ANNOTATIONS

The information may be laid in the name of the complainant alone: *R. v. Ostler, ex p. A.-G. B.C.*, [1966] 1 C.C.C. 249, 52 W.W.R. 483, *sub nom. R. v. Harvey and Schmidt* and *R. v. Gyles, ex p. Mandelbaum*, [1969] 3 C.C.C. 119, 5 C.R.N.S. 307 *sub nom. Mandelbaum v. Denstedt* (Man. C.A.).

**JUSTICE TO HEAR INFORMANT AND WITNESSES / Process compulsory / Procedure when witnesses attend / Summons to be issued except in certain cases / No process in blank / Endorsement of warrant by justice / Promise to appear or recognizance deemed to have been confirmed / Issue of summons or warrant.**

507. (1) Subject to subsection 523(1.1), a justice who receives an information, other than an information laid before the justice under section 505, shall, except where an accused has already been arrested with or without a warrant,

- (a) hear and consider, *ex parte*,
  - (i) the allegations of the informant, and
  - (ii) the evidence of witnesses, where he considers it desirable or necessary to do so; and
- (b) where he considers that a case for so doing is made out, issue, in accordance with this section, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence.

(2) No justice shall refuse to issue a summons or warrant by reason only that the alleged offence is one for which a person may be arrested without warrant.

(3) A justice who hears the evidence of a witness pursuant to subsection (1) shall

- (a) take the evidence on oath; and
- (b) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied.

(4) Where a justice considers that a case is made out for compelling an accused to attend before him to answer to a charge of an offence, he shall issue a summons to the accused unless the allegations of the informant or the evidence of any witness or witnesses taken in accordance with subsection (3) discloses reasonable grounds to believe that it is necessary in the public interest to issue a warrant for the arrest of the accused.

(5) A justice shall not sign a summons or warrant in blank.

(6) A justice who issues a warrant under this section or section 508 or 512 may, unless the offence is one mentioned in section 522, authorize the release of the accused pursuant to section 499 by making an endorsement on the warrant in Form 29.

(7) Where, pursuant to subsection (6), a justice authorizes the release of an accused pursuant to section 499, a promise to appear given by the accused or a recognizance entered into by the accused pursuant to that section shall be deemed, for the purposes of subsection 145(5), to have been confirmed by a justice under section 508.

(8) Where, on an appeal from or review of any decision or matter of jurisdiction, a new trial or hearing or a continuance or renewal of a trial or hearing is ordered, a justice may issue either a summons or a warrant for the arrest of the accused in order to

compel the accused to attend at the new or continued or renewed trial or hearing. R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 35; R.S.C. 1985, c. 27 (1st Supp.), s. 78; 1994, c. 44, s. 43.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. With respect to oaths and solemn affirmations see ss. 13 to 15 of the Canada Evidence Act, R.S.C. 1985, c. C-5. The terms “summons” and “warrant” are defined in s. 493. The contents of a summons and the means of service are set out in s. 509. The contents of a warrant are set out in ss. 511 and 513. It is executed in accordance with s. 514. A warrant or summons may be issued, executed, given or entered into on a holiday by virtue of s. 20. Where the information is laid under s. 505 then the process issued by the peace officer or officer in charge is confirmed or cancelled in accordance with s. 508. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

Note s. 31(1) of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that where anything is required or authorized to be done by or before, *inter alia*, a justice of the peace it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

Failure to attend court as required or attend for the purposes of the Identification of Criminals Act is an offence under s. 145. As well a warrant may issue under s. 510 for failure to attend for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1, as required in a summons. A warrant may issue under s. 512 where the accused fails to appear for court as required or where a summons cannot be served because the accused is evading service.

#### SYNOPSIS

This section provides a procedure that must be followed when a justice receives an information other than one under s. 505.

Subsection (1) states that except where an accused has already been arrested, the justice shall hear and consider, *ex parte*, the allegations of the informant. Where the justice considers it desirable or necessary, he shall also hear the evidence of witnesses. Where the justice considers that a case for so doing has been established, he shall issue a summons or a warrant for the arrest of the accused. A justice may not refuse to issue a summons or a warrant only for the reason that the offence is one which permits arrest without a warrant.

Subsection (3) requires that any evidence heard pursuant to subsec. (1) must be taken on oath and in accordance with s. 540 to the extent that this is possible.

Subsection (4) provides that the justice may issue a summons to compel the attendance of the accused to answer a charge of an offence if a case for doing so is made out. The justice may issue a warrant for the arrest of the accused if there are reasonable grounds to believe that this is necessary in the public interest. The justice may not sign a warrant or a summons in blank.

Subsection (6) empowers the justice who issues a warrant under this section, s. 508 or 512, where the offence is one described in paras. (a) to (d), to authorize the release of the accused pursuant to s. 499 by endorsing the warrant. Where an accused is released under subsec. (6), the promise to appear or recognizance shall be deemed to have been confirmed under s. 508 for the purposes of s. 145(5).

Subsection (8) states that a justice may issue a summons or a warrant to compel the attendance of the accused where a new trial or hearing is ordered on appeal or review or a continuance of a trial is ordered.

#### ANNOTATIONS

**Minimum requirements of information** – Although the information may not comply with the requirements as to sufficiency in s. 581(3) such a defect does not render the information null and void *ab initio* and incapable of founding jurisdiction to compel the appearance of the accused before the Court to answer the allegation that he committed



an indictable offence: *Re Bahinipaty and The Queen* (1983), 5 C.C.C. (3d) 439, 23 Sask. R. 36 (C.A.).

To be valid, an information cannot be laid against an unknown person but must be sworn against a named person or against a person who can be sufficiently described so as to be identifiable. As a pre-condition to the exercise of the power to hear and consider the evidence of witnesses under this section, the information must comply with ss. 504 and 581 and the name or sufficient description of the accused is an essential part of an information. The justice of the peace has no power to embark on an inquiry on an information which does not conform with the provisions of s. 581 in order to obtain sufficient information to take a proper information: *Re Buchbinder and The Queen* (1985), 20 C.C.C. (3d) 481, 47 C.R. (3d) 135 (Ont. C.A.).

**Duty to hold inquiry [subsec. (1)(a)]** – The justice's failure to hold an inquiry as required by this section prior to issuing the summons does not affect the jurisdiction of the provincial court judge: *R. v. Pottle* (1979), 49 C.C.C. (2d) 113 (Nfld. C.A.); *R. v. Bachman*, [1979] 6 W.W.R. 468 (B.C.C.A.). It would seem that the law in Ontario is to the contrary: *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83n.

**Procedure in holding inquiry [subsec. (3)]** – The inquiry under this section is to be held *in camera* and the accused has no right to attend and no right to notice. On the hearing Crown counsel may attend as counsel for the informant: *R. v. Whitmore* (1987), 41 C.C.C. (3d) 555 (Ont. H.C.J.), affd 51 C.C.C. (3d) 294 (Ont. C.A.), as to propriety of holding an *ex parte* hearing, and the attendance of Crown counsel.

While the requirement that the hearing be held *in camera* is an infringement on the guarantee to freedom of expression under s. 2(b) of the Charter, it represents a reasonable limit: *Southam Inc. v. Coulter* (1990), 60 C.C.C. (3d) 267, 75 O.R. (3d) 1, 40 O.A.C. 341 (C.A.).

A justice of the peace, although appointed by the Attorney General and as court administrator required to maintain a good working relationship with other components of the justice system, had the necessary independence and impartiality to carry out her duties under this section. Of importance in this respect is the oath that she must take to truly and faithfully execute her duties as a justice of the peace: *R. v. Isaac* (1989), 47 C.C.C. (3d) 353 (B.C.S.C.).

**Nature of decision to issue process** – In determining whether to issue a summons or a warrant a provincial court judge exercises his discretion and accordingly *mandamus* cannot lie against him: *R. v. Coughlan, ex p. Evans*, [1970] 3 C.C.C. 61, 8 C.R.N.S. 201 (Alta. S.C.). In any event the supervisory court may only order the inferior court to hear the matter again: *R. v. Jones, ex p. Cohen*, [1970] 2 C.C.C. 374 (B.C.S.C.).

A justice has jurisdiction to withdraw and annul his warrant where he issued it under a misconception of the facts: *Re Eckersley and The Queen* (1972), 7 C.C.C. (2d) 314 (Que.Mun.Ct.).

If the Justice's refusal to issue process was based on extraneous considerations, or if his discretion was not exercised judicially following a proper hearing, *mandamus* will lie: *Re Blythe and The Queen* (1973), 13 C.C.C. (2d) 192 (B.C.S.C.); *Re Swan and Tavrydas and The Queen, ex p. Syme* (1979), 48 C.C.C. (2d) 501 (Ont. H.C.J.).

A Justice acts judicially in determining whether or not he will issue a process requiring attendance in Court. A refusal does not invalidate an information; the informant is entitled to re-apply before the same or another Justice for process to be issued: *R. v. Allen* (1974), 20 C.C.C. (2d) 447 (Ont.C.A.).

**Access to evidence taken on hearing** – Although the justice presiding at a preliminary hearing has no power to order production of any statements given before a justice under this section, as a matter of fairness such statements should be made available to the accused notwithstanding the proceedings under this section are conducted *ex parte* and

*in camera*. If the defence has these statements he may cross-examine the witness on them in the same manner as any other prior statement: *Re Cohen and The Queen* (1976), 32 C.C.C. (2d) 446, 34 C.R.N.S. 362 *sub nom.* *A.-G. Que. v. Cohen* (Que.C.A.). An appeal by the Crown to the S.C.C. was allowed 46 C.C.C. (2d) 473, 13 C.R. (3d) 36, the Court holding that the decision of the justice refusing such cross-examination was not reviewable on *certiorari*. In the result the Court did not consider the correctness of the justice's ruling.

**Right to proceed under this section where s. 501 or 505 not complied with** – Where there has been non-compliance with the mandatory provisions of s. 505, it is open to the Crown to proceed by way of an information laid under s. 504 and the justice may issue either a summons or a warrant under this section in order to compel the accused's attendance unless it can be said that the subsequent proceedings constitute an abuse of process: *Re Riley and The Queen* (1981), 60 C.C.C. (2d) 193 (Ont. C.A.).

Where the provisions of s. 505 have not been complied with, the information having been sworn after the return date in the appearance notice, a warrant or summons may issue under this section: *R. v. Gagné* (1989), 53 C.C.C. (3d) 89 (Que. C.A.). There is no necessity to cancel the appearance notice and in fact no jurisdiction to do so: *Re Tremblay and The Queen* (1982), 68 C.C.C. (2d) 273, 28 C.R. (3d) 262 (B.C.C.A.).

A summons may also issue under this section although the appearance notice was invalid for failure to comply with s. 501(4) and the information laid under s. 505 was neither cancelled nor confirmed by the justice: *Re Thomson and The Queen* (1984), 11 C.C.C. (3d) 435, 51 A.R. 273 (C.A.).

Until such time as the accused comes before a Judge capable of taking his election and plea, the Court has not assumed any jurisdiction in the matter and should any error be made in the method of summoning the accused to Court then it may be corrected by the issuance of a new summons or warrant. It is only when the accused has appeared in Court and made his election or plea that the Court has become seized with jurisdiction which can be lost if nothing is done on a Court date: *R. v. Macaskill* (1981), 58 C.C.C. (2d) 361, 45 N.S.R. (2d) 181 (S.C. App. Div.). Similarly, *Re Kennedy and The Queen* (1983), 8 C.C.C. (3d) 322, [1983] 6 W.W.R. 673 (B.C.C.A.).

**Other notes** – The issuance of a summons by a justice of the peace other than the Justice before whom the complaint was sworn is legal: *R. v. Southwick, ex p. Gilbert Steel Ltd.*, [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (Ont. C.A.).

#### JUSTICE TO HEAR INFORMANT AND WITNESSES / Procedure when witnesses attend.

**508. (1) A justice who receives an information laid before him under section 505 shall**

- (a) hear and consider, *ex parte*,
  - (i) the allegations of the informant, and
  - (ii) the evidence of witnesses, where he considers it desirable or necessary to do so;
- (b) where he considers that a case for so doing is made out, whether the information relates to the offence alleged in the appearance notice, promise to appear or recognizance or to an included or other offence,
  - (i) confirm the appearance notice, promise to appear or recognizance, as the case may be, and endorse the information accordingly, or
  - (ii) cancel the appearance notice, promise to appear or recognizance, as the case may be, and issue, in accordance with section 507, either a summons or a warrant for the arrest of the accused to compel the accused to attend before him or some other justice for the same territorial division to answer to a charge of an offence and endorse on the summons or warrant that the appearance notice, promise to appear or recognizance, as the case may be, has been cancelled; and

- (c) where he considers that a case is not made out for the purposes of paragraph (b), cancel the appearance notice, promise to appear or recognizance, as the case may be, and cause the accused to be notified forthwith of such cancellation.
- (2) A justice who hears the evidence of a witness pursuant to subsection (1) shall
  - (a) take the evidence on oath; and
  - (b) cause the evidence to be taken in accordance with section 540 in so far as that section is capable of being applied. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 79.

#### CROSS-REFERENCES

The term "justice" is defined in s. 2. With respect to oaths and solemn affirmations see ss. 13 to 15 of the Canada Evidence Act, R.S.C. 1985, c. C-5. The terms "appearance notice", "promise to appear" and "recognizance" are defined in s. 493. The contents of these forms of release are set out in s. 501. Under s. 512 even though the accused has been released on one of these forms of release the justice may issue a summons or warrant. Where the information is laid under s. 504 then the process is issued by the justice in accordance with s. 507. For discussion of the pre-trial release provisions see the *Note on the scheme for pre-trial release* under s. 495.

Note s. 31(1) of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that where anything is required or authorized to be done by or before, *inter alia*, a justice of the peace it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done.

Failure to attend court as required or attend for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1, is an offence under s. 145.

#### SYNOPSIS

This section sets out the procedure that must be followed when a justice receives an information laid before him under s. 505.

Subsection (1) requires a justice in this situation to hear and consider, *ex parte*, the allegations of the informant and, where it is considered desirable or necessary, the evidence of witnesses. Where a case is made out, the justice shall confirm the appearance notice, the promise to appear or the recognizance and endorse the information accordingly. The justice may also cancel the appearance notice, the promise to appear, or the recognizance and compel the accused, by summons or warrant, to appear in order to answer to a charge of an offence. If the justice considers that a case is not made out for the purposes of para. (b), the justice may cancel the appearance notice, promise to appear or recognizance and order that the accused be notified of this cancellation.

Subsection (2) requires that a justice, who hears the evidence of a witness pursuant to subsec. (1), must take the evidence on oath and, in so far as is possible, in accordance with s. 540.

#### ANNOTATIONS

Failure to confirm the appearance notice has relevance only to any proceedings taken against the accused should he fail to attend Court as required therein. Such failure does not void the information and once the accused appears there is no necessity that the appearance notice be confirmed: *R. v. Wetmore* (1976), 32 C.C.C. (2d) 347 (N.S.S.C. App. Div.); *Re Maximick and The Queen* (1979), 48 C.C.C. (2d) 417, 10 C.R. (3d) 97, [1979] 6 W.W.R. 731 (B.C.C.A.); *Re McGinnis and The Queen* (1979), 51 C.C.C. (2d) 301, [1980] 2 W.W.R. 89, 19 A.R. 249 (C.A.). *Contra*: *R. v. Harris* (1978), 39 C.C.C. (2d) 256 (Ont. Prov. Ct.) and *semble*, *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), at least where timely objection is made.

Prior to confirming the appearance notice, the justice must be satisfied that the notice complies with provisions of the Criminal Code including the requirement that the accused was served with copy of the notice. Where the accused fails to appear as



required, a judge may issue a summons or warrant without proof of service of the appearance notice: *R. v. DeMelo* (1994), 92 C.C.C. (3d) 52, 73 O.A.C. 371 (C.A.).

Where an accused challenges the sufficiency of the *ex parte* hearing required by subsec. (1), the presumption of regularity applies and the burden is on the accused to show on a balance of probabilities that the requisite hearing had not taken place. For there to be compliance with this subsection, there need not be a “formal” hearing, although it would be preferable for the justice of the peace to ask the informant to briefly divulge the factual basis of the charge: *R. v. Morton* (1992), 70 C.C.C. (3d) 244, 7 O.R. (3d) 625 (Gen. Div.), *affd* 83 C.C.C. (3d) 95n (C.A.).

A charge of failing to comply with a requirement that the accused attend for fingerprinting must be dismissed if the promise to appear is only confirmed after the date set out for attendance for fingerprinting: *R. v. Tulloch* (1987), 40 C.C.C. (3d) 90 (Ont. Prov. Ct.).

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**SUMMONS / Service on individual / Proof of service / Content of summons / Attendance for purposes of *Identification of Criminals Act*.**

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**509. (1) A summons issued under this Part shall**

- (a) be directed to the accused;
- (b) set out briefly the offence in respect of which the accused is charged; and
- (c) require the accused to attend court at a time and place to be stated therein and to attend thereafter as required by the court in order to be dealt with according to law.

(2) A summons shall be served by a peace officer who shall deliver it personally to the person to whom it is directed or, if that person cannot conveniently be found, shall leave it for him at his last or usual place of abode with some inmate thereof who appears to be at least sixteen years of age.

(3) Service of a summons may be proved by the oral evidence, given under oath, of the peace officer who served it or by his affidavit made before a justice or other person authorized to administer oaths or to take affidavits.

(4) There shall be set out in every summons the text of subsection 145(4) and section 510.

(5) A summons may, where the accused is alleged to have committed an indictable offence, require the accused to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act*, and a person so appearing is deemed, for the purposes only of that Act, to be in lawful custody charged with an indictable offence. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 80.

**NOTE:** Subsection (5) re-enacted by 1992, c. 47, s. 71 (to come into force by order of the Governor in Council). The unproclaimed text, *printed in lightface italics*, reads as follows:

(5) A summons may require the accused to appear at a time and place stated in it for the purposes of the *Identification of Criminals Act*, where the accused is alleged to have committed an indictable offence and, in the case of an offence designated as a contravention under the *Contraventions Act*, the Attorney General of Canada has not elected under section 50 of that Act that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket.

**CROSS-REFERENCES**

The term “peace officer” is defined in s. 2. Summons is defined in s. 493 as a summons in Form 6. Section 841 provides that forms varied to suit the case and forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided. A summons may be issued or given on a holiday by virtue of s. 20. For protection of person executing process see ss. 25 to 28.

Failure to attend court as required or attend for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1, is an offence under s. 145. As well a warrant may issue under s. 510 for failure to attend for the purposes of the Identification of Criminals Act. A warrant may issue under s. 512 where the accused fails to appear for court as required or where a summons cannot be served because the accused is evading service.

## SYNOPSIS

This section deals with the summons.

Subsection (1) requires that a summons issued under Part XVI be directed to the accused, set out the offence with which the accused is charged, and require the accused to attend in court at a time and place to be stated and thereafter as required by the court.

Subsection (2) states that a summons must be served by a peace officer for personal delivery upon the person to whom it is directed. If that person cannot be *conveniently* found, the peace officer must leave the summons at the person's latest or usual residence with a person who lives in the premises and who appears to be at least 16 years old.

Subsection (3) provides that service of a summons may be proved by oral evidence under oath of the peace officer who served it. It may also be proved by way of affidavit.

Subsection (4) requires that the text of ss. 145(4) and 510 be set out in every summons.

Subsection (5) states that a summons may require the accused to appear at a stated time and place for the purposes of the Identification of Criminals Act, if the offence the accused is alleged to have committed is an indictable one.

## ANNOTATIONS

There is no jurisdiction in a Court to proceed *ex parte* against a defendant served with a summons outside Canada: *Re Shulman and The Queen* (1975), 23 C.C.C. (2d) 242, 58 D.L.R. (3d) 586 (B.C.C.A.).

A justice has no power to issue a summons to an accused solely for the purpose of the Identification of Criminals Act and not in conjunction with procuring his attendance at Court: *Re Michelsen and The Queen* (1983), 4 C.C.C. (3d) 371, 33 C.R. (3d) 285 (Man. Q.B.).

**Subsec. (5)** – The discretionary power to require an accused to attend for fingerprinting does not violate the principles of fundamental justice as guaranteed by s. 7 of the Charter of Rights and Freedoms: *R. v. Beare*; *R. v. Higgins* (1988), 45 C.C.C. (3d) 57, 66 C.R. (3d) 97, [1989] 1 W.W.R. 97, [1988] 2 S.C.R. 387 (7:0).

## FAILURE TO APPEAR.

**510.** Where an accused who is required by a summons to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act*, does not appear at that time and place, a justice may issue a warrant for the arrest of the accused for the offence with which he is charged. R.S., c. 2 (2nd Supp.), s. 5.

**NOTE:** Section 510 re-enacted by 1992, c. 47, s. 72 (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*510. Where an accused who is required by a summons to appear at a time and place stated in it for the purposes of the Identification of Criminals Act does not appear at that time and place and, in the case of an offence designated as a contravention under the Contraventions Act, the Attorney General of Canada has not elected under section 50 of that Act that the proceeding be dealt with and disposed of as if it had been commenced by filing a ticket, a justice may issue a warrant for the arrest of the accused for the offence with which the accused is charged.*

## CROSS-REFERENCES

The term "justice" is defined in s. 2. The terms "summons" and "warrant" are defined in s. 493.

Failure to attend for the purposes of the Identification of Criminals Act, R.S.C. 1985, c. I-1, is an offence under s. 145. A warrant may also issue for failure to attend for the purposes of the Identification of Criminals Act as required in a promise-to-appear appearance notice or recognizance pursuant to s. 502. A warrant may issue under s. 512 where the accused fails to appear for court as required or where a summons cannot be served because the accused is evading service.

## SYNOPSIS

This section deals with the failure to apply by an accused, who is required by summons to appear at a stated time and place for the Identification of Criminals Act. If the accused does not appear as required, the justice may issue a warrant for the arrest of the accused for the offence with which he is charged.

## CONTENTS OF WARRANT TO ARREST / No return day.

### 511. (1) A warrant issued under this Part shall

- (a) name or describe the accused;
- (b) set out briefly the offence in respect of which the accused is charged; and
- (c) order that the accused be forthwith arrested and brought before the judge or justice who issued the warrant or before some other judge or justice having jurisdiction in the same territorial division, to be dealt with according to law.

(2) A warrant issued under this Part remains in force until it is executed and need not be made returnable at any particular time. R.S., c. C-34, s. 456; R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 81.

## CROSS-REFERENCES

The term “justice” is defined in s. 2. Section 31(1) of the Interpretation Act, R.S.C. 1985, c. I-21, provides that where anything is required or authorized to be done by or before, *inter alia*, a justice of the peace it shall be done by or before one whose jurisdiction or powers extend to the place where the thing is to be done. The terms “accused” and “warrant” are defined in s. 493.

Formalities in a warrant are set out in s. 513. Under s. 20 a warrant may be executed on a holiday. A warrant is executed in accordance with ss. 29 and 514, and s. 10 of the Charter. For protection of person executing warrants and other process see ss. 25 to 28.

## SYNOPSIS

This section sets out the necessary contents of a warrant to arrest issued under Part XVI.

Subsection (1) states that a warrant issued under Part XVI shall name or describe the accused, set out briefly the charge, and order the immediate arrest of the accused, who must then be brought before a judge or justice having jurisdiction, in order to be dealt with according to law.

Subsection (2) states that a warrant issued under Part XVI remains in force until it is executed. It is not necessary that it be made returnable at any specific time.

## ANNOTATIONS

The provincial court is a statutory court and there is no statutory or common law authority in a provincial court to stay execution of out of province warrants. Moreover, the provincial court is not a court of competent jurisdiction within the meaning of s. 24(1) of the Canadian Charter of Rights and Freedoms with jurisdiction to stay execution of warrants on the basis of an alleged breach of the accused’s rights under the Charter. While the provincial superior court would be a court of competent jurisdiction within the meaning of s. 24(1) with the power to grant an appropriate remedy, the superior court should ordinarily defer to the trial courts of the province from which the warrant originated: *R. v. Phillip* (1989), 51 C.C.C. (3d) 488 (B.C.S.C.).



**CERTAIN ACTIONS NOT TO PRECLUDE ISSUE OF WARRANT / Warrant in default of appearance.**

512. (1) A justice may, where the justice has reasonable and probable grounds to believe that it is necessary in the public interest to issue a summons or a warrant for the arrest of the accused, issue a summons or warrant notwithstanding that

- (a) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed or cancelled under subsection 508(1);
- (b) a summons has previously been issued under subsection 507(4); or
- (c) the accused has been released unconditionally or with the intention of compelling his appearance by way of summons.

**(2) Where**

- (a) service of a summons is proved and the accused fails to attend court in accordance with the summons,
- (b) an appearance notice or promise to appear or a recognizance entered into before an officer in charge has been confirmed under subsection 508(1) and the accused fails to attend court in accordance therewith in order to be dealt with according to law, or
- (c) it appears that a summons cannot be served because the accused is evading service,

a justice may issue a warrant for the arrest of the accused. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 82.

**CROSS-REFERENCES**

The term "justice" is defined in s. 2. The terms "accused", "appearance notice", "promise to appear", "summons", "warrant" and "recognizance" are defined in s. 493. As to contents of warrant see ss. 511 and 513. A warrant is executed in accordance with ss. 29 and 514, and s. 10 of the Charter. For protection of person executing warrants and other process see ss. 25 to 28.

**SYNOPSIS**

This section empowers a justice to issue a warrant in certain specific situations.

Subsection (1) states that a justice may issue a summons or a warrant for the arrest of an accused notwithstanding that an appearance notice, a promise to appear or a recognizance has been confirmed or cancelled under s. 508(1). A summons or warrant may also be issued by a justice under this subsection even if another summons has been issued under s. 507(4) or the accused has been released unconditionally or with the intention of compelling his appearance by way of summons. However, in all of these instances the justice must believe that it is in the public interest to issue the summons or warrant.

Subsection (2) provides that a justice may issue a warrant for the arrest of the accused where service of summons is proved and the accused fails to appear in court. The justice may also issue a warrant when an appearance notice, a promise to appear or a recognizance has been confirmed under s. 508(1) and the accused fails to appear in court, or when a summons cannot be served because the accused appears to be evading service.

**ANNOTATIONS**

**Subsec. (1)** – An accused's release from custody because of non-compliance with s. 525 does not preclude a justice from issuing a warrant for his arrest again for the same offence: *Ex p. Chung* (1975), 26 C.C.C. (2d) 497, [1976] 1 W.W.R. 453 (B.C.C.A.).

This subsection gives a Judge a residual power to issue a warrant where the accused after an initial appearance in Court fails to appear, even if the initial appearance was pursuant to defective process such as a failure to comply with s. 505: *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C.

refused 35 N.R. 83n. Folld: *Re Siller and The Queen* (1980), 59 C.C.C. (2d) 169 (B.C.C.A.).

**Subsec. (2)** – There is no jurisdiction to issue a warrant simply to preserve jurisdiction where the accused is already in custody but has not been brought before the court: *Re Inverarity and The Queen* (1984), 18 C.C.C. (3d) 74 (Sask. Q.B.). [Note: as to whether jurisdiction would be lost in such circumstances regard must be had to s. 485.]

However, to the contrary is *Re Hartmann and The Queen* (1986), 30 C.C.C. (3d) 286 (Ont. H.C.J.), where it was held that a warrant could issue under this subsection, and possibly under subsec. (1), to preserve jurisdiction where the accused was not brought to court on a remand date. It is not a condition precedent to the issuance of a warrant under this subsection that its issuance be necessary in the public interest and resort to this subsection does not depend on the fact that the accused did not have a lawful excuse for failing to attend in court.

## FORMALITIES OF WARRANT.

**513. A warrant in accordance with this Part shall be directed to the peace officers within the territorial jurisdiction of the justice, judge or court by whom or by which it is issued. R.S., c. 2 (2nd Supp.), s. 5.**

## CROSS-REFERENCES

“Warrant” is defined in s. 493. The contents of the warrant are described in s. 511. Under s. 20 a warrant may be executed on a holiday. A warrant is executed in accordance with ss. 29 and 514, and s. 10 of the Charter. For protection of person executing warrants and other process see ss. 25 to 28.

## EXECUTION OF WARRANT / By whom warrant may be executed.

**514. (1) A warrant in accordance with this Part may be executed by arresting the accused**

- (a) wherever he is found within the territorial jurisdiction of the justice, judge or court by whom or by which the warrant was issued; or
- (b) wherever he is found in Canada, in the case of fresh pursuit.

**(2) A warrant in accordance with this Part may be executed by a person who is one of the peace officers to whom it is directed, whether or not the place in which the warrant is to be executed is within the territory for which the person is a peace officer. R.S., c. 2 (2nd Supp.), s. 5.**

## CROSS-REFERENCES

“Justice” and “peace officer” are defined in s. 2. “Warrant” is defined in s. 493. The contents of the warrant are described in ss. 511 and 513. Under s. 20 a warrant may be executed on a holiday. A warrant is executed in accordance with ss. 29 and 513, and s. 10 of the Charter. For protection of person executing warrants see ss. 25 to 28. Where the warrant cannot be executed in accordance with this section then an application may be made under s. 528 to a justice, in whose jurisdiction the accused is believed to be, who may endorse the warrant authorizing the arrest within his jurisdiction.

## SYNOPSIS

This section describes the execution of a warrant issued under Part XVI on the accused.

Subsection (1) states that a warrant may be executed by arresting the accused wherever he is found within the territorial jurisdiction of the issuing court. In the case of fresh pursuit, the warrant may be executed wherever the accused is found in Canada.

Subsection (2) provides that the warrant may be executed by one of the peace officers to whom it is directed, even if the place where the warrant is to be executed is not part of that peace officer’s territory.

*Judicial Interim Release*

ORDER OF RELEASE / Release on undertaking with conditions, etc. / Power of justice to name sureties in order / Alternative to physical presence / Release on undertaking with conditions, etc. / Conditions authorized / Additional conditions / Idem / Detention in custody / Order of detention / Order of release / Idem / Sufficiency of record / Justification for detention in custody / Detention in custody for offence mentioned in s. 469 / Order re no communication.

515. (1) Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

(2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released

- (a) on his giving an undertaking with such conditions as the justice directs;
- (b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
- (c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;
- (d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or
- (e) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and upon his depositing with the justice such sum of money or other valuable security as the justice directs.

(2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice, judge or court orders that an accused be released on his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties.

(2.2) Where, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the appearance shall be by actual physical attendance of the accused but the justice may, where the prosecutor and the accused so agree, allow the accused to appear by means of any suitable telecommunication device, including telephone, that is satisfactory to the justice.

(3) The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made.



(4) The justice may direct as conditions under subsection (2) that the accused shall do any one or more of the following things as specified in the order:

- (a) report at times to be stated in the order to a peace officer or other person designated in the order;
- (b) remain within a territorial jurisdiction specified in the order;
- (c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
- (d) abstain from communicating with any witness or other person expressly named in the order, or refrain from going to any place expressly named in the order, except in accordance with the conditions specified in the order that the justice considers necessary;
- (e) where the accused is the holder of a passport, deposit his passport as specified in the order; and
- (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

(4.1) Before making an order under subsection (2), in the case of an accused who is charged with an offence in the commission of which violence against a person was used, threatened or attempted or an offence described in section 264 of this Act, or in subsection 39(1) or (2) or 48(1) or (2) of the *Food and Drugs Act* or in subsection 4(1) or (2) of the *Narcotic Control Act*, the justice shall consider whether it is desirable, in the interests of the safety of the accused or of any other person, to include as a condition of the order that the accused be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order and that the accused surrender any firearms acquisition certificate that the accused possesses, and where the justice decides that it is not desirable, in the interests of the safety of the accused or of any other person, for the accused to possess any of those things, the justice may add the appropriate condition to the order.

**NOTE:** Subsection (4.1) replaced 1995, c. 39, s. 153 by subssecs. (4.1) to (4.12) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Condition prohibiting possession of firearms, etc. / Surrender, etc. / Reasons.*

(4.1) *When making an order under subsection (2), in the case of an accused who is charged with*

- (a) *an offence in the commission of which violence against a person was used, threatened or attempted,*
- (b) *an offence under section 264 (criminal harassment),*
- (c) *an offence relating to the contravention of subsection 39(1) or (2) or 48(1) or (2) of the Food and Drugs Act or subsection 4(1) or (2) or 5(1) of the Narcotic Control Act, or*

**NOTE:** Subsection (4.1)(c) replaced 1995, c. 39, s. 188(b) (to come into force on the later of the day on which ss. 6 and 7 of Bill C-8 (An Act respecting the control of certain drugs . . .) comes into force and the day on which subsec. (4.1)(c) as enacted by 1995, c. 39, s. 153 comes into force). The text, which is not yet in force as of May 15, 1996 and therefor printed in *lightface italics*, reads as follows:

- (c) *an offence relating to the contravention of subsection 6(1) or (2) or 7(1) or (2) of the Controlled Drugs and Substances Act, or*
- (d) *an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance.*

*the justice shall add to the order a condition prohibiting the accused from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, until the accused is dealt with*

*according to law unless the justice considers that such a condition is not required in the interests of the safety of the accused or of any other person.*

(4.11) *Where the justice adds a condition described in subsection (4.1) to an order made under subsection (2), the justice shall specify in the order the manner and method by which*

(a) *the things referred to in subsection (4.1) that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and*

(b) *the authorizations, licences and registration certificates held by the person shall be surrendered.*

(4.12) *Where the justice does not add a condition described in subsection (4.1) to an order made under subsection (2), the justice shall include in the record a statement of the reasons for not adding the condition.*

**NOTE:** Subsection (4.1) replaced 1996, Bill C-8, s. 71(1) (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

*Additional conditions.*

(4.1) *Before making an order under subsection (2), in the case of an accused who is charged with an offence in the commission of which violence against a person was used, threatened or attempted or an offence described in section 264 of this Act, or in subsection 5(3) or (4) or 6(3) of the Controlled Drugs and Substances Act, the justice shall consider whether it is desirable, in the interests of the safety of the accused or of any other person, to include as a condition of the order that the accused be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order and that the accused surrender any firearms acquisition certificate that the accused possesses, and where the justice decides that it is not desirable, in the interests of the safety of the accused or of any other person, for the accused to possess any of those things, the justice may add the appropriate condition to the order.*

(4.2) *Before making an order under subsection (2), in the case of an accused who is charged with an offence described in section 264, or an offence in the commission of which violence against a person was used, threatened or attempted, the justice shall consider whether it is desirable, in the interests of the safety of any person, to include as a condition of the order that the accused abstain from communicating with any witness or other person expressly named in the order, or be prohibited from going to any place expressly named in the order.*

(5) *Where the prosecutor shows cause why the detention of the accused in custody is justified, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall include in the record a statement of his reasons for making the order.*

(6) *Notwithstanding any provision of this section, where an accused is charged*

(a) *with an indictable offence, other than an offence listed in section 469, that is alleged to have been committed while he was at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,*

(b) *with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,*

(c) *with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or*

(d) *with having committed an offence under section 4 or 5 of the Narcotic Control*

**Act or the offence of conspiring to commit an offence under section 4 or 5 of that Act,**

**NOTE:** Subsection (6)(d) replaced 1996, Bill C-8, s. 71(2) (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

(d) *with having committed an offence punishable by imprisonment for life under subsection 5(3) or (4) or 6(3) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence.*

the justice shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified, but where the justice orders that the accused be released, he shall include in the record a statement of his reasons for making the order.

(7) Where an accused to whom paragraph 6(a), (c) or (d) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(a) to (e) with the conditions described in subsections (4) to (4.2) or, where the accused was at large on an undertaking or recognizance with conditions, the additional conditions described in subsections (4) to (4.2), that the justice considers desirable, unless the accused, having been given a reasonable opportunity to do so, shows cause why the conditions or additional conditions should not be imposed.

(8) Where an accused to whom paragraph (6)(b) applies shows cause why the accused's detention in custody is not justified, the justice shall order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs (2)(a) to (e) with the conditions, described in subsections (4) to (4.2), that the justice considers desirable.

(9) For the purposes of subsections (5) and (6), it is sufficient if a record is made of the reasons in accordance with the provisions of Part XVIII relating to the taking of evidence at preliminary inquiries.

(10) For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds:

- (a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
- (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice.

(11) Where an accused who is charged with an offence mentioned in section 469 is taken before a justice, the justice shall order that the accused be detained in custody until he is dealt with according to law and shall issue a warrant in Form 8 for the committal of the accused.

(12) A justice who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating with any witness or other person named in the order, except in accordance with such conditions specified in the order as the justice deems necessary. R.S., c. C-34,



s. 457; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 47; R.S.C. 1985, c. 27 (1st Supp.), ss. 83, 186; 1991, c. 40, s. 31; 1993, c. 45, s. 8; 1994, c. 44, s. 44.

## CROSS-REFERENCES

The term "justice" is defined in s. 2. The terms "recognizance" and "undertaking" are defined in s. 493. "Sureties" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21, as sufficient sureties and when those words are used one person is sufficient therefor, unless otherwise expressly required.

**Note on judicial interim release** – Where the accused is not released by the arresting officer or the officer in charge (defined in s. 493) then s. 503 requires that he be taken before a justice (defined in s. 2) without unreasonable delay and within 24 hours where a justice is available. Upon being taken before a justice the accused is entitled to a bail hearing under s. 515 unless he is charged with an offence listed in s. 469, such as murder, or he pleads guilty. Following is a brief discussion of the procedure and the relationship between the various provisions as they apply to an accused charged with an offence other than an offence listed in s. 469. For the s. 469 offences see the note under s. 522.

The hearing under s. 515 is variously described in the case law as a judicial interim release hearing or "show cause" hearing because in most cases the onus is on the prosecution to show cause why the accused should not be released on an undertaking (defined in s. 493) without conditions. There are certain exceptions, listed in s. 515(6), where the onus is reversed and it is the accused who must show cause why he should not be detained. In either case cause for detention is set out in s. 515(10). Where the prosecutor shows cause why the accused should not be released on an unconditional undertaking then the onus is on the prosecutor to show why the accused should not be released on a form of release representing the least interference with the accused's liberty, from an undertaking with conditions to a recognizance (defined in s. 493), with or without sureties (defined in s. 35 of the Interpretation Act), and finally a detention order. These forms of release are described in s. 515(2) and the conditions which may be imposed are set out in s. 515(4) and (4.1). In certain cases, described in s. 515(2)(d), and (e), the justice may also make an order requiring a cash deposit with or without sureties. Where the onus is on the prosecutor to show cause s. 515(5) requires the justice to give reasons for making a detention order. Where the onus is on the accused then s. 515(6) requires that the justice give reasons for making a release order. Even where the accused is detained for some other reason, *e.g.*, because he is serving sentence, he is entitled to a hearing under s. 515, however, if the justice makes a release order then by virtue of s. 519 the accused will still remain in custody until he is no longer required to be detained for some other reason.

Sections 516 to 518 set out the procedure to be followed on the bail hearing. Section 516 deals with adjournments. Section 517 provides for a non-publication order. Section 518 sets out the kind of evidence which may be tendered on the hearing. The effect of s. 518 is to give a relatively wide latitude to the justice permitting him to receive and base his decision on evidence "considered credible or trustworthy". Thus the rules of evidence which would apply at a trial would not apply on the bail hearing. One limit on the receipt of evidence is the proviso in s. 518(1)(b), which prohibits questioning of the accused respecting the offence with which he is charged. The scope of this subsection is uncertain, there being some case law noted under s. 518 holding that, while the accused cannot be asked by the justice or the prosecutor about the offence, he is entitled to volunteer his testimony concerning the offence. Where a release order is made then s. 519 sets out the procedure for putting the order into effect and the circumstances in which the accused will be released.

The Code also sets out an elaborate system of review. Under s. 520 the accused may apply to a judge (defined in s. 493) to review a detention order or to review the terms upon which he was released. Section 521 gives a similar right of review to the prosecutor to review any release order made by a justice. It would also seem that orders made under ss. 520 or 521 can in turn be reviewed under those sections. The application is on notice to the prosecutor or accused as the case may be (ss. 520(2) and 521(2)). The procedure on the review hearing resembles the procedure on the original s. 515 hearing, except that the onus is on the applicant to show cause why the original order should be vacated (ss. 520(7) and 521(8)). The presence of the accused would not appear to be mandatory but the judge may make an order requiring the accused's presence which order may be

enforced through issuance of a warrant (ss. 520(3), (5) and 521(3), (5)). Ordinarily, the judge will consider the transcript of proceedings sought to be reviewed but has power to consider other additional evidence or exhibits (ss. 520(7) and 521(8)). Adjournment of the proceeding is provided for in ss. 520(4) and 521(4).

Section 523(2) also provides for a more informal review process at various stages of the proceedings by a justice, a preliminary inquiry judge, a judge of the trial court, or the trial judge. Note, however, that the release or detention order can only be vacated under this subsection upon cause being shown and, in some circumstances, the review can only be undertaken where both the accused and the prosecutor consent. Section 524 enacts a procedure for dealing with cases where it is alleged that the accused has violated or is about to violate any form of release either issued by a peace officer or by a justice or has committed an indictable offence while on a form of release. That section gives a power to arrest with (subsec. (1)) or without warrant (subsec. (2)). Upon arrest under this section the accused will be taken before a justice and where it is shown that his arrest was justified (subsec. (8)) then the release order is cancelled and the accused ordered detained unless he can show cause why he should not be detained in custody. If the accused shows cause then s. 524(9) provides for the types of release order which may be made. Any order made under s. 524 may be reviewed under ss. 520 and 521 by the accused or the prosecutor as the case may be. The procedure on the s. 524 hearing is similar to the original show cause hearing (subsec. (12)). Finally, s. 525 sets out a procedure for an automatic review, by a judge, of the detention of any accused who is ordered detained either under s. 515, 521 or 524. The time when the review occurs depends on whether the accused is charged with an indictable offence (90 days) or a summary conviction offence (30 days). The scope of s. 525 remains subject to some uncertainty. In particular it is not clear whether the accused is entitled to a review where he has been ordered released but is unable to comply with the terms of the recognizance and it is unclear whether the section applies where the accused has previously unsuccessfully applied to a judge under s. 520. The procedure under the s. 525 hearing resembles the procedure under s. 515, except that notwithstanding where the onus originally lay the judge must be satisfied that the accused's continued detention is justified within the meaning of s. 515(10) (subsec. (4)). Subsections (5) to (7) describe a procedure for cancelling any release order made under s. 525, a procedure which resembles the s. 524 procedure. Aside from those subsections there would not appear to be any mechanism for reviewing a release order made under s. 525. Subsection (9) also requires the judge in any event to give directions for expediting the trial. A similar discretionary power is given to any justice or judge conducting a hearing under any of the other sections, pursuant to s. 526.

Barring a review under these provisions the effect of s. 523(1) is that the release or detention order remains in effect until verdict. Where the accused is found guilty then the release order remains in effect unless the judge orders that he be taken into custody pending sentence. Section 523(1.1) provides a procedure for the release order in respect of one information to apply to a new information charging the same offence, or an included offence.

Where the accused pleads guilty either prior to the show cause hearing under s. 515 or in the course of the hearing then, pursuant to s. 518(2), the justice may make an order provided for in s. 515 for his release pending sentence.

The procedure for enforcement of a recognizance is set out in Part XXV. That Part sets out the responsibilities of sureties (s. 764); procedure for rendering of accused by his sureties (ss. 766, 767 and 769); substitution of a new surety (s. 767.1), and the new release hearing where the accused is rendered into custody by his sureties (s. 769). That Part also sets out the procedure in case of default by the accused, including endorsing the fact of the default (s. 770); the hearing for estreat of the bail (s. 771); levying execution to enforce a writ of *fiery facias* where the recognizance is ordered forfeited (ss. 772 and 773).

There are special limitations on the making of interim release and detention orders where the court makes an assessment order under Part XX.1. See in particular ss. 672.16, 672.17 and 672.18.

## ANNOTATIONS

**Burden of proof** – The evidentiary burden upon the Crown at this early stage is upon

the minimum standard, the balance of probability: *R. v. Julian* (1972), 20 C.R.N.S. 227 (N.S.S.C.).

**Fixing amount of deposit** – It was held in *R. v. Garrington* (1972), 9 C.C.C. (2d) 472, [1973] 1 O.R. 370 (H.C.J.) that it was wrong to fix the amount of the cash deposit as some portion of the amount still unrecovered (the accused were charged with a robbery of a large amount of money) or to fix the amount so high that it was effectively a detention order.

**Fixing amount of surety** – Where the amount fixed for sureties is so high that in effect it amounts to a detention order it will be reduced accordingly: *R. v. Cichanski* (1976), 25 C.C.C. (2d) 84 (Ont. H.C.J.).

**Reasonable conditions** – To come within the meaning of the term “reasonable conditions”, the particular term must be related to a purpose which would otherwise justify the accused’s detention pending trial: *R. v. Keenan* (1979), 57 C.C.C. (2d) 267, 12 C.R. (3d) 135 (Que. C.A.).

The justice may validly impose a condition that the accused remain out of a certain part of the city where the term is designed to prevent the commission of further offences while the accused is on judicial interim release: *R. v. Bielefeld* (1981), 64 C.C.C. (2d) 216 (B.C.S.C.).

**Effect of order to stand trial on lesser offence** – Where an accused who has been ordered detained on a charge of robbery is committed for trial on the lesser offence of attempted robbery the original order remains in effect: *Ex p. Walker* (1974), 20 C.C.C. (2d) 539 (Ont. H.C.J.); cf. *R. v. Lafontaine* (1973), 13 C.C.C. (2d) 316 (Ont. H.C.J.) noted under s. 522.

**Requirement of reasons** – The requirement of reasons is directory only and the failure to give reasons does not affect the validity of the detention order: *R. v. Baker* (1973), 13 C.C.C. (2d) 340 (B.C.S.C.).

**Reverse onus [subsec. (6)]** – Notwithstanding an accused may fall within this subsection the basic philosophy of the interim release provisions is that prior to conviction all those persons who do not constitute a danger to public and who will show up for trial ought not to be detained in custody. Where as a result of this subsection the onus is on the accused the Justice must still consider the two grounds set out in subsec. (10) in determining whether or not to release the accused. The Justice does not have a residual discretion to refuse bail: *R. v. Quinn* (1977), 34 C.C.C. (2d) 473 (N.S.Co.Ct.); *Batson, Webb and Conrad* (1977), 21 N.B.R. (2d) 275 (C.A.).

The reverse onus prescribed by subsec. (2)(d) does not violate ss. 7, 9 or 11(e) of the Charter. The onus which subsec. (2)(d) imposes is reasonable in the sense that it requires the accused to provide information which he is most capable of providing. The special rules combat the pre-trial recidivism and absconding problems which are characteristic of systematic drug trafficking which usually occurs in a highly sophisticated and lucrative commercial setting. While the provision also applies to the small or casual drug dealers, they will normally have no difficulty in justifying their release and obtaining bail: *R. v. Pearson* (1992), 77 C.C.C. (3d) 124, [1992] 3 S.C.R. 665, 17 C.R. (4th) 1.

Similarly, the scope of subsec. (6)(a) is sufficiently narrow to constitute just cause under s. 11(e) and is constitutional: *R. v. Morales* (1992), 77 C.C.C. (3d) 91, [1992] 3 S.C.R. 711, 17 C.R. (4th) 74.

**Grounds for detention [subsec. (10)]** – The public safety component or para. (b), namely where there is a substantial likelihood that the accused if released will interfere with the administration of justice or commit further crimes, constitutes just cause for the denial of bail within the meanings of s. 11(e) of the Charter. However, the “public interest” component as a basis for pre-trial detention does violate s. 11(e) because it authorizes detention in terms which are vague and imprecise and thus authorizes a denial of



bail without just cause. This component is thus unconstitutional and the words “in the public interest or” should be struck down: *R. v. Morales*, *supra*.

Even where there is very strong evidence against the accused this is merely one factor to be taken into account by the judge: *R. v. Perron* (1989), 51 C.C.C. (3d) 518, 73 C.R. (3d) 174 (Que. C.A.).

The fact that a co-accused has been released is not a relevant consideration where there is no evidence before the court as to the proceedings with respect to that accused. Nor is the likelihood of substantial delay a relevant consideration since the Code provides for review in cases of undue delay: *R. v. Lesage* (1975), 25 C.C.C. (2d) 173 (Que. Sess. Peace).

## REMAND IN CUSTODY.

**516.** A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused. R.S., c. 2 (2nd Supp.), s. 5.

## CROSS-REFERENCES

The term “justice” is defined in s. 2. As to calculation of “clear days” see s. 27(1) of the Interpretation Act, R.S.C. 1985, c. I-21. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

## SYNOPSIS

This section authorizes a justice at any time, either before or during a hearing under s. 515, to adjourn proceedings and remand the accused to custody in prison. Such a remand will be made in Form 19 and shall not be for a longer period than three clear days, unless the accused person consents. The remand may be made upon application by either the prosecutor or the accused.

## ANNOTATIONS

Failure to comply with this section, *i.e.*, by failing to issue a warrant of committal, though it may render unlawful his detention during the period does not affect the Court’s jurisdiction over the accused or the offence: *Re Morrison and The Queen* (1975), 29 C.C.C. (2d) 323, [1976] W.W.D. 18 (B.C.S.C.).

The proceedings must be continued within the three clear days. Thus an adjournment on the 22nd day of the month to the 26th day of the month without the accused’s consent does not comply with this section: *R. v. Khabra* (1978), 39 C.C.C. (2d) 475, 2 C.R. (3d) 187 (B.C.S.C.).

On a court-ordered remand in custody if gaol facilities are available the accused must be held there separate from police investigation holding-cells: *R. v. Precourt* (1976), 39 C.C.C. (2d) 311, 36 C.R.N.S. 150 (Ont. C.A.).

## ORDER DIRECTING MATTERS NOT TO BE PUBLISHED FOR SPECIFIED PERIOD / Failure to comply / Definition of “newspaper”.

**517.** (1) Where the prosecutor or the accused intends to show cause under section 515, he shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any newspaper or broadcast before such time as

- (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
- (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.
- (2) Every one who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.
- (3) In this section, "newspaper" has the same meaning as in section 297. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 48; R.S.C. 1985, c. 27 (1st Supp.), s. 101(2)(a).

#### CROSS-REFERENCES

The terms "prosecutor" and "justice" are defined in s. 2. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

Trial of the offence under subsec. (2) is conducted by a summary conviction court pursuant to Part XXVII. The punishment is as set out in s. 787 [except note the maximum fine provided for in s. 719 in the case of a corporation] and the limitation period is set out in s. 786(2).

#### SYNOPSIS

This section authorizes a justice dealing with a hearing under s. 515 to make an order directing that matters not be published for a specified period.

Subsection (1) states that the justice shall, upon application by the accused during proceedings under s. 515, make an order that evidence, information, representations and reasons given, not be published in any newspaper or broadcast. Such an order may be made to last, if a preliminary hearing is held, until such time, if applicable, as the accused is discharged or, if the accused is committed for trial, until the trial ends. The justice may also make such an order on his or her own initiative.

Subsection (2) makes failure to comply with an order under this section a summary conviction offence. The accused must prove that such a failure to comply was *with lawful excuse*.

#### ANNOTATIONS

A Judge has no power to prohibit publication of his decision granting or refusing release. He may only prohibit publication of his reasons for the decision: *R. v. Forget* (1982), 65 C.C.C. (2d) 373, 35 O.R. (2d) 238 (C.A.).

A judge has no power under this section to also order a ban on publication of the identity of the accused or on information which journalists have obtained from the police: *Southam Inc. v. Brassard* (1987), 38 C.C.C. (3d) 74, 59 C.R. (3d) 161, [1987] R.J.Q. 1841 (Que. S.C.), where however it was pointed out that publication of material which would interfere in some manner with the course of justice would amount to contempt of court.

The temporary ban on publication provided for in this section is not an unconstitutional infringement of freedom of expression as guaranteed by ss. 1 and 2(b) of the Charter of Rights and Freedoms: *Re Global Communications Ltd. and A.-G. Can.* (1984), 10 C.C.C. (3d) 97, 38 C.R. (3d) 209, 44 O.R. (2d) 609 (C.A.).

#### INQUIRIES TO BE MADE BY JUSTICE AND EVIDENCE / Release pending sentence.

518. (1) In any proceedings under section 515,

- (a) the justice may, subject to paragraph (b), make such inquiries, on oath or otherwise, of and concerning the accused as he considers desirable;
- (b) the accused shall not be examined by the justice or any other person except counsel for the accused respecting the offence with which the accused is

charged, and no inquiry shall be made of the accused respecting that offence by way of cross-examination unless the accused has testified respecting the offence;

- (c) the prosecutor may, in addition to any other relevant evidence, lead evidence
  - (i) to prove that the accused has previously been convicted of a criminal offence,
  - (ii) to prove that the accused has been charged with and is awaiting trial for another criminal offence,
  - (iii) to prove that the accused has previously committed an offence under section 145, or
  - (iv) to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;
- (d) the justice may take into consideration any relevant matters agreed on by the prosecutor and the accused or his counsel;
- (d.1) the justice may receive evidence obtained as a result of an interception of a private communication under and within the meaning of Part VI, in writing, orally or in the form of a recording and, for the purposes of this section, subsection 189(5) does not apply to that evidence; and
- (e) the justice may receive and base his decision on evidence considered credible or trustworthy by him in the circumstances of each case.

(2) Where, before or at any time during the course of any proceedings under section 515, the accused pleads guilty and that plea is accepted, the justice may make any order provided for in this Part for the release of the accused until the accused is sentenced. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 49; R.S.C. 1985, c. 27 (1st Supp.), s. 84; 1994, c. 44, s. 45.

#### CROSS-REFERENCES

The terms “prosecutor” and “justice” are defined in s. 2. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

#### SYNOPSIS

This section describes the kinds of inquiries that may be made and evidence that may be led in proceedings under s. 515.

While the justice is empowered to make such inquiries as he considers desirable, para. (b) makes it clear that the accused may not be cross-examined respecting the offence with which he has been charged unless the accused has testified in chief respecting the offence. The prosecutor may lead evidence on issues that are enumerated in para. (c) as well as on other relevant matters. The justice may consider any relevant information agreed to by the prosecutor and the accused or counsel for the accused.

Paragraph (d.1) states that the justice may receive evidence obtained as a result of an interception of private communications. Section 189(5), which deals with admission into evidence of intercepted communications, does not apply.

Subsection (2) allows a justice to make any order of release found in Part XVI when the accused pleads guilty and is remanded for sentence.

#### ANNOTATIONS

**Examination of accused [subsec. (1)(b)]** – This subsection does not preclude the Crown from tendering evidence as to the accused’s extra-judicial statements and such statements to persons in authority are admissible without a *voir dire* to determine voluntariness: *Bouffard v. The Queen* (1979), 16 C.R. (3d) 373 (Que. S.C.).

A statement obtained from the accused during the hearing in violation of this paragraph is not admissible in subsequent Court proceedings against the accused: *Re Deom et*



*al. and The Queen* (1981), 64 C.C.C. (2d) 222 (B.C.S.C.). This is so even where the violation is initiated by the accused's own counsel in examination of the accused: *R. v. Paonessa and Paquette* (1982), 66 C.C.C. (2d) 300, 27 C.R. (3d) 179, 36 O.R. (2d) 221 (C.A.), *affd* on other grounds 3 C.C.C. (3d) 384, 34 C.R. (3d) 96 (S.C.C.) (5:0).

**Probability of conviction** – See also notes under s. 515.

**Meaning of “credible or trustworthy”** [subsec. (1)(e)] – Credible and trustworthy evidence includes evidence ordinarily inadmissible at trial as long as the other party has fair opportunity to correct or contradict it: *Re Powers and The Queen* (1972), 9 C.C.C. (2d) 583, 20 C.R.N.S. 23 (Ont. H.C.J.). Similarly *R. v. Woo* (1994), 90 C.C.C. (3d) 404 (B.C.S.C.).

While this paragraph entitles the justice to act on hearsay evidence considered trustworthy as well as direct evidence considered credible, it is not authority for Crown counsel simply reading a statement of the circumstances of the offence, a procedure which deprives the accused of his right to cross-examine: *R. v. Hajdu* (1984), 14 C.C.C. (3d) 563 (Ont. H.C.J.). Similarly, *R. v. Woo* (1994), 90 C.C.C. (3d) 404 (B.C.S.C.).

However, consider *R. v. Dhindsa et al.* (1986), 30 C.C.C. (3d) 368 (B.C.S.C.) holding that both Crown and defence counsel may make statements as to the anticipated evidence. Where there is a controversy or contradiction, then affidavits may be tendered and relied upon and if affidavits will not suffice to resolve the conflict, then *viva voce* evidence could be called and cross-examination take place.

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**RELEASE OF ACCUSED / Discharge from custody / Warrant for committal.**

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- 519.** (1) Where a justice makes an order under subsection 515(1), (2), (7) or (8),
- (a) if the accused thereupon complies with the order, the justice shall direct that the accused be released
    - (i) forthwith, if the accused is not required to be detained in custody in respect of any other matter, or
    - (ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter; and
  - (b) if the accused does not thereupon comply with the order, the justice who made the order or another justice having jurisdiction shall issue a warrant for the committal of the accused and may endorse thereon an authorization to the person having the custody of the accused to release the accused when the accused complies with the order
    - (i) forthwith after the compliance, if the accused is not required to be detained in custody in respect of any other matter, or
    - (ii) as soon thereafter as the accused is no longer required to be detained in custody in respect of any other matter
 and if the justice so endorses the warrant, he shall attach to it a copy of the order.
- (2) Where the accused complies with an order referred to in paragraph (1)(b) and is not required to be detained in custody in respect of any other matter, the justice who made the order or another justice having jurisdiction shall, unless the accused has been or will be released pursuant to an authorization referred to in that paragraph, issue an order for discharge in Form 39.
- (3) Where the justice makes an order under subsection 515(5) or (6) for the detention of the accused, he shall issue a warrant for the committal of the accused. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 50; R.S.C. 1985, c. 27 (1st Supp.), s. 85.

**CROSS-REFERENCES**

The term “justice” is defined in s. 2. “Warrant of committal” is defined in s. 493. Section 841 provides that forms varied to suit the case and forms to the like effect shall be deemed to be good, valid

and sufficient in the circumstances for which, respectively, they are provided. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

## SYNOPSIS

This section deals with the release of the accused after a justice has made an order under s. 515(1), (2), (7) or (8).

Subsection (1) provides that where a justice makes a release order under s. 515, the accused shall be released if he complies with the order. Such release will be immediate if the accused is not required to be held in custody on another matter, or as soon as the accused is not required to be detained on another matter. If the accused does not comply with the order under s. 515, a justice having jurisdiction must issue a warrant for the accused's committal. In such a case, the justice may endorse on the warrant an authorization to release the accused when he complies with the order. The timing of this release will depend on the matters set out in paras. (b)(i) and (ii).

Subsection (2) states that when the accused complies with an order referred to in subsection (1)(b) and is not required to be detained in custody on another matter, the accused may also be released by way of an order for discharge in Form 39.

Subsection (3) states that a justice who has ordered the detention of the accused must issue a warrant of committal.

## ANNOTATIONS

A judge has no power to make a "release" order permitting an accused serving a penitentiary sentence to be released on condition that he reside at the penitentiary except where entitled to be absent pursuant to passes granted by the Parole Board: *R. v. Arviv* (1987), 38 C.C.C. (3d) 283 (Ont. Dist. Ct.).

It is the duty of the justice or judge to determine the sufficiency of a proposed surety not the Crown Attorney: *R. v. Dewsbury* (1989), 50 C.C.C. (3d) 163, 39 C.R.R. 301 (Ont. H.C.J.).

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**REVIEW OF ORDER OF JUSTICE / Notice to prosecutor / Accused to be present / Adjournment of proceedings / Failure of accused to attend / Execution / Evidence and powers of judge on review / Limitation of further applications / Application of ss. 517, 518 and 519.**

**520. (1) Where a justice makes an order under subsection 515(2), (5), (6), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the accused may, at any time before the trial of the charge, apply to a judge for a review of the order made by the justice.**

**(2) An application under this section shall not, unless the prosecutor otherwise consents, be heard by a judge unless the accused has given to the prosecutor at least two clear days notice in writing of the application.**

**(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.**

**(4) A judge may, before or at any time during the hearing of an application under this section, on application by the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.**

**(5) Where an accused, other than an accused who is in custody, has been ordered by**

a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) A warrant issued under subsection (5) may be executed anywhere in Canada.

(7) On the hearing of an application under this section, the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b) the exhibits, if any, filed in the proceedings before the justice, and
- (c) such additional evidence or exhibits as may be tendered by the accused or the prosecutor,

and shall either

- (d) dismiss the application, or
- (e) if the accused shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers is warranted.

(8) Where an application under this section or section 521 has been heard, a further or other application under this section or section 521 shall not be made with respect to that same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(9) The provisions of section 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 51; R.S.C. 1985, c. 27 (1st Supp.), s. 86; 1994, c. 44, s. 46.

#### CROSS-REFERENCES

The terms "prosecutor" and "justice" are defined in s. 2 and "judge" in s. 493. As to calculation of "at least two clear days" see s. 27 of the Interpretation Act, R.S.C. 1985, c. I-21. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

#### SYNOPSIS

This section sets out the procedure by which an accused may obtain a review of the order made by a justice under s. 515(2), (5), (6), (7), (8) or (12). The decision of a justice to vacate an order under s. 523(2)(b) may also be reviewed by the accused under this section.

Subsection (1) allows the accused to apply to a judge for a review of the order at any time prior to trial.

Unless the prosecutor consents, subsec. (2) requires that a review under this section be heard only if the accused has given to the prosecutor two clear days' notice.

If the prosecutor, the accused or his counsel requests, or the judge so orders, the accused shall be present at the hearing of an application under this section.

Subsection (3) provides that where the accused is in custody, the judge may order in writing the person having custody of the accused to bring him to court.

Subsection (4) authorizes a judge to adjourn the hearing of the application at the request of the prosecutor or the accused. Such application may be brought prior to or during the hearing. If the accused is in custody, no adjournment for more than three clear days will be granted unless the accused consents.

If an accused who is not in custody is ordered by a judge to be present at the hearing and does not attend, the judge is authorized by subsec. (5) to issue an arrest warrant. This warrant may be executed anywhere in Canada.

Subsection (7) lists in paras. (a), (b) and (c) the items that the judge hearing the application may consider. Subsection (7)(d) and (e) empower the judge to either dismiss the



application or, if the accused shows cause, allow the application, vacate the earlier order and make any other order under s. 515 that is appropriate.

Subsection (8) makes it clear that the accused may make further applications under this section or s. 521 only after 30 days have expired since the previous application, unless the judge gives leave.

Subsection (9) states that the provisions of ss. 517, 518 and 519 will apply with necessary modifications in an application under this section.

## ANNOTATIONS

**Jurisdiction** – While subsec. (1) only refers to review of an order by a “justice”, the wording of this subsection indicates that the accused may apply for review of an order of a Judge made either under this section or s. 521: *R. v. Gouveia* (1982), 1 C.C.C. (3d) 143 (Ont. H.C.J.), *R. v. Saracino* (1989), 47 C.C.C. (3d) 185 (Ont. H.C.J.). *Contra: R. v. Lahooti* (1978), 38 C.C.C. (2d) 481 (Ont. H.C.J.).

While a Judge of the Manitoba Court of Appeal has jurisdiction to review a refusal to make an order for judicial interim release, in the absence of special circumstances the further application for review should be made to a Judge of the Court of Queen’s Bench: *R. v. Petrie*, [1985] 2 W.W.R. 128, 30 Man. R. (2d) 145 (C.A. in chambers); *R. v. Semenick*, [1985] 2 W.W.R. 132, 30 Man. R. (2d) 147 (C.A. in chambers).

**Nature of review** – “A review” of the Justice’s order gives the Judge the power to substitute his own discretion. The new bail sections should be liberally interpreted in favour of the accused with less emphasis on the nature of the offence: *R. v. Thompson* (1972), 7 C.C.C. (2d) 70, 18 C.R.N.S. 102 (B.C.S.C.).

The review by the Judge of the Justice’s order is in effect a *de novo* hearing and is not an appeal based only on the record of proceedings before the Justice: *Re Powers and The Queen* (1972), 9 C.C.C. (2d) 533, 20 C.R.N.S. 23 (Ont. H.C.J.). *Folld R. v. Sexton* (1976), 33 C.R.N.S. 307 (Nfld. Dist.Ct.).

In *R. v. O’Neill* (1973), 11 C.C.C. (2d) 240, 21 C.R.N.S. 107 (N.B.S.C.) the Judge treated the review as an appeal and determined whether or not there was evidence upon which the Justice could have reasonably made his order.

These proceedings are not a hearing *de novo* but are a form of review to determine whether or not the provincial court judge erred in law or principle in making his order, and accordingly, barring extraordinary circumstances, a transcript of the original hearing is necessary: *Hunter v. The Queen* (1973), 24 C.R.N.S. 197 (Ont. Co. Ct.).

An application under this section is not strictly an ordinary appeal so that while due consideration must be given to the initial order of the Justice, the Judge is entitled to exercise an independent discretion: *R. v. Carrier* (1979), 51 C.C.C. (2d) 307, 2 Man. R. (2d) 168 (C.A. in Chambers).

**Procedure on review** – Upon review the onus is upon the applicant to demonstrate an error in law or principle by the Justice of the Peace who made the order under review: *R. v. Horvat* (1972), 9 C.C.C. (2d) 1 (B.C.S.C.).

The order of a justice of the peace vacated in para. (e) is not rendered *void ab initio* so as to negative any charge laid for breaching it, but instead is terminated in favour of the substituted order: *R. v. Goldrick* (1974), 17 C.C.C. (2d) 74, 25 C.R.N.S. 389 (Ont. H.C.J.).

While the Judge may hear additional evidence, the transcript of the proceedings before the Justice should be filed with the Court, otherwise it would be impossible to determine whether or not the Justice was in error: *Hunter v. The Queen* (1973), 24 C.R.N.S. 197 (Ont. Co. Ct.).

However, a transcript is not always required, particularly where no *viva voce* evidence was heard before the Justice, merely counsel’s submissions, and to require the transcript might defeat the intent of this legislation which was to encourage expeditious disposition

of bail matters: *R. v. Carrier* (1979), 51 C.C.C. (2d) 307, 2 Man. R. (2d) 168 (C.A. in Chambers).

It has been held, considering the predecessor to para. (e), that even where the accused demonstrates some error by the justice in the making of the initial detention order or the conduct of the hearing, the judge is not required to vacate the detention order and make a release order unless the accused shows why the detention order was not justified on the primary or secondary ground. On the review the Crown may rely on the evidence at the original hearing and may adduce additional evidence to justify the accused's continued detention: *R. v. English* (1983), 8 C.C.C. (3d) 487 (Ont. Co. Ct.); *R. v. Saswirsky* (1984), 17 C.C.C. (3d) 341, 43 C.R. (3d) 276 (Ont. H.C.J.).

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**REVIEW OF ORDER OF JUSTICE / Notice to accused / Accused to be present / Adjournment of proceedings / Failure of accused to attend / Warrant for detention / Execution / Evidence and powers of judge on review / Limitation of further applications / Application of ss. 517, 518 and 519.**

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521. (1) Where a justice makes an order under subsection 515(1), (2), (7), (8) or (12) or makes or vacates any order under paragraph 523(2)(b), the prosecutor may, at any time before the trial of the charge, apply to a judge for a review of the order made by the justice.

(2) An application under this section shall not be heard by a judge unless the prosecutor has given to the accused at least two clear days notice in writing of the application.

(3) If the judge so orders or the prosecutor or the accused or his counsel so requests, the accused shall be present at the hearing of an application under this section and, where the accused is in custody, the judge may order, in writing, the person having the custody of the accused to bring him before the court.

(4) A judge may, before or at any time during the hearing of an application under this section, on application of the prosecutor or the accused, adjourn the proceedings, but if the accused is in custody no adjournment shall be for more than three clear days except with the consent of the accused.

(5) Where an accused, other than an accused who is in custody, has been ordered by a judge to be present at the hearing of an application under this section and does not attend the hearing, the judge may issue a warrant for the arrest of the accused.

(6) Where, pursuant to paragraph (8)(e), the judge makes an order that the accused be detained in custody until he is dealt with according to law, he shall, if the accused is not in custody, issue a warrant for the committal of the accused.

(7) A warrant issued under subsection (5) or (6) may be executed anywhere in Canada.

(8) On the hearing of an application under this section, the judge may consider

- (a) the transcript, if any, of the proceedings heard by the justice and by any judge who previously reviewed the order made by the justice,
- (b) the exhibits, if any, filed in the proceedings before the justice, and
- (c) such additional evidence or exhibits as may be tendered by the prosecutor or the accused,

and shall either

- (d) dismiss the application, or
- (e) if the prosecutor shows cause, allow the application, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.

(9) Where an application under this section or section 520 has been heard, a further

or other application under this section or section 520 shall not be made with respect to the same accused, except with leave of a judge, prior to the expiration of thirty days from the date of the decision of the judge who heard the previous application.

(10) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of an application under this section. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 52; R.S.C. 1985, c. 27 (1st Supp.), s. 87; 1994, c. 44, s. 47.

#### CROSS-REFERENCES

The terms “prosecutor” and “justice” are defined in s. 2 and “judge” in s. 493. As to calculation of “at least two clear days” see s. 27 of the Interpretation Act, R.S.C. 1985, c. I-21. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

#### SYNOPSIS

This section is the companion to s. 520. It describes the procedure that the prosecutor must follow to review an order made by a justice under s. 515(1), (2), (7), (8) or (12) or vacated by a justice under s. 523(2)(b).

Subsection (2) requires that the prosecutor give the accused at least two clear days’ notice in writing of the application.

Subsection (3) provides for the presence of the accused if the judge so orders or the prosecutor or the accused so requests. Where the accused is in custody, the judge may order in writing the person having custody of the accused to bring him to court.

Subsection (4) authorizes the judge to adjourn the proceedings at any time prior to or during the hearing upon application by the prosecutor or the accused. If the accused is in custody, no adjournment shall be longer than three days unless the accused consents.

Subsection (5) states that when an accused who is not in custody and who has been ordered by the judge to be present at the hearing of an application under this section, fails to attend, the judge may issue an arrest warrant.

If the judge makes an order under this section that the accused be detained in custody, he must issue a warrant of committal if the accused is not in custody. A warrant issued under this subsection or subsec. (5) may be executed anywhere in Canada.

Subsection (8) sets out items that a judge may consider in a hearing under this section. It also describes the dispositions available to the judge at the conclusion of the hearing.

Subsection (9), like s. 520(8), requires a waiting period of 30 days between applications under this section or s. 520, unless a judge gives leave.

Subsection (10) makes the provision of ss. 517, 518 and 519 applicable to a proceeding under this section with such modifications as circumstances require.

#### ANNOTATIONS

In the absence of evidence of excess of jurisdiction or error in principle, a Judge on review, even though he would not have come to the same decision as did the Justice, should not alter it unless the prosecutor can show cause by additional evidence or by pointing to a demonstrable error: *R. v. La Chapelle and La Chapelle* (1974), 19 C.C.C. (2d) 70 (N.S.S.C.).

An application may be made under this section although the order sought to be reviewed is that of a judge under s. 520 rather than an order of a justice. However, except where there has been a substantial change in circumstances, the judge conducting the second review should not interfere with the existing order unless it is established that the judge conducting the first review made an error in principle in application of the relevant provisions which materially affected the outcome of the initial application: *R. v. Saracino* (1989), 47 C.C.C. (3d) 185 (Ont. H.C.J.).



**INTERIM RELEASE BY JUDGE ONLY / Idem / Order re no communication / Release of accused / Order not reviewable except under s. 680 / Application of sections 517, 518 and 519 / Other offences.**

**522. (1) Where an accused is charged with an offence listed in section 469, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.**

**(2) Where an accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).**

**(2.1) A judge referred to in subsection (2) who orders that an accused be detained in custody under this section may include in the order a direction that the accused abstain from communicating with any witness or other person named in the order except in accordance with such conditions specified in the order as the judge deems necessary.**

**(3) Where the judge does not order that the accused be detained in custody pursuant to subsection (2), the judge may order that the accused be released on giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsections 515(4) and (4.1) as the judge considers desirable.**

**(4) An order made under this section is not subject to review, except as provided in section 680.**

**(5) The provisions of sections 517, 518 except subsection (2) thereof, and 519 apply with such modifications as the circumstances require in respect of an application for an order under subsection (2).**

**(6) Where an accused is charged with an offence mentioned in section 469 and with any other offence, a judge acting under this section may apply the provisions of this Part respecting judicial interim release to that other offence. R.S., c. 2 (2nd Supp.), s. 5; 1972, c. 13, s. 36; 1974-75-76, c. 93, s. 53; R.S.C. 1985, c. 27 (1st Supp.), s. 88; 1991, c. 40, s. 32; 1994, c. 44, s. 48.**

#### **CROSS-REFERENCES**

The term "superior court of criminal jurisdiction" is defined in s. 2. The terms "accused", "recognizance" and "undertaking" are defined in s. 493.

**Note on judicial interim release** – Where the accused is charged with an offence listed in s. 469 such as murder then he may not be released by a peace officer, officer in charge or justice. Section 503 requires that he be taken before a justice (defined in s. 2) without unreasonable delay and, in any event, within 24 hours, where a justice is available. The justice will then make a detention order (s. 515(11)). The onus is then on the accused to apply for a show cause hearing by making an application under s. 522 to a judge of the superior court of criminal jurisdiction (defined in s. 2). The procedure on the s. 522 hearing is similar to the show cause hearing under s. 515 except that the onus is on the accused in all cases to show why his detention is not justified for the reasons set out in s. 515(10). Where the accused shows cause then the judge may order the accused's release on an undertaking or recognizance on the same terms as may a justice acting under s. 515(2), (4) and (4.1) and thus see the discussion under s. 515.

Sections 517 and 518 set out the procedure to be followed on the bail hearing. Section 517 provides for a non-publication order. Section 518 sets out the kind of evidence which may be tendered on the hearing. The effect of s. 518 is to give a relatively wide latitude to the judge permitting him to receive and base his decision on evidence "considered credible or trustworthy". Thus the rules of

evidence which would apply at a trial would not apply on the bail hearing. One limit on the receipt of evidence is the proviso in s. 518(1)(b) which prohibits questioning of the accused respecting the offence with which he is charged. The scope of this subsection is uncertain, there being some case law noted under s. 518 holding that while the accused cannot be asked by the judge or the prosecutor about the offence he is entitled to volunteer his testimony concerning it. The presence of the accused would not appear to be mandatory. Where a release order is made then s. 519 sets out the procedure for putting the order into effect and the circumstances in which the accused will be released.

The system for review of either a release or detention order is more restricted than is the case of an accused charged with a non-s. 469 offence. There is no *right* to a review. The only formal review mechanism is set out in s. 680 and requires an application to the Chief Justice or acting Chief Justice of the Court of Appeal for directions referring the case to the Court of Appeal (defined in ss. 2 and 673). Where the Chief Justice gives such directions then the Court of Appeal will hear the review application and may confirm the decision, vary the decision or substitute such other decision as, in its opinion, should have been made. Under s. 680(2) with the consent of the parties the review directed by the Chief Justice may be heard by a single judge rather than by three judges of the Court of Appeal.

Section 523(2) also provides for a more informal review process at various stages of the proceedings but only by a judge of the superior court of criminal jurisdiction. Note, however, that the release or detention order can only be vacated under this subsection upon cause being shown and in some circumstances the review can only be undertaken where both the accused and the prosecutor consent. Section 524 enacts a procedure for dealing with cases where it is alleged that the accused has violated or is about to violate the release order or has committed an indictable offence while on a form of release. That section gives a power to arrest with (subsec. (1)) or without warrant (subsec. (2)). Upon arrest under this section the accused will be taken before a justice who is required to remand the accused to appear before a judge of the superior court of criminal jurisdiction. Where it is shown that his arrest was justified (subsec. (4)) then the release order is cancelled by the judge. The accused is then ordered detained unless he can show cause why he should not be detained in custody. If the accused shows cause then s. 524(5) provides for the types of release order which may be made. Any order made under s. 524 may only be reviewed pursuant to s. 680. The procedure on the s. 524 hearing is similar to the original show cause hearing (subsec. (12)). There is some uncertainty as to the scope of s. 524 where the accused is arrested for an indictable offence while on a s. 522 release order. It would seem that the procedure to be followed is that unless the prosecutor elects to proceed under s. 524 the justice will have jurisdiction to proceed with a bail hearing in relation to the new non-s. 469 charge under s. 515. See *R. v. Yarema* (1989), 52 C.C.C. (3d) 242 (Ont. H.C.J.), noted under s. 524.

The automatic review procedure set out in s. 525 does not apply to an accused charged with a s. 469 offence. Section 526 however provides that the judge conducting a hearing under this Part may give directions for expediting the trial.

Barring a review under ss. 680, 523(2) or 524 then the effect of s. 523(1) is that the release order remains in effect until the trial is completed. Section 523(1.1) provides a procedure for the release order in respect of one information to apply to a new information charging the same offence or an included offence.

Under s. 522(6) where the accused is also charged with an offence not listed in s. 469 the judge to whom an application is made under s. 522 may also make an order for release or detention in respect of this other offence. Invoking subsec. (6) will avoid the necessity of multiple hearings in the case of an accused charged with an offence listed in s. 469 and some other offence.

The procedure for enforcement of a recognizance is set out in Part XXV. That Part sets out the responsibilities of sureties (s. 764); procedure for rendering of the accused by his sureties (ss. 766, 767, 769); substitution of a new surety (s. 767.1), and the new release hearing where the accused is rendered into custody by his sureties (s. 769). That Part also sets out the procedure in case of default by the accused, including endorsing the fact of the default (s. 770); the hearing for estreat of bail (s. 771), and levying execution to enforce a writ of *fiery facias* where the recognizance is ordered forfeited (ss. 772, 773).

There are special limitations on the making of interim release and detention orders where the court makes an assessment order under Part XX.1. See in particular ss. 672.16, 672.17 and 672.18.

## ANNOTATIONS

Prior to the recent amendments to this section there was some uncertainty as to whether a detention or release order made under this section in relation to a murder charge lapsed when the accused was committed for trial on a charge of manslaughter (an offence not specified in s. 469). The following cases hold that in such circumstances there should be a new bail hearing before a justice or provincial court judge: *R. v. LaFontaine* (1973), 13 C.C.C. (2d) 316, 23 C.R.N.S. 4 (Ont. H.C.J.); *R. v. Manuel* (1981), 60 C.C.C. (2d) 97, 22 C.R. (3d) 204 (Ont. H.C.J.); *R. v. Favel* (1985), 19 C.C.C. (3d) 335 (Sask. Q.B.). To the contrary is *Re Degerness and The Queen* (1980), 57 C.C.C. (2d) 534 (B.C.S.C.).

A detention order made on a charge of first degree murder does not lapse when the accused is committed for trial on a charge of second degree murder and is reviewable only pursuant to s. 680: *R. v. Archer* (1981), 59 C.C.C. (2d) 384, 21 C.R. 352 (Ont. C.A.).

It was held in relation to the predecessor to this section that the reverse onus in para. (2)(f) in the case of a murder charge does not offend the guarantee to reasonable bail under the Charter of Rights and Freedoms: *R. v. Bray* (1983), 2 C.C.C. (3d) 325, 32 C.R. (3d) 316, 144 D.L.R. (3d) 305 (Ont. C.A.); *R. v. Dubois (No. 2)* (1983), 8 C.C.C. (3d) 344 (Que. S.C.). *Contra: R. v. Pugsley* (1982), 2 C.C.C. (3d) 266, 31 C.R. (3d) 217 (N.S.S.C. App. Div.).

The reverse onus requires the accused to establish that on a balance of probabilities his detention is not justified on either the primary or secondary ground. However, there is no burden on the accused to disprove the offence or his implication in it; the onus is on the Crown to adduce evidence of the accused's implication in the offence: *R. v. Bray*, *supra*.

In *R. v. Morales* (1992), 77 C.C.C. (3d) 91 (S.C.C.) the court held that the "public interest" component of s. 515(10)(b) was too vague and imprecise to withstand constitutional scrutiny and could not be considered just cause to refuse bail. The public safety criteria, that there is a substantial likelihood that the accused will commit an offence or interfere with the administration of justice, are, however, valid. These holdings would also apply to bail applications under this section.

The overwhelming nature of the evidence of guilt and the probability of conviction are merely factors to be considered and are the determining factors in deciding whether the accused should be released pending trial. The accused is entitled to the benefit of the presumption of innocence and the judge should not decide the result of the trial: *R. v. Braun* (1994), 91 C.C.C. (3d) 237, 33 C.R. (4th) 381, 68 W.A.C. 189 (Sask. C.A.).

Subsection (4) of this section must be read with s. 523(2) which gives a judge of the trial court power to vacate any order previously made upon cause being shown. While resort must be had to the procedure under s. 680 where the allegation is that the original judge made an error, where it is submitted that there has been a change in circumstances the parties should resort to s. 523(2). Where the Crown's consent is required for the review powers to be exercised by a superior court judge, it would be expected that in cases of new circumstances the Crown would not unreasonably withhold its consent: *R. v. Patterson* (1985), 19 C.C.C. (3d) 149, [1985] 4 W.W.R. 357 (Alta. C.A.).

**PERIOD FOR WHICH APPEARANCE NOTICE, ETC., CONTINUES IN FORCE / Where new information charging same offence / Order vacating previous order for release or detention / Provisions applicable to proceedings under subsection (2).**

**523. (1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or has been released from custody under or by virtue of any provision of this Part, the appearance notice, promise to appear, summons, undertaking or recognizance issued to, given or entered into by the accused continues in**



force, subject to its terms, and applies in respect of any new information charging the same offence or an included offence that was received after the appearance notice, promise to appear, summons, undertaking or recognizance was issued, given or entered into,

- (a) where the accused was released from custody pursuant to an order of a judge made under subsection 522(3), until his trial is completed; or
- (b) in any other case,
  - (i) until his trial is completed, and
  - (ii) where the accused is, at his trial, determined to be guilty of the offence, until a sentence within the meaning of section 673 is imposed on the accused unless, at the time the accused is determined to be guilty, the court, judge or justice orders that the accused be taken into custody pending such sentence.

(1.1) Where an accused, in respect of an offence with which he is charged, has not been taken into custody or is being detained or has been released from custody under or by virtue of any provision of this Part and after the order for interim release or detention has been made, or the appearance notice, promise to appear, summons, undertaking or recognizance has been issued, given or entered into, a new information, charging the same offence or an included offence, is received, section 507 or 508, as the case may be, does not apply in respect of the new information and the order for interim release or detention of the accused and the appearance notice, promise to appear, summons, undertaking or recognizance, if any, applies in respect of the new information.

(2) Notwithstanding subsections (1) and (1.1),

- (a) the court, judge or justice before whom an accused is being tried, at any time,
- (b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or
- (c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time
  - (i) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other justice,
  - (ii) where the accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province, or
  - (iii) the court, judge or justice before which or whom an accused is to be tried, may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

(3) The provisions of sections 517, 518 and 519 apply, with such modifications as the circumstances require, in respect of any proceedings under subsection (2), except that subsection 518(2) does not apply in respect of an accused who is charged with an offence listed in section 469. R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 54; R.S.C. 1985, c. 27 (1st Supp.), s. 89.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2 and “accused”, “appearance notice”, “promise to appear”, “undertaking”, “recognizance” and “summons” in s. 493. An order under subsec. (2)(b) is reviewable pursuant to s. 520 or s. 521 by the accused or the prosecutor as the case may be. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on*

*judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

## SYNOPSIS

This section describes the periods of time for which various specified forms of release continue to be in force.

Subsection (1) states that an appearance notice, promise to appear, summons, undertaking or recognizance remains in force until the completion of the accused's trial and, unless the judge orders the accused to be detained prior to the imposition of sentence, until the sentencing has been completed. For an accused charged with an offence listed under s. 469, the form of release remains valid until the completion of the trial. Subsection (1.1) provides that when an accused is at liberty on a form of release and a new information charging the same or an included offence is received, the original form of release continues to apply.

Subsection (2) applies notwithstanding subssecs. (1) and (1.1), and authorizes any order previously made under Part XVI to be vacated and replaced with any other order provided for by this Part.

Subsection (3) states that ss. 517, 518 and 519 apply with such modifications as are necessary in respect of any proceedings under subsec. (2).

Section 518(2) does not apply with respect to an accused who is charged with an offence listed in s. 469.

## ANNOTATIONS

**Subsec. (2)** – The mere fact that the accused has been ordered to stand trial is not sufficient cause to warrant the revocation of the accused's release order under para. (a) and the making of a detention order: *R. v. Braithwaite* (1980), 57 C.C.C. (2d) 351 (N.S.S.C. App. Div.).

The justice may exercise his jurisdiction under para. (b) even where the release order was made by a judge on a review: *Re Wedow and The Queen* (1981), 62 C.C.C. (2d) 381, 23 C.R. (3d) 187 (Alta. Q.B.).

Where the trial Judge who made the detention order was sitting as a Court of record a writ of *habeas corpus* is not available to the accused: *Ex P. Sternig* (1974), 16 C.C.C. (2d) 459, 46 D.L.R. (3d) 317 (Ont. H.C.J.).

## *Arrest of Accused on Interim Release*

**ISSUE OF WARRANT FOR ARREST OF ACCUSED** / Arrest of accused without warrant / Hearing / Retention of accused / Release of accused / Order not reviewable / Release of accused / Powers of justice after hearing / Release of accused / Reasons / Where justice to order that accused be released / Provisions applicable to proceedings under this section / Certain provisions applicable to order under this section.

**524. (1)** Where a justice is satisfied that there are reasonable and probable grounds to believe that an accused

(a) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or

(b) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

he may issue a warrant for the arrest of the accused.

**(2)** Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused

- (a) has contravened or is about to contravene any summons, appearance notice, promise to appear, undertaking or recognizance that was issued or given to him or entered into by him, or
- (b) has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,

may arrest the accused without warrant.

(3) Where an accused who has been arrested with a warrant issued under subsection (1), or who has been arrested under subsection (2), is taken before a justice, the justice shall

- (a) where the accused was released from custody pursuant to an order made under subsection 522(3) by a judge of the superior court of criminal jurisdiction of any province, order that the accused be taken before a judge of that court; or
- (b) in any other case, hear the prosecutor and his witnesses, if any, and the accused and his witnesses, if any.

(4) Where an accused described in paragraph (3)(a) is taken before a judge and the judge finds

- (a) that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or
  - (b) that there are reasonable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,
- he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

(5) Where the judge does not order that the accused be detained in custody pursuant to subsection (4), he may order that the accused be released upon his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2) (a) to (e) with such conditions described in subsection 515(4) or, where the accused was at large on an undertaking or a recognizance with conditions, such additional conditions, described in subsection 515(4), as the judge considers desirable.

(6) Any order made under subsection (4) or (5) is not subject to review, except as provided in section 680.

(7) Where the judge does not make a finding under paragraph (4)(a) or (b), he shall order that the accused be released from custody.

(8) Where an accused described in subsection (3), other than an accused to whom paragraph (a) of that subsection applies, is taken before the justice and the justice finds

- (a) that the accused has contravened or had been about to contravene his summons, appearance notice, promise to appear, undertaking or recognizance, or
  - (b) that there are reasonable grounds to believe that the accused has committed an indictable offence after any summons, appearance notice, promise to appear, undertaking or recognizance was issued or given to him or entered into by him,
- he shall cancel the summons, appearance notice, promise to appear, undertaking or recognizance and order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of subsection 515(10).

(9) Where the accused shows cause why his detention in custody is not justified within the meaning of subsection 515(10), the justice shall order that the accused be released upon his giving an undertaking or entering into a recognizance described in



any of paragraphs 515(2)(a) to (e) with such conditions, described in subsection 515(4), as the justice considers desirable.

(10) Where the justice makes an order under subsection (9), he shall include in the record a statement of his reasons for making the order, and subsection 515(9) is applicable with such modifications as the circumstances require in respect thereof.

(11) Where the justice does not make a finding under paragraph (8)(a) or (b), he shall order that the accused be released from custody.

(12) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section, except that subsection 518(2) does not apply in respect of an accused who is charged with an offence mentioned in section 522.

(13) Section 520 applies in respect of any order made under subsection (8) or (9) as though the order were an order made by a justice under subsection 515(2) or (5), and section 521 applies in respect of any order made under subsection (9) as though the order were an order made by a justice under subsection 515(2). R.S., c. C-34, s. 458; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 55.

#### CROSS-REFERENCES

The term "justice" is defined in s. 2 and "accused", "appearance notice", "promise to appear", "undertaking", "recognizance" and "summons" in s. 493. Breach of the terms of a release order issued by a peace officer, officer in charge, justice or judge is an offence under s. 145. The procedure for enforcement of a recognizance is set out in Part XXV. That Part sets out the responsibilities of sureties (s. 764); procedure for rendering of the accused by his sureties (ss. 766, 767, 769); substitution of a new surety (s. 767.1); and the new release hearing where the accused is rendered into custody by his sureties (s. 769). That Part also sets out the procedure in case of default by the accused, including endorsing the fact of the default (s. 770); the hearing for estreat of the bail (s. 771); levying execution to enforce a writ of *fiat facias* where the recognizance is ordered forfeited (ss. 772, 773). For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

#### SYNOPSIS

This section sets out the procedure to be followed when a warrant for the arrest of an accused who is on interim release is sought.

Subsection (1) provides that where a justice is satisfied that there are reasonable grounds to believe that an accused person has contravened or is about to contravene his form of release or has committed an indictable offence after entering into a form of release, that justice may issue a warrant for the arrest of the accused.

Subsection (2) states that when a peace officer has reasonable grounds to believe that the accused has done any of the things listed above, the officer may arrest the accused without a warrant.

Subsection (3) requires the justice before whom an accused, apprehended under subsec. (1) or (2), is brought, to hear the prosecutor, the accused and any witness. If the accused was released in relation to an offence under s. 469, the justice must order that the accused be taken before a judge of the superior court of criminal jurisdiction.

Subsection (4) requires a judge of the superior court of criminal jurisdiction before whom an accused, charged with an offence under s. 469, appears pursuant to subsec. (3), to cancel the accused's form of release if that judge finds that the accused has done any of the things listed in subsec. 4(a) and (b). The judge must order that the accused be detained in custody unless the accused, after being given a reasonable opportunity to do so, shows cause why such detention is not justified.

Subsection (5) allows the judge to release the accused, on conditions, if the judge con-

siders this to be desirable. Any order made under subsec. (4) or (5) above can be reviewed only as provided for in s. 680. If the judge does not find that the accused has done the things described in subsec. (4)(a) and (b), he shall order the release of the accused.

Subsections (8), (9), (10) and (11) provide for a similar scheme to deal with an accused who has been taken into custody after release on charges relating to offences other than those listed in s. 469. In this situation, a justice is empowered to deal with the accused when that person is apprehended.

Subsection (12) provides that ss. 517, 518 and 519 apply, with any necessary modifications, to proceedings under this section except that s. 518(2) does not apply in respect of an accused charged with an offence under s. 469.

Subsection (13) provides that the review procedures described in ss. 520 and 521 apply to a judge under this section.

## ANNOTATIONS

**Subsec. (1)** – A Justice may without the necessity of a specific charge in writing being laid before him issue a warrant for arrest pursuant to this section: *Re Fulton and The Queen* (1972), 10 C.C.C. (2d) 120, [1973] 2 W.W.R. 174 (Sask. Q.B.).

In acting under this subsection the justice must act judicially. A provincial Court Judge who has himself been witness to the reasonable and probable grounds has no jurisdiction to issue the warrant or conduct the subsequent hearing under subsec. (3). Such a judge does not have the requisite measure of neutrality and detachment: *Re Kot and The Queen* (1983), 10 C.C.C. (3d) 297 (Ont. H.C.J.). [Note: an appeal to the Ontario Court of Appeal was quashed the issue being moot: 11 C.C.C. (3d) 96n (Ont. C.A.).]

As it is not a term of an appearance notice that the accused keep the peace and be of good behaviour, a justice has no power to issue a warrant under this subsection based merely upon the fact that the accused is charged with subsequently committing a similar offence: *Re S and The Queen* (1986), 33 C.C.C. (3d) 383 (Sask. Q.B.).

**Subsec. (3)** – An application under this subsection to cancel the accused's recognizance is properly brought before a justice notwithstanding the release order was made by a Judge on a review under s. 520: *Re R. and Kinger* (1982), 65 C.C.C. (2d) 483, 28 C.R. (3d) 282 (Alta. C.A.).

Where an accused appears before a justice for alleged misconduct, either under subsec. (1) or (2), as a result of misconduct alleged to have occurred after release by a superior court judge pursuant to s. 522, the justice should first ascertain the basis of the accused's appearance. Where the only reason for the appearance is that the accused has been arrested for alleged misconduct then the justice must order that the accused appear before a superior court judge pursuant to subsec. (3)(a). If, however, in addition, charges have been laid under s. 145 for failing to comply with the release order or for commission of some other criminal offence then the prosecutor should indicate whether or not he proposes to proceed under this section. If the prosecutor elects to proceed under this section then again the justice should order that the accused appear before a superior court judge pursuant to subsec. (3)(a) before dealing with release on the new charges. Where, however, the prosecutor does not so elect then the justice has jurisdiction to deal with release of the accused on the new charges pursuant to s. 515: *R. v. Yarema* (1989), 52 C.C.C. (3d) 242 (Ont. H.C.J.), affd 64 C.C.C. (3d) 260, 5 C.R. (4th) 125, 3 O.R. (3d) 459 (C.A.).

This section and s. 515 are not mutually exclusive. Thus, even where a hearing has been held before a justice under s. 515 for offences committed while the accused was at large on a release order made by a superior court judge under s. 522, the Crown is not precluded from subsequently applying to the superior court under this section to review the original release order: *R. v. Yarema* (1991), 64 C.C.C. (3d) 260, 3 O.R. (3d) 459 (C.A.).

Where an accused has not only failed to comply with the conditions of the recognizance but has been charged with new offences then the justice has jurisdiction to hear an

application for bail on the new charges as well as to cancel the previous release order: *R. v. Gabrielson* (1991), 62 C.C.C. (3d) 571 (Ont. Ct. (Gen. Div.)).

**Subsec. (8)** – It was held in *R. v. Lafond* (1975), 25 C.C.C. (2d) 568, 32 C.R.N.S. 66 (Que. Sess. Peace) that where an accused who has previously been released is brought before the Justice for a show cause hearing for an offence committed while released then even though the accused does not technically come within subsec. (3) the Justice may exercise the jurisdiction under this subsection and cancel the previous form of release. Such a situation would arise where the accused was arrested under s. 495 and not as the result of a warrant issued under subsec. (1) or as a result of a police officer's belief under subsec. (2).

In determining whether the conditions of release have been violated any issue as to whether the conditions allegedly violated were ambiguous must be determined on the basis of where the original burden lay for interim release. Thus where the offence was one for which the original burden was on the accused to show cause why he should be released, for example, on a charge of conspiracy to traffic in narcotics, then any ambiguity in the terms must be resolved in favour of the Crown: *Ex p. Clarke* (No. 2) (1978), 42 C.C.C. (2d) 23 (Nfld. S.C.T.D.).

## ***Review of Detention Where Trial Delayed***

**TIME FOR APPLICATION TO JUDGE / Notice of hearing / Matters to be considered on hearing / Order / Warrant of judge for arrest / Arrest without warrant by peace officer / Hearing and order / Provisions applicable to proceedings / Directions for expediting trial.**

**525. (1)** Where an accused who has been charged with an offence other than an offence listed in section 469 and who is not required to be detained in custody in respect of any other matter is being detained in custody pending his trial for that offence and the trial has not commenced

(a) in the case of an indictable offence, within ninety days from

(i) the day on which the accused was taken before a justice under section 503, or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, the day on which he was taken into custody under that order, or

(b) in the case of an offence for which the accused is being prosecuted in proceedings by way of summary conviction, within thirty days from

(i) the day on which the accused was taken before a justice under subsection 503(1), or

(ii) where an order that the accused be detained in custody has been made under section 521 or 524, the day on which he was taken into custody under that order,

the person having the custody of the accused shall, forthwith on the expiration of those ninety or thirty days, as the case may be, apply to a judge having jurisdiction in the place in which the accused is in custody to fix a date for a hearing to determine whether or not the accused should be released from custody.

**(2)** On receiving an application under subsection (1), the judge shall

(a) fix a date for the hearing described in subsection (1) to be held in the jurisdiction

(i) where the accused is in custody, or

(ii) where the trial is to take place; and



- (b) direct that notice of the hearing be given to such persons, including the prosecutor and the accused, and in such manner, as the judge may specify.
- (3) On the hearing described in subsection (1), the judge may, in deciding whether or not the accused should be released from custody, take into consideration whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.
- (4) If, following the hearing described in subsection (1), the judge is not satisfied that the continued detention of the accused in custody is justified within the meaning of subsection 515(10), the judge shall order that the accused be released from custody pending the trial of the charge on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions described in subsection 515(4) as the judge considers desirable.
- (5) Where a judge having jurisdiction in the province where an order under subsection (4) for the release of an accused has been made is satisfied that there are reasonable grounds to believe that the accused
- (a) has contravened or is about to contravene the undertaking or recognizance upon which he has been released, or
  - (b) has, after his release from custody on his undertaking or recognizance, committed an indictable offence,
- he may issue a warrant for the arrest of the accused.
- (6) Notwithstanding anything in this Act, a peace officer who believes on reasonable grounds that an accused who has been released from custody under subsection (4)
- (a) has contravened or is about to contravene the undertaking or recognizance on which he has been released, or
  - (b) has, after his release from custody on his undertaking or recognizance, committed an indictable offence,
- may arrest the accused without warrant and take him or cause him to be taken before a judge having jurisdiction in the province where the order for his release was made.
- (7) A judge before whom an accused is taken pursuant to a warrant issued under subsection (5) or pursuant to subsection (6) may, where the accused shows cause why his detention in custody is not justified within the meaning of subsection 515(10), order that the accused be released on his giving an undertaking or entering into a recognizance described in any of paragraphs 515(2)(a) to (e) with such conditions, described in subsection 515(4), as the judge considers desirable.
- (8) The provisions of sections 517, 518 and 519 apply with such modifications as the circumstances require in respect of any proceedings under this section.
- (9) Where an accused is before a judge under any of the provisions of this section, the judge may give directions for expediting the trial of the accused. R.S., c. C-34, s. 459; R.S., c. 2 (2nd Supp.), s. 5; 1974-75-76, c. 93, s. 56; R.S.C. 1985, c. 27 (1st Supp.), s. 90; 1994, c. 44, s. 49.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2 and “judge”, “recognizance” and “undertaking” in s. 493. As to calculation of “within” a certain number of days see s. 27(5) of the Interpretation Act, R.S.C. 1985, c. I-21. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

The accused of course has a constitutional right to trial within a reasonable time and thus see notes under s. 11(b) of the Charter.

## SYNOPSIS

This section provides for a review of the detention of an accused person when that person's trial has been delayed. This review applies only to persons charged with offences other than those listed in s. 469.

Subsection (1) places an obligation on the person having custody of the accused to apply to the judge having jurisdiction to fix a date for a hearing to determine whether an accused should be released after the applicable time period has expired. The time periods vary according to the type of offence alleged to have been committed and the section under which the accused has been detained.

Subsection (2) requires a judge, upon receipt of the application under subsec. (1), to fix a date for the hearing, and to direct that notice be given to the prosecutor and the accused.

Subsection (3) authorizes the judge to consider whether the prosecutor or the accused has been responsible for any unreasonable delay in the trial of the charge.

Under subsec. (4), the judge must consider, following the hearing, whether the continued detention of the accused is justified on the primary or secondary grounds as outlined in s. 515(10). The judge may decide to release the accused under this section using any of the forms of release described in s. 515(2)(a) to (e) with such conditions described in s. 515(4) as are appropriate.

Subsections (5) and (6) authorize the arrest of an accused person who has been released under subsec. (4) with or without a warrant where there are grounds to believe that he has violated or is about to violate his undertaking or recognizance, or that he has committed an indictable offence subsequent to release.

Subsection (7) states that the onus is on the accused brought before a justice under subsec. (5) or (6) to show cause why detention is not justified. Sections 515(10), (2) and (4) are applicable, depending on the circumstances. Sections 517, 518 and 519 are applicable with such modifications as circumstances require.

Subsection (9) gives the judge dealing with an accused under this section a discretion to give directions for expediting the trial.

## ANNOTATIONS

**Application of section** – This section applies, notwithstanding that the accused has previously applied, unsuccessfully, for review of the detention under s. 520: *R. v. Neill* (1990), 60 C.C.C. (3d) 261, [1991] 2 W.W.R. 352, 109 A.R. 231 (Alta. C.A.); *R. v. Waine* (1990), 56 C.C.C. (3d) 61 (Ont. H.C.J.); *R. v. Johnson* (1980), 57 C.C.C. (2d) 49 (Ont. H.C.J.); *R. v. Burton* (1993), 84 C.C.C. (3d) 311, 25 C.R. (4th) 167, 47 W.A.C. 233 (B.C.C.A.); *Re Dass and The Queen* (1978), 39 C.C.C. (2d) 365, [1978] 2 W.W.R. 274 (Man. C.A.).

This section only applies where the accused is held on a detention order and not where he is being held by virtue of s. 519, i.e., bail has been set but the accused is unable to meet the conditions for release: *Ex p. Srebot* (1975), 28 C.C.C. (2d) 160 (B.C.C.A.).

An accused in custody on a detention order and a warrant under s. 524 is entitled to a review under this section: *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147, [1981] 3 W.W.R. 737 (B.C.C.A.).

**Procedure** – An application brought on a week later and then set for hearing is reasonable compliance with this section: *R. v. Kozak and Lewis* (1975), 32 C.R.N.S. 245, [1976] 1 W.W.R. 356 (B.C.S.C.).

Jurisdiction over the offence is not affected by the fact that due to inadvertence nothing was done on the date to which a review under this section was adjourned: *Re Gagliardi and The Queen* (1981), 60 C.C.C. (2d) 267 (B.C.C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 38 N.R. 356n.

**Effect of failure to comply with section** – It was held by the court in *Ex. p. Cordes* (1976), 31 C.C.C. (2d) 279 (Alta. S.C. App. Div.) that failure to comply with this section

does not *ipso facto* vacate the previous detention order and render the accused's detention illegal entitling him to release on *habeas corpus*. On a *habeas corpus* application brought because of unreasonable delay the Judge would have regard to the same considerations set out in this section. Where the section has not been complied with the appropriate remedy is *mandamus* to require compliance therewith.

To a similar effect is *R. v. Pomfret* (1990), 53 C.C.C. (3d) 56 (Man. C.A.), where the court also held that the failure to hold the review as required by this section did not, in the circumstances, result in arbitrary detention in violation of s. 9 of the Charter. The lapse of time was not of such an extent that the court could infer deliberateness or design on the part of the gaoler. Finally, refusing to release the accused on his application for *habeas corpus* did not violate s. 10(c) of the Charter. The *habeas corpus* application brought to the court's attention that the accused was entitled to a review under this section and resulted in him receiving that to which he was entitled under the law, namely a bail review hearing.

The accused's detention does not become unlawful merely upon the expiration of the 90 days. The custodian is under a statutory obligation to seek the hearing required under this section as soon as practicable after the expiration of the 90 day period. Where an application for a hearing has been made by the custodian, the appropriate disposition of a claim to release on *habeas corpus* is to refer that claim to the judge conducting the hearing under this section. Where no application has been made, *habeas corpus* may lie to determine whether the lapse of time has tainted the legality of the detention. Alternatively, an accused may apply by way of *mandamus* to compel the director to comply: *Vukelich v. Vancouver Pre-Trial Centre, Director* (1993), 87 C.C.C. (3d) 32, 27 C.R. (4th) 15, 64 W.A.C. 38 (B.C.C.A.).

## DIRECTIONS FOR EXPEDITING PROCEEDINGS.

**526.** Subject to subsection 525(9), a court, judge or justice before which or whom an accused appears pursuant to this Part may give directions for expediting any proceedings in respect of the accused. R.S., c. 2 (2nd Supp.), s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 91.

## CROSS-REFERENCES

The term "justice" is defined in s. 2 and "accused" and "judge" in s. 493. The accused of course has a constitutional right to trial within a reasonable time and thus see notes under s. 11(b) of the Charter. For an overview of the application of this Part and the procedure respecting release pending trial see *Note on judicial interim release* under s. 515, or the *Note on judicial interim release* under s. 522 where the accused is charged with an offence listed in s. 469.

## SYNOPSIS

This section authorizes a court, judge, or justice dealing with an accused under Part XVI of the Code to give directions for expediting any proceedings relating to the accused.

## *Procedure to Procure Attendance of a Prisoner*

**PROCURING ATTENDANCE / Provincial court judge's order / Conveyance of prisoner / Detention of prisoner required as witness / Detention in other cases / Application of sections respecting sentence / Transfer of prisoner / Conveyance of prisoner / Return.**

**527.** (1) A judge of a superior court of criminal jurisdiction may order in writing that a person who is confined in a prison be brought before the court, judge, justice or provincial court judge before who the prisoner is required to attend, from day to day as may be necessary, if



- (a) the applicant for the order sets out the facts of the case in an affidavit and produces the warrant, if any; and
  - (b) the judge is satisfied that the ends of justice require that an order be made.
- (2) A provincial court judge has the same powers for the purposes of subsection (1) as a judge has under that subsection where the person whose attendance is required is confined in a prison within the province in which the provincial court judge has jurisdiction.
- (3) An order that is made under subsection (1) or (2) shall be addressed to the person who has custody of the prisoner, and on receipt thereof that person shall
- (a) deliver the prisoner to any person who is named in the order to receive him; or
  - (b) bring the prisoner before the court, judge, justice or provincial court judge, as the case may be, on payment of his reasonable charges in respect thereof.
- (4) Where a prisoner is required as a witness, the judge or provincial court judge shall direct, in the order, the manner in which the prisoner shall be kept in custody and returned to the prison from which he is brought.
- (5) Where the appearance of a prisoner is required for the purposes of paragraph (1)(a) or (b), the judge or provincial court judge shall give appropriate directions in the order with respect to the manner in which the prisoner is
- (a) to be kept in custody, if he is ordered to stand trial; or
  - (b) to be returned, if he is discharged on a preliminary inquiry or if he is acquitted of the charge against him.
- (6) Sections 717 and 731 apply where a prisoner to whom this section applies is convicted and sentenced to imprisonment by the court, judge, justice or provincial court judge.

**NOTE:** Subsection (6) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to ss. 717 and 731 with ss. 718.3 and 743.1.

- (7) On application by the prosecutor, a judge of a superior court of criminal jurisdiction may, if the prisoner consents in writing, order the transfer of a prisoner to the custody of a peace officer named in the order for a period specified in the order where the judge is satisfied that the transfer is required for the purpose of assisting a peace officer acting in the execution of his duties.
- (8) An order under subsection (7) shall be addressed to the person who has custody of the prisoner and on receipt thereof that person shall deliver the prisoner to the peace officer who is named in the order to receive him.
- (9) When the purposes of any order made under this section have been carried out, the prisoner shall be returned to the place where he was confined at the time the order was made. R.S., c. C-34, s. 460; R.S.C. 1985, c. 27 (1st Supp.), ss. 92, 101(2)(b); 1994, c. 44, s. 50.

## SYNOPSIS

This section sets out the procedure to procure the attendance of a prisoner at his preliminary hearing, the trial of his charge, or to give evidence in criminal proceedings.

Subsection (1) states that when a prisoner's attendance is required, an application must be made to a judge of a superior court of criminal jurisdiction. The applicant must set out the facts of the case in an affidavit and produce any warrant to the judge. The judge may, if satisfied that the ends of justice require it, make a written order to bring the prisoner before the court.

Subsection (2) provides that a Provincial Court judge has the same powers as the

judges described in subsec. (1) except that the provincial court judge may only order the appearance of a prisoner being held in that province.

Subsection (3) describes the requirements of an order made under subsecs. (1) and (2).

Subsection (4) states that the judge or provincial court judge must direct the manner in which a prisoner, required to testify as a witness, shall be kept in custody and returned to prison.

Subsection (5) sets out the kinds of directions a judge or provincial court judge must include in an order compelling the attendance of a prisoner at his preliminary hearing or trial.

Subsection (7) authorizes a superior court judge to order the transfer of a prisoner to a named peace officer for a specified period where such a transfer would assist the peace officer in the execution of his duties. The prisoner must consent in writing to this procedure. An order under subsec. (7) must be addressed to the person having custody of the prisoner and, upon receipt, that person must deliver the prisoner to the named peace officer.

Subsection (9) requires that the prisoner be returned to the place of confinement when the purposes of any order made under this section have been accomplished.

## ANNOTATIONS

A witness brought to court pursuant to an order under this section may be compelled to testify notwithstanding he has not been served with a subpoena and there is no warrant issued under s. 698 outstanding: *R. v. Ayres* (1984), 15 C.C.C. (3d) 208, 42 C.R. (3d) 33 (Ont. C.A.).

The judge in making an order under this section in relation to an accused who is detained in another district has power under subsec. (5) to order that the accused be brought to the local gaol several days prior to the actual trial date to afford him a reasonable opportunity to properly prepare his defence: *Auclair v. Dube J.S.P. and R.* (1984), 39 C.R. (3d) 398 (Que. S.C.).

Although this section provides a convenient procedure for securing the attendance at court of persons confined in custody on other matters, it was open to a justice of the peace to resort to the provisions of s. 512 and issue a bench warrant for the arrest of an accused where the accused, detained on another matter, was not brought to court to set a date for his trial: *Re Hartmann and The Queen* (1986), 30 C.C.C. (3d) 286 (Ont. H.C.J.).

## Endorsement of Warrant

### ENDORISING WARRANT / Copy of affidavit or warrant / Effect of endorsement.

528. (1) Where a warrant for the arrest or committal of an accused, in any form set out in Part XXVIII in relation thereto, cannot be executed in accordance with section 514 or 703, a justice within whose jurisdiction the accused is or is believed to be shall, on application and proof on oath or by affidavit of the signature of the justice who issued the warrant, authorize the arrest of the accused within his jurisdiction by making an endorsement, which may be in Form 28, on the warrant.

(1.1) A copy of an affidavit or warrant submitted by a means of telecommunication that produces a writing has the same probative force as the original for the purposes of subsection (1).

(2) An endorsement that is made upon a warrant pursuant to subsection (1) is sufficient authority to the peace officers to whom it was originally directed, and to all peace officers within the territorial jurisdiction of the justice by whom it is endorsed, to execute the warrant and to take the accused before the justice who issued the war-

rant or before any other justice for the same territorial division. R.S., c. C-34, s. 461; 1974-75-76, c. 93, s. 57; R.S.C. 1985, c. 27 (1st Supp.), s. 93; 1994, c. 44, s. 51.

#### CROSS-REFERENCES

"Justice" and "peace officer" are defined in s. 2. "Warrant" is defined in s. 493. Under s. 20, a warrant may be executed on a holiday. A warrant is executed in accordance with this section and s. 29 and s. 10 of the Charter. For protection of persons executing warrants see ss. 25 to 28.

#### SYNOPSIS

This section empowers a justice to authorize the arrest of an accused person who is believed to be in that justice's jurisdiction, when a warrant for arrest or committal cannot be executed in accordance with ss. 514 or 703. The justice being asked to authorize the arrest of the accused will endorse the warrant only upon proof on oath or by affidavit of the signature of the justice who issued the warrant. Under subsec. (1.1), a faxed copy has the same probative value as the original.

Subsection (2) states that an endorsement on the warrant pursuant to subsec. (1) is sufficient authority to the peace officers to whom it was originally directed, along with all peace officers within the territorial jurisdiction of the endorsing justice, to execute the warrant.

529. [*Repealed (with heading). 1994, c. 44, s. 52.*]

## Part XVII / LANGUAGE OF ACCUSED

LANGUAGE OF ACCUSED / *Idem* / Accused to be advised of right / Remand / Variation of order.

530. (1) On application by an accused whose language is one of the official languages of Canada, made not later than

- (a) the time of the appearance of the accused at which his trial date is set, if
  - (i) he is accused of an offence mentioned in section 553 or punishable on summary conviction, or
  - (ii) the accused is to be tried on an indictment preferred under section 577,
- (b) the time of his election, if the accused elects under section 536 to be tried by a provincial court judge, or
- (c) the time when the accused is ordered to stand trial, if the accused
  - (i) is charged with an offence listed in section 469,
  - (ii) has elected to be tried by a court composed of a judge or a judge and jury, or
  - (iii) is deemed to have elected to be tried by a court composed of a judge and jury,

a justice of the peace or provincial court judge shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

**Editor's Note:** By virtue of R.S.C. 1985, c. 27 (1st Supp.), s. 209(4), paras. (a) to (c) repealed and substituted by R.S.C. 1985, c. 27 (1st Supp.), s. 94, came into force in New Brunswick, Manitoba, Ontario, the Yukon Territory and the Northwest Territories on June 20, 1985; proclaimed in force with respect to summary conviction in Nova Scotia, Prince Edward Island and Saskatchewan and with respect to indictable offences in Saskatchewan, on September 1, 1987. These paragraphs are in force in all other prov-



inices in respect of summary conviction offences or indictable offences effective January 1, 1990.

(2) On application by an accused whose language is not one of the official languages of Canada, made not later than whichever of the times referred to in paragraphs (1)(a) to (c) is applicable, a justice of the peace or provincial court judge may grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada in which the accused, in the opinion of the justice or provincial court judge, can best give testimony or, if the circumstances warrant, who speak both official languages of Canada.

(3) The justice of the peace or provincial court judge before whom an accused first appears shall, if the accused is not represented by counsel, advise the accused of his right to apply for an order under subsection (1) or (2) and of the time before which such an application must be made.

(4) Where an accused fails to apply for an order under subsection (1) or (2) and the justice of the peace, provincial court judge or judge before whom the accused is to be tried, in this Part referred to as “the court”, is satisfied that it is in the best interests of justice that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or, if the language of the accused is not one of the official languages of Canada, the official language of Canada in which the accused, in the opinion of the court, can best give testimony, the court may, if it does not speak that language, by order remand the accused to be tried by a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak that language or, if the circumstances warrant, who speak both official languages of Canada.

(5) An order under this section that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony may, if the circumstances warrant, be varied by the court to require that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak both official languages of Canada. 1977-78, c. 36, s. 1; R.S.C. 1985, c. 27 (1st Supp.), s. 94.

**Editor's Note:** This section proclaimed in force in New Brunswick, Yukon Territory and Northwest Territories, May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982; in force in all other provinces in respect of summary conviction offences or indictable offences effective January 1, 1990. See also note following subsec. (1).

#### CROSS-REFERENCES

The terms “justice” and “provincial court judge” are defined in s. 2.

The procedure respecting conduct of the proceedings is set out in s. 530.1. Change of venue where necessary to facilitate the trial where an order is made under this section is provided for in s. 531. This Part does not derogate from other rights which may be afforded by provincial legislation, by virtue of s. 532. Provision for making regulations to carry out the provisions of this Part is provided for in s. 533.

Also see s. 841(3) which requires that any preprinted portions of a form set out in Part XXVIII shall be printed in both official languages.

#### SYNOPSIS

This section sets out the procedure whereby an accused can elect to be tried before a court (including a jury) which speaks one *or both* official languages.

Subsection (1), which deals with an accused whose mother tongue is either French or English, provides that the application in this regard shall be made not later than the time

a trial date is fixed where: (a) the offence is indictable, but within the absolute jurisdiction of a provincial court judge; (b) the offence is a summary conviction matter; (c) proceedings are commenced by way of a "direct" indictment (s. 577), or (d) the accused "elects" to be tried before a provincial court judge. In cases where there is a preliminary inquiry, the application need not be made until the accused has been ordered to stand trial.

Under subsec. (2) a similar application can be made by an accused whose mother tongue is not one of the two official languages but who is able to testify in one, or both, of them.

In the case of an unrepresented accused, subsec. (3) imposes upon the justice of the peace or provincial court judge before whom the accused first appears an obligation to advise the accused of his or her rights in this regard.

Even if no application is made by the accused under this provision, subsec. (4) empowers the trial court to make the necessary order if it is satisfied that to do so would be in the best interests of the administration of justice. If the justice of the peace or judge who makes the order does not speak the necessary language(s), he can remand the accused to appear before someone who does.

Subsection (5) permits that any order made under this provision for a trial in only one official language can, if circumstances warrant, be varied to encompass both languages.

## ANNOTATIONS

**Constitutional considerations** – In the companion cases of *A.-G. Man. v. Forest* (1979), 49 C.C.C. (2d) 353, [1979] 2 S.C.R. 1032 (7:0) and *A.-G. Que. v. Blaikie et al*; *A.-G. Que. v. Laurier et al.* (1979), 49 C.C.C. (2d) 359, [1979] 2 S.C.R. 1016 (7:0) provincial legislation in Manitoba and Quebec respectively making English in the former and French in the latter the official language of, *inter alia*, the Courts was held *ultra vires* as being in conflict with the Manitoba Act, 1870 (Can.), c. 3, as confirmed by the British North America Act, 1871, in the case of Manitoba and in conflict with s. 133 of the British North America Act, 1867, in the case of Quebec. In both those provinces use of either official language in the Courts is an entrenched right.

**Circumstances where order to be made** – An order was made for trial by a bilingual jury where it was desirable that the two accused be jointly tried although one had requested a French-speaking jury and the other had made no such request and his counsel only spoke English: *R. v. Lapointe and Sicotte* (1981), 64 C.C.C. (2d) 562 (Ont. Gen. Sess. of Peace). Similarly: *R. v. Garcia* (1990), 58 C.C.C. (3d) 43 (Que. S.C.).

**Duty to advise unrepresented accused [subsec. (3)]** – The provisions of this subsection are mandatory and require the Justice or Judge to bring home to the accused his rights either personally in the language of the accused, or through an interpreter or use of some written form. This function may not be delegated to duty counsel: *R. v. Lapierre* (1980), 54 C.C.C. (2d) 408 (Ont. Dist. Ct.).

**Procedure on trial** – The accused having requested a trial of a drinking and driving offence to be in the French language, the trial judge did not err in refusing to admit into evidence a breathalyzer certification which was only in the English language. The Crown had made no attempt at trial to have the certificate translated: *R. v. Boudreau* (1990), 59 C.C.C. (3d) 436, 25 M.V.R. (2d) 103, 107 N.B.R. (2d) 298 (N.B.C.A.).

While there may be circumstances in which a court before trial would order translation of a document to enable the accused to make full answer and defence and to have a fair trial, the mere fact that the accused has chosen to have his trial in the French language pursuant to s. 530 does not thereby entitle him to have disclosure from the Crown and police provided to him in the French language: *R. v. Rodrigue* (1994), 91 C.C.C. (3d) 455 (Y.T.S.C.), *affd* 95 C.C.C. (3d) 129, 87 W.A.C. 275, 26 C.R.R. (2d) 175, leave to appeal to S.C.C. refused 99 C.C.C. (3d) vi.

**WHERE ORDER GRANTED UNDER SECTION 530.**

**530.1** Where an order is granted under section 530 directing that an accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language that is the language of the accused or in which the accused can best give testimony,

- (a) the accused and his counsel have the right to use either official language for all purposes during the preliminary inquiry and trial of the accused;
- (b) the accused and his counsel may use either official language in written pleadings or other documents used in any proceedings relating to the preliminary inquiry or trial of the accused;
- (c) any witness may give evidence in either official language during the preliminary inquiry or trial;
- (d) the accused has a right to have a justice presiding over the preliminary inquiry who speaks the official language that is the language of the accused;
- (e) except where the prosecutor is a private prosecutor, the accused has a right to have a prosecutor who speaks the official language that is the language of the accused;
- (f) the court shall make interpreters available to assist the accused, his counsel or any witness during the preliminary inquiry or trial;
- (g) the record of proceedings during the preliminary inquiry or trial shall include
  - (i) a transcript of everything that was said during those proceedings in the official language in which it was said,
  - (ii) a transcript of any interpretation into the other official language of what was said, and
  - (iii) any documentary evidence that was tendered during those proceedings in the official language in which it was tendered; and
- (h) any trial judgment, including any reasons given therefor, issued in writing in either official language, shall be made available by the court in the official language that is the language of the accused. R.S.C. 1985, c. 31 (4th Supp.), s. 94.

**CROSS-REFERENCES**

The terms “justice” and “provincial court judge” are defined in s. 2.

Change of venue, where necessary to facilitate the trial where an order is made under s. 530, is provided for in s. 531. This Part does not derogate from other rights which may be afforded by provincial legislation, by virtue of s. 532. Provision for making regulations to carry out the provisions of this Part is provided for in s. 533.

Also see s. 841(3) which requires that any preprinted portions of a form set out in Part XXVIII shall be printed in both official languages.

**SYNOPSIS**

This section deals with the effect of an order made under s. 530. Where there is such an order, this section provides that: (a) the accused, defence counsel and witnesses have the right to use either official language during the preliminary inquiry or trial; (b) the accused and defence counsel may use pleadings and documents in either official language during such proceedings; (c) the accused has the right to have a justice presiding over the preliminary inquiry who speaks the official language of the accused; (d) except in the case of private prosecutions, the accused has the right to a prosecutor who speaks the official language of the accused; (e) interpreters shall be made available as required to the accused, defence counsel and witnesses during the preliminary inquiry or trial (this is also required by s. 14 of the *Canadian Charter of Rights and Freedoms*); (f) the record of the proceedings will be in the official language which was spoken, and will contain any interpretation which was given in the other official language. Documents will be in the official language in which they were tendered, and (g) any written reasons will be made available in the official language of the accused.



**ANNOTATIONS**

To the extent that para. (e) purports to deny or infringe the right of a public prosecutor in Quebec to use English or French, it is inconsistent with s. 133 of the Constitution Act, 1867 and therefore the paragraph is inoperative in Quebec: *R. v. Cross* (1991), 76 C.C.C. (3d) 445, [1991] R.J.Q. (S.C.).

**CHANGE OF VENUE.**

**531.** Notwithstanding any other provision of this Act but subject to any regulations made pursuant to section 533, the court shall order that the trial of an accused be held in a territorial division in the same province other than that in which the offence would otherwise be tried if an order has been made that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada and such order cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried. 1977-78, c. 36, s. 1.

**Editor's Note:** This section proclaimed in force in New Brunswick, Yukon Territory and Northwest Territories, May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982; in force in all other provinces in respect of summary conviction offences or indictable offences effective January 1, 1990.

**CROSS-REFERENCES**

The terms "justice", "provincial court judge" and "territorial division" are defined in s. 2. Procedure for an order for a trial in the official language of the accused is in s. 530. The procedure respecting conduct of the proceedings is set out in s. 530.1. This Part does not derogate from other rights which may be afforded by provincial legislation, by virtue of s. 532. Provision for making regulations to carry out the provisions of this Part is provided for in s. 533.

Also see s. 841(3) which requires that any preprinted portions of a form set out in Part XXVIII shall be printed in both official languages.

Provision for change of venue in other circumstances is provided for in ss. 599 and 600.

**SYNOPSIS**

This section provides that, subject to any regulations made pursuant to s. 533, the court must make an order changing the venue of the trial of an accused to another location within the province where: (a) an order regarding which official language the trial is to be conducted in has been made under s. 530, and (b) that order cannot be conveniently complied with in the territorial division in which the offence would otherwise be tried.

It is expected that such orders will be made only in jury trials. In all other situations court officials will be able to arrange for a justice of the peace or judge fluent in the required language(s) to travel to the area where proceedings would normally be held.

**SAVING.**

**532.** Nothing in this Part or the *Official Languages Act* derogates from or otherwise adversely affects any right afforded by a law of a province in force on the coming into force of this Part in that province or thereafter coming into force relating to the language of proceedings or testimony in criminal matters that is not inconsistent with this Part or that Act. 1977-78, c. 36, s. 1.

**Editor's Note:** This section proclaimed in force in New Brunswick, Yukon Territory and Northwest Territories, May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982, in force in all other provinces in respect of summary conviction offences or indictable offences effective January 1, 1990.

**CROSS-REFERENCES**

Procedure for an order for a trial in the official language of the accused is in s. 530.

The procedure respecting conduct of the proceedings is set out in s. 530.1. Change of venue where necessary to facilitate the trial where an order is made under s. 530 is provided for in s. 531. Provision for making regulations to carry out the provisions of this Part is provided for in s. 533.

Also see s. 841(3) which requires that any preprinted portions of a form set out in Part XXVIII shall be printed in both official languages.

**ANNOTATIONS**

As a result of pre-Confederation legislation still in force in Alberta an accused and his counsel have the right to use the French language for all purposes during his preliminary hearing and trial but the presiding judge or the jury need not be able to comprehend the French language without an interpreter: *Re Paquette and The Queen (No. 1)* (1987), 38 C.C.C. (3d) 333, [1988] 1 W.W.R. 97, 55 Alta. L.R. (2d) 1 (C.A.). The same pre-Confederation legislation was also considered in Saskatchewan in *R. v. Mercure* (1988), 39 C.C.C. (3d) 385, [1988] 1 S.C.R. 234, [1988] 2 W.W.R. 577 (6:2) in relation, however, to a trial of a provincial offence. It was there held that while the defendant was entitled to use French and to have his plea entered in French the defendant did not have the right to insist on a trial before a judge who understood that language without an interpreter.

**REGULATIONS.**

**533. The Lieutenant Governor in Council of a province may make regulations generally for carrying into effect the purposes and provisions of this Part in the province and the Commissioner of the Yukon Territory and the Commissioner of the Northwest Territories may make regulations generally for carrying into effect the purposes and provisions of this Part in the Yukon Territory and the Northwest Territories, respectively. 1977-78, c. 36, s. 1.**

**Editor's Note:** This section proclaimed in force in New Brunswick, Yukon Territory and Northwest Territories, May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982; in force in all other provinces in respect of summary conviction offences or indictable offences effective January 1, 1990.

**NOTE:** Re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

**REGULATIONS.**

*533. The Lieutenant Governor in Council of a province may make regulations generally for carrying into effect the purposes and provisions of this Part in the province and the Commissioner of the Yukon Territory, the Commissioner of the Northwest Territories and the Commissioner of Nunavut may make regulations generally for carrying into effect the purposes and provisions of this Part in the Yukon Territory, the Northwest Territories and Nunavut, respectively.*

**CROSS-REFERENCES**

Procedure for an order for a trial in the official language of the accused is in s. 530. The procedure respecting conduct of the proceedings is set out in s. 530.1. This Part does not derogate from other rights which may be afforded by provincial legislation, by virtue of s. 532. Change of venue, where necessary to facilitate the trial where an order is made under s. 530, is provided for in s. 531.

Also see s. 841(3) which requires that any preprinted portions of a form set out in Part XXVIII shall be printed in both official languages.

**COMING INTO FORCE / Consultation / Where no agreement reached.**

534. (1) Sections 530 and 531 to 533 shall come into force in any of the Provinces of Quebec, Nova Scotia, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, in respect of

- (a) offences punishable on summary conviction, or
- (b) indictable offences

on a day fixed by a proclamation declaring those sections to be in force in that Province with respect to those offences.

(2) Section 530.1 shall come into force in a province

- (a) in respect of offences punishable on summary conviction,
  - (i) on the day the *Official Languages Act* is assented to, in the case of a province in which sections 530 and 531 to 533 and paragraph 638(1)(f) are in force on that day in respect of offences punishable on summary conviction, or
  - (ii) on the day on which those sections and that paragraph come into force in respect of offences punishable on summary conviction, in the case of a province in which they are not in force in respect of offences punishable on summary conviction on the day this Act is assented to; and
- (b) in respect of indictable offences,
  - (i) on the day the *Official Languages Act* is assented to, in the case of a province in which those sections and that paragraph are in force in respect of indictable offences on that day, or
  - (ii) on the day on which those sections and that paragraph come into force in respect of indictable offences, in the case of a province in which they are not in force in respect of indictable offences on the day this Act is assented to.

(3) Notwithstanding any other provision in this section, sections 530 and 531 to 533 shall come into force on January 1, 1990

- (a) in respect of offences punishable on summary conviction, in any province in which those sections are not in force in respect of offences punishable on summary conviction immediately prior to that date; and
  - (b) in respect of indictable offences, in any province in which those sections are not in force in respect of indictable offences immediately prior to that date.
- R.S.C. 1985, c. 27 (1st Supp.), s. 95; c. 31 (4th Supp.), s. 95.

**CROSS-REFERENCES**

For cross-references see notes to s. 530.

**SYNOPSIS**

Prior to January 1, 1990, this provision authorized a selective proclamation of this Part. By virtue of subsec. (3), this Part is now proclaimed in force throughout Canada.

**Part XVIII / PROCEDURE ON PRELIMINARY INQUIRY*****Jurisdiction*****INQUIRY BY JUSTICE.**

535. Where an accused who is charged with an indictable offence is before a justice, the justice shall, in accordance with this Part, inquire into that charge and any other indictable offence, in respect of the same transaction, founded on the facts that are



disclosed by the evidence taken in accordance with this Part. R.S., c. C-34, s. 463; R.S.C. 1985, c. 27 (1st Supp.), s. 96.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. As a matter of practice preliminary inquiries are usually conducted by provincial court judges. For further discussion re procedure on preliminary inquiries see *Note on procedure at preliminary inquiry* under s. 537.

#### SYNOPSIS

This provision confers general jurisdiction on a “justice” to deal with accused persons, in accordance with Part XVIII, who are charged with indictable offences.

Section 2 defines “justice” as including justices of the peace and provincial court judges. Local practice will determine which functions are carried out by a justice and which by a judge. For the most part, it is the provincial court judge who will deal with matters of bail and election, and preside over preliminary inquiries.

#### ANNOTATIONS

In *Re Mairs et al.* (1961), 130 C.C.C.361, 35 C.R. 265 (B.C.S.C.) it was held, following *R. v. Hughes* (1879), 4 Q.B.D.614, and *R. v. Shaw* (1865), 10 Cox.C.C.66, that process is not necessary to the jurisdiction of the justices to hear and adjudicate and that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there but may try it.

If the justice is of the opinion that the charge does not reveal an offence known to law and is an absolute nullity, the accused is not “charged with an indictable offence” and the justice may discharge him without taking evidence: *R. v. Bolduc* (1980), 60 C.C.C. (2d) 357, 20 C.R. (3d) 372 (Que. C.A.), affd 68 C.C.C. (2d) 413, 28 C.R. (3d) 193n, 137 D.L.R. (3d) 674, [1982] 1 S.C.R. 573 (7:0).

Aside from determining whether the charge in the information is valid on its face, the justice presiding at a preliminary inquiry has no jurisdiction to inquire into the validity of the allegation contained in the information itself, by embarking on an inquiry as to whether or not the informant had reasonable grounds for swearing the information: *Re Hislop and The Queen* (1983), 7 C.C.C. (3d) 240, 36 C.R. (3d) 29 (Ont. C.A.), leave to appeal to S.C.C. refused November 7, 1983.

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#### REMAND BY JUSTICE TO PROVINCIAL COURT JUDGE IN CERTAIN CASES /

**Election before justice in certain cases / Procedure where accused elects trial by provincial court judge / Procedure where accused elects trial by judge alone or by judge and jury or deemed election / Jurisdiction.**

**536. (1)** Where an accused is before a justice other than a provincial court judge charged with an offence over which a provincial court judge has absolute jurisdiction under section 553, the justice shall remand the accused to appear before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed.

**(2)** Where an accused is before a justice charged with an offence, other than an offence listed in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, the justice shall, after the information has been read to the accused, put the accused to his election in the following words:

You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to have a preliminary inquiry and to be tried by a judge without a jury; or you may elect to have a preliminary inquiry and to be tried by a court composed of a judge and jury. If you do not elect now, you shall be deemed to have elected to have a

**preliminary inquiry and to be tried by a court composed of a judge and jury. How do you elect to be tried?**

(3) Where an accused elects to be tried by a provincial court judge, the justice shall endorse on the information a record of the election and shall

- (a) where the justice is not a provincial court judge, remand the accused to appear and plead to the charge before a provincial court judge having jurisdiction in the territorial division in which the offence is alleged to have been committed; or
- (b) where the justice is a provincial court judge, call on the accused to plead to the charge and if the accused does not plead guilty, proceed with the trial or fix a time for the trial.

(4) Where an accused elects to have a preliminary inquiry and to be tried by a judge without a jury or by a court composed of a judge and jury or does not elect when put to his election, the justice shall hold a preliminary inquiry into the charge and if the accused is ordered to stand trial, the justice shall endorse on the information and, where the accused is in custody, on the warrant of committal, a statement showing the nature of the election of the accused or that the accused did not elect, as the case may be.

(5) Where a justice before whom a preliminary inquiry is being or is to be held has not commenced to take evidence, any justice having jurisdiction in the province where the offence with which the accused is charged is alleged to have been committed has jurisdiction for the purposes of subsection (4). R.S., c. C-34, s. 464; R.S.C. 1985, c. 27 (1st Supp.), s. 96.

#### CROSS-REFERENCES

The terms "justice", "provincial court judge" and "territorial division" are defined in s. 2. Territorial jurisdiction is generally dealt with in Part XIV. The pleas which the accused may enter are set out in ss. 606 to 613. Validity of an information is dealt with in ss. 580 to 601. The jurisdiction of the provincial court judge to try the accused is set out in Part XIX. Where the accused refuses to elect under this section then by virtue of s. 565(1)(c) he is deemed to have elected trial by judge and jury. He may however re-elect in accordance with s. 561. Where accused who are jointly charged fail to elect the same mode of trial then, pursuant to s. 567, the justice may decline to record the elections and the accused are deemed to have elected trial by judge and jury under s. 565(1)(b). For further discussion re procedure on preliminary inquiries see *Note on procedure at preliminary inquiry* under s. 537.

**Note on mode of trial** – The scheme of the Criminal Code is to classify offences as pure indictable [e.g., robbery, s. 344], purely summary [e.g., soliciting, s. 213] or hybrid, i.e., the prosecution may elect whether to proceed by way of summary conviction or by indictment [e.g., assault, s. 266]. The effect of s. 468 is that the superior court of criminal jurisdiction may try any purely indictable offence or any hybrid offence where the prosecution elects to proceed by way of indictment. Other courts of criminal jurisdiction (defined in s. 2) may, however, try indictable offences except those offences listed in s. 469 [e.g., murder, s. 235]. The offences listed in s. 469 may only be tried by the superior court of criminal jurisdiction with a jury subject to a re-election in conformity with s. 473. Indictable offences not listed in s. 469 fall into two categories. For the majority of the indictable offences not listed in s. 469 the accused may elect his mode of trial as set out in s. 536(2) and within limits may change his election [see, e.g., s. 561]. While the Attorney General is given a narrow discretion to override this election and require a jury trial under s. 568 in the circumstances defined therein and in addition a provincial court judge has a discretion to override or not record an accused's election for trial by provincial court judge and hold a preliminary inquiry [see for example ss. 555 and 567] the thrust of the provisions is to give the accused the right to determine the manner of trial. [In those provinces which still maintain two levels of courts in addition to the provincial court, it is in the discretion of the Crown whether to place the indictment in the superior court or the other court, however described, e.g., county court, where the accused elects trial other than by

provincial court judge.] The other group of offences are those offences listed in s. 553 [e.g., keeping common bawdy house, s. 210(1)] which fall within the absolute jurisdiction of a provincial court judge, meaning that the accused does not have a normal election as to the mode of trial under s. 536(2). Nevertheless, the other courts with jurisdiction to try indictable offences have jurisdiction to try the offences listed in s. 553 if the provincial court judge elects not to try the offence and requires that the case proceed by way of preliminary inquiry pursuant to s. 555(1), or in the course of the trial it is disclosed that in fact the offence is not one over which the provincial court judge has absolute jurisdiction, in which case the accused must then be put to his election under s. 536(2) [for example a charge of theft of goods of a value not exceeding \$1,000 where the evidence discloses that the value of the goods exceeds \$1,000].

For all summary conviction offences meaning purely summary conviction or hybrid offences where the prosecution elects to proceed by way of summary conviction only the summary conviction court (defined in s. 785) may try the accused. The procedure for trial of summary conviction offences generally resembles trial of an indictable offence by a provincial court judge but that procedure including special rights of appeal is set out in Part XXVII.

## SYNOPSIS

This section sets out the general procedures to be followed in the provincial court in dealing with an accused charged with an indictable offence.

If the accused appears before a justice of the peace and the offence is one within the absolute jurisdiction of a provincial court judge, the justice must, under subsec. (1), remand the accused to appear before a judge in the territorial division in which the offence is alleged to have occurred.

Subsection (2) sets out the language to be used where the offence is one for which the accused has an “election” as to the mode of trial (i.e., provincial court judge, judge alone or judge and jury). This will occur where the offence is not one within the absolute jurisdiction of a provincial court judge (s. 533), or is one which must proceed before a superior court (s. 469).

Under subsec. (3), where the election for trial in provincial court is made before a justice, the accused will be remanded to appear before a judge for the taking of a plea and the fixing of a date for hearing. Of course, if the accused is already before a judge, he or she can deal with these matters. There is no requirement that the “election” be put at the accused’s first appearance before a justice or judge. Often this will be deferred until the accused has had sufficient time to retain and be advised by counsel.

Where the election is for trial before other than a provincial court judge, a preliminary inquiry will be held. This will also occur if the accused, for whatever reason, refuses to elect (subsec. (4)). A record of the election, or refusal, will be made.

If no evidence has yet been called, subsec. (5) permits the hearing to be conducted by a justice or judge other than the one before whom the accused elected. (Also see s. 547.1 – justice unable to continue.)

## ANNOTATIONS

**Form of election** – The form of election should be put to the accused substantially in the form in which it is set out in this subsection and in fact courts should follow the precise language of the subsection. In particular, merely asking the accused: “How do you elect to be tried?” is not sufficient to give the Court jurisdiction to hold a preliminary hearing where counsel replies that he elects to be tried by “Judge alone”: *R. v. Leske*, [1969] 1 C.C.C. 347, 2 C.R.N.S. (Alta. S.C. App.Div.).

**Election by accused** – In *R. v. Karpuk* (1962), 133 C.C.C. 108, 37 C.R. 326 (Ont. C.A.), a conviction was quashed when it appeared that the reply of the accused, when asked to elect, left no doubt that he was considering trial forthwith as against trial at a later date, rather than the alternative modes of trial open to him.

It was held in *R. v. Bobyk*, [1963] 2 C.C.C. 91, 39 C.R. 27 (Alta. S.C. App. Div.), that the consent by which the accused foregoes the privilege of trial by jury must be given in



a manner that makes it clear beyond doubt that he has consented to forego that right. The consent cannot be inferred from the conduct of the accused nor given otherwise than by an express consent given openly in court.

Despite the fact that the election does not appear in the transcript the endorsement on the information as to the accused's election constitutes sufficient proof of the compliance with this section in the absence of evidence to the contrary: *R. v. Squires* (1977), 35 C.C.C. (2d) 325, 11 Nfld. & P.E.I.R. 457 (Nfld. C.A.).

**Delay in putting to election** – In *Doyle v. The Queen* (1976), 29 C.C.C. (2d) 177, 35 C.R.N.S.1 (9:0) (S.C.C.) it was held that what would have amounted to a delay of almost eight months before the accused was put to his election involved a loss of jurisdiction over the accused. Ritchie J., referring to [now] s. 536 stated as follows:

In my view, the whole structure of the procedural provisions of the *Code* which deal with the treatment of persons immediately after they have been arrested is designed to provide a speedy disposition of their cases. As I have said, the arresting officer is required to bring such a person before a Magistrate within 24 hours, and the duties with which a Magistrate is thereafter seized are all phrased in mandatory language so that I am unable to agree with the view expressed in the Newfoundland Court of Appeal which culminates in the present case in authorization of a delay of eight months between the arrest and the opportunity to elect for trial. In my view, the failure of both Magistrates to put the accused to his election as required by the *Code* was a clear error which of itself involved the loss of jurisdiction over the accused.

In *R. v. Locke* (1976), 31 C.C.C. (2d) 441, 12 Nfld. & P.E.I.R. 286 (Nfld.Prov.Ct.) it was held, considering *Doyle v. The Queen*, *supra*, that the election should be put to the accused as soon as he is prepared to make his election and in any event within a reasonably short time. However, this subsection does not require that the accused be put to his election immediately after the information is read to him on his first appearance in Court and before he has had an opportunity to consult counsel.

In *Re Aiello and The Queen* (1977), 33 C.C.C. (2d) 280 (Ont.H.C.J.) it was held that under s. 537(1)(a) the Magistrate has power to adjourn the inquiry for any sufficient reason which would include an adjournment to enable the accused to retain counsel so that an intelligent election under this subsection can be made. Further, even if the failure to put the accused to his election resulted in a loss of jurisdiction it was only loss of jurisdiction over the person which would be regained when the accused appeared in Court again on the charge.

The mere failure to put the accused to his election at the first or any particular subsequent appearance will not result in loss of jurisdiction but the refusal to put the accused to his election when he so requests will result in a loss of jurisdiction over the accused: *Re Chaisson and The Queen* (1984), 15 C.C.C. (3d) 50 (Ont. H.C.J.).

In *Re Regina and Geszthelyi* (1977), 33 C.C.C. (2d) 543, 38 C.R.N.S. 15 *sub nom. Geszthelyi v. The Queen* (B.C.C.A.) this section was interpreted as merely prescribing the order which is to be followed in the proceedings but does not fix the time for making the election. Thus jurisdiction was not lost where the accused was not put to his election on his first appearance. Further, the power of adjournment under s. 537(1)(a) exists throughout the proceedings and is not dependent on the accused having been given his election at the outset.

**Failure to endorse election [subsec. (4)]** – It was held in relation to the predecessor to this subsection that failure to endorse the nature of the election was fatal to the conviction: *R. v. MacDonald* (1974), 18 C.C.C. (2d) 136, 8 N.S.R. (2d) 589 (S.C.App.Div.); but the Justice need not set out the entire subsec. (2). This subsection is sufficiently complied with if a memorandum as to how the accused elected is endorsed on the information: *R. v. Squires* (1977), 35 C.C.C. (2d) 325, 11 Nfld. & P.E.I.R. 457 (Nfld.C.A.). And in *R. v. Sagutch* (1991), 63 C.C.C. (3d) 569 (B.C.C.A.) it was held that, while the failure of the judge to endorse the election was a jurisdictional error, the accused's appeal from the dismissal of an application to quash the order to stand trial could be dismissed pursuant to s. 686(1)(b)(iv).

## Powers of Justice

### POWERS OF JUSTICE.

#### 537. (1) A justice acting under this Part may

- (a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason;
- (b) remand the accused to custody for the purposes of the *Identification of Criminals Act*;
- (b) [*Repealed (old provision)*. 1991, c. 43, s. 9.]
- (c) except where the accused is authorized pursuant to Part XVI to be at large, remand the accused to custody in a prison by warrant in Form 19;
- (d) resume an inquiry before the expiration of a period for which it has been adjourned with the consent of the prosecutor and the accused or his counsel;
- (e) order in writing, in Form 30, that the accused be brought before him, or any other justice for the same territorial division, at any time before the expiration of the time for which the accused has been remanded;
- (f) grant or refuse permission to the prosecutor or his counsel to address him in support of the charge, by way of opening or summing up or by way of reply on any evidence that is given on behalf of the accused;
- (g) receive evidence on the part of the prosecutor or the accused, as the case may be, after hearing any evidence that has been given on behalf of either of them;
- (h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing;
- (i) regulate the course of the inquiry in any way that appears to him to be desirable and that is not inconsistent with this Act; and
- (j) where the prosecutor and the accused so agree, permit the accused to appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the inquiry other than a part in which the evidence of a witness is taken. R.S., c. C-34, s. 465; R.S., c. 2 (2nd Supp.), s. 6; 1972, c. 13, s. 38; 1974-75-76, c. 93, s. 58; 1991, c. 43, s. 9; 1994, c. 44, s. 53.

#### (2) to (4) [*Repealed*. 1991, c. 43, s. 9.]

### CROSS-REFERENCES

The term “justice” is defined in s. 2. As a matter or practice preliminary inquiries are usually conducted by provincial court judges.

**Note on procedure at preliminary inquiry** – This section, in general, sets out the powers of the justice or provincial court judge presiding at a preliminary inquiry and, in particular, deals with adjournment of the inquiry and orders directing that the accused attend for observation or be remanded for observation. Where an issue of fitness to stand trial arises at the preliminary inquiry then the procedure to be followed is set out in ss. 672.11 to 672.2 and 672.22 to 672.33. Section 523(2) gives the justice a power to vary a release or detention order for non-s. 469 offences where cause is shown where the Crown and defence consent to the justice exercising that jurisdiction [not necessarily consenting that the order should be made]. In addition at the completion of the preliminary inquiry the justice without consent of the parties but upon cause being shown may vary the release or detention order in relation to a non-s. 469 offence.

The procedure for conducting the preliminary inquiry is set out in this Part and may briefly be described as follows. While the accused is arraigned on the charge he is not called upon to plead.

Section 539 permits an application to be made to prohibit publication of the proceedings until the accused is discharged, or if ordered to stand trial, until the trial is ended. The order is mandatory when applied for by the accused at the opening of the inquiry. The order is discretionary when applied for by the prosecutor. Where the accused is not represented by counsel the justice is to inform the accused of his right to apply for the order under s. 539. It is a summary conviction offence (s. 539(3)) to violate the order. It is not unusual, in addition, to apply for an order excluding witnesses until they have testified. While not specifically provided for in this Part it would seem that s. 537(1)(h) or (i) is wide enough to permit the making of such an order. In a proper case the judge can hold the inquiry in camera pursuant to s. 537(1)(h). The taking of evidence commences with the calling of evidence by the prosecutor which is taken under oath [or affirmation] in accordance with s. 540 and the provisions of ss. 14 to 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5. While s. 540 provides for the evidence to be taken in the form of a deposition this provision is virtually never resorted to now and evidence is usually taken verbatim by a court reporter or through the use of sound-recording equipment as contemplated by s. 540(1)(b)(ii) and (5). The record is then in the form of a transcript. Section 715 provides for the admission of evidence taken at the preliminary inquiry where the witness is unavailable for the reasons set out therein at the trial. Section 715.1 provides for admission of a video tape at the preliminary inquiry, made within a reasonable time after the alleged offence in the case of an accused charged with certain sexual offences, where the complainant is under 18 years of age. As to other provisions which govern admission of evidence in sexual offence cases see the notes under the particular section with which the accused is charged or the cross-references under s. 150.1. Sections 709 to 714 provide a means for obtaining the evidence of a witness through appointment of a commissioner to take the evidence. Provisions for securing the presence of witnesses through subpoena and material witness warrant are set out in Part XXII. Procedure for procuring the attendance of a witness who is in custody or the attendance of the accused himself where he is in custody is set out in s. 527. Where a witness refuses to be sworn or to answer questions or to produce documents requested the justice may adjourn the inquiry and remand the witness to custody for successive periods each not exceeding eight days, pursuant to s. 545. Where the accused absconds in the course of the preliminary inquiry the justice may continue the preliminary inquiry in his absence under s. 544. Pursuant to s. 549 the preliminary inquiry may be waived at any stage where the accused and the Crown consent to an order to stand trial. This may be done at any stage of the proceedings and even before any evidence has been taken.

The accused has the right to cross-examine any prosecution witnesses by virtue of s. 540(1)(a). Section 542 makes it clear that the prosecution may introduce a confession by an accused. However, the common law voluntariness rule applies at the preliminary inquiry as at trial. It is a summary conviction offence to publish a report concerning a confession or admission by the accused unless the accused was discharged or the trial has been completed (s. 542(2)). After the prosecution has called its evidence s. 541 provides that the accused is to be addressed in the terms set out in s. 541(1) and anything he says is taken down pursuant to s. 541(2) and is admissible in evidence in accordance with s. 657, subject to possible application of s. 13 of the Charter. Having been addressed the accused is then entitled to call witnesses pursuant to s. 541(3) and their evidence is taken in the same manner as the prosecution evidence (s. 541(4)). At the conclusion of all the evidence the accused and probably the prosecutor are entitled to make submissions as to whether or not the accused should be ordered to stand trial pursuant to s. 548. Section 548 gives the justice the power to order that the accused stand trial for the offence charged or any other indictable offence (including a hybrid offence) in respect of the same transaction. Following an order to stand trial an indictment will be presented in accordance with s. 574, except that if the accused was discharged, or no preliminary inquiry was held, then the provisions of s. 577 must be complied with.

Certain other miscellaneous provisions govern the conduct of the inquiry. Section 538 incorporates s. 556 respecting appearance of a corporate accused. Section 543 provides for the transfer of the proceedings to another jurisdiction where it appears that the offence was committed outside the limits of the jurisdiction in which the accused has been charged. Section 546 provides that certain irregularities, defects or variances do not affect the validity of the preliminary inquiry or subsequent



proceedings. Section 547 provides for adjournment where the accused has been misled by the irregularity, defect or variance. Section 547.1 provides for the continuation of the preliminary inquiry before another justice where the initial justice is unable to continue. Section 550 is a little-used provision permitting the justice to require a material witness to enter into a recognizance and for committal of the witness if he fails to comply with the recognizance. Section 551 provides for the transmission of the record to the trial court. After the order to stand trial s. 603 gives the accused the right to inspect the record and to receive copies upon payment of a fee. It is customary in any event to order a copy of the preliminary inquiry. The evidence taken on the preliminary inquiry constitutes a prior statement reduced to writing for the purposes of ss. 9 and 10 of the Canada Evidence Act.

## ANNOTATIONS

**Jurisdiction generally to control process** – It was held in *Doyle v. The Queen* (1976), 29 C.C.C. (2d) 177, [1977] 1 S.C.R. 597, 68 D.L.R. (3d) 270, 35 C.R.N.S. 1 (9:0), that the power and jurisdiction of a magistrate [now provincial court judge] acting under the Code are circumscribed by the provisions contained therein and must be found to have been confirmed thereby either expressly or by necessary implication. The Court disapproved of the opinion expressed in *R. v. Keating* (1973), 11 C.C.C. (2d) 133, 21 C.R.N.S. 217 (Ont. C.A.) that the Court has an inherent jurisdiction to control its own process. Rather, “the careful and detailed procedural directions mentioned in the Code are of necessity exhaustive . . . the power of a magistrate or justice acting under the Criminal Code [are] entirely statutory”.

The power given the judge under this section includes the power to order that counsel be disqualified from continuing to act where necessary to prevent the lawyer from placing himself in a conflict of interest: *Re Regina and Robillard* (1986), 28 C.C.C. (3d) 22 (Ont. C.A.).

**Right to adjourn** – Until the Crown elects otherwise a Crown option offence is deemed to be indictable and the Court has power to adjourn the proceedings under this subsection: *R. v. Gougeon*; *R. v. Haesler*; *R. v. Gray* (1980), 55 C.C.C. (2d) 218 (Ont. C.A.), leave to appeal to S.C.C. refused 35 N.R. 83n.

**Right to make submissions [subsec. (1)(f)]** – The Justice has no discretion to refuse counsel for the accused the right to make submissions and such a refusal is a denial of natural justice which will lead to the committal for trial being quashed: *R. v. Taillefer et al.* (1978), 42 C.C.C. (2d) 282, 3 C.R. (3d) 357 (Ont. C.A.).

**Evidence and Crown right to call witnesses [As to defence evidence, see s. 541]** – The Crown has a discretion to present only that evidence which makes out a *prima facie* case: *Caccamo v. The Queen* (1975), 29 C.R.N.S. 78 (7:2) (S.C.C.).

The Crown has a discretion to call whatever witnesses it requires and the presiding justice has no power to direct the Crown to call certain witnesses: *Re R. and Brass* (1981), 64 C.C.C. (2d) 206 (Sask. Q.B.).

Conversely, the judge has no power to prevent the prosecution from calling certain witnesses although he is satisfied there is sufficient evidence to order that the accused stand trial: *Re R. and Schreder* (1987), 36 C.C.C. (3d) 216, 59 C.R. (3d) 183, [1987] N.W.T.R. 240 (S.C.).

The Crown has the right during a preliminary inquiry to withdraw the charge against one accused and call him as a witness against the other accused: *R. v. Dick*, [1969] 1 C.C.C. 147, 4 C.R.N.S. 102 *sub nom. Re Dick* (Ont. H.C.J.).

**Exclusion of public [subsec. (1)(h)]** – If possible a hearing should be conducted by the Judge on the question as to whether he should exercise his discretion and limit the public's access to his Court, but in any event the record should contain both his order and his reasons therefor: *Re Armstrong and State Of Wisconsin* (1972), 7 C.C.C. (2d) 331, [1972] 3 O.R. 229 (Ont. H.C.J.).

The justice has no power to limit the exclusion order to certain members of the public such as foreign journalists who have indicated they intend to publish details of the evidence despite a publication ban under s. 539. Thus, it may be that to secure a fair trial for the accused all members of the public must be excluded: *R. v. Sayegh (No. 1)* (1982), 66 C.C.C. (2d) 430 (Ont. Prov. Ct.) and *R. v. Sayegh (No. 2)* (1982), 66 C.C.C. (2d) 432 (Ont. Prov. Ct.).

The mere possibility that spectators might talk to prospective witnesses is not a ground to order exclusion of the public. Further, while the judge is, in some circumstances, entitled to make the order excluding the public on the basis of submissions of counsel, where those submissions, to the effect that certain spectators might intimidate witnesses, are challenged and it is clear that counsel did not purport to speak from personal knowledge nor to convey instructions that he had received on the matter, then the submissions are nothing but speculation and not a basis for an order of exclusion: *Re Vaudrin and The Queen* (1982), 2 C.C.C. (3d) 214, 32 C.R. (3d) 162 (B.C.S.C.).

**Exclusion of witnesses** – Upon counsel's request an order for exclusion of witnesses must be made unless grounds are shown why the justice should not make the order: *Re Learn and The Queen* (1981), 63 C.C.C. (2d) 191 (Ont. H.C.J.).

Further, there is virtually no case where credibility is in issue and witnesses will be testifying as to fact and the application is unopposed, that the justice would be justified in refusing to make the requested order: *Re Collette and The Queen; Re Richard and The Queen* (1983), 6 C.C.C. (3d) 300 (Ont. H.C.J.), affd 7 C.C.C. (3d) 574n (C.A.), leave to appeal to S.C.C. refused February 7, 1984.

The power to make an exclusion order does not include the power to order that there be no communication between counsel and the witnesses: *Re O'Callaghan and The Queen* (1982), 65 C.C.C. (2d) 459, 25 C.R. (3d) 68 (Ont. H.C.J.).

**Absence of accused** – The provisions of the Criminal Code contemplate the presence of the accused throughout his preliminary inquiry and the accused is not entitled to unilaterally waive a procedural requirement which is enacted both for his benefit and for the benefit of the Crown: *Re McLachlan and The Queen* (1986), 24 C.C.C. (3d) 255 (Ont. C.A.).

In an identification case, the judge has a discretion to permit the accused to sit in the body of the court. However, refusal to exercise the discretion is not a jurisdictional matter and is therefore not reviewable by the superior court: *Re Vaudrin and The Queen* (1982), 2 C.C.C. (3d) 214 (B.C.S.C.).

Also now see s. 537(1)(f).

**Full answer and defence** – The accused is entitled to make full answer and defence at his preliminary inquiry: *R. v. Pearson* (1957), 117 C.C.C. 249, 25 C.R. 342 (Alta. S.C. App. Div.).

The accused was deprived of his right to full answer and defence when he attended for his preliminary inquiry and found that the Crown had substituted numerous charges within the exclusive jurisdiction of a provincial court judge who refused to allow him an adjournment: *Re Regina v. Carter* (1972), 7 C.C.C. (2d) 49, [1972] 3 O.R. 50 (H.C.J.).

**Application of Charter** – A provincial court judge presiding at a preliminary inquiry is not a court of competent jurisdiction under s. 24 of the Canadian Charter of Rights and Freedoms and therefore has no power to order a stay of proceedings by reason of unreasonable delay under s. 11(b) of the Charter: *Mills v. The Queen* (1986) 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863 (4:3).

Nor does a judge presiding at a preliminary inquiry have jurisdiction to determine the constitutionality of an evidentiary provision of the Criminal Code under s. 52 of the Constitutional Act, 1982: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 4 O.R. (3d) 383 (S.C.C.) (7:2).

Notwithstanding the preference for alleged violations of s. 11(b) of the Charter being

heard by the trial court, in a proper case, the superior court should grant an order staying proceedings by reason of violation of s. 11(b) of the Charter due to unreasonable delay in commencing the preliminary inquiry. Where the application is brought to the superior court in advance of the preliminary inquiry, that court may properly consider the entire period of time up to the date set for the hearing where the date for the preliminary inquiry was fixed and could not, at the behest of the accused, be moved up: *R. v. Smith* (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1 (9:0).

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## CORPORATION.

**538. Where an accused is a corporation, subsections 556(1) and (2) apply, with such modifications as the circumstances require. R.S., c. C-34, s. 466.**

## CROSS-REFERENCES

For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

## SYNOPSIS

A corporation shall appear at the preliminary inquiry into charges against it by counsel or by agent. Where the corporation has been served with a summons and does not appear, the preliminary inquiry may proceed in the absence of the accused corporation.

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## *Taking Evidence of Witnesses*

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**ORDER RESTRICTING PUBLICATION OF EVIDENCE TAKEN AT PRELIMINARY INQUIRY / Accused to be informed of right to apply for order / Failure to comply with order / Definition of “newspaper”.**

**539. (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry**

**(a) may, if application therefor is made by the prosecutor, and**

**(b) shall, if application therefor is made by any of the accused, make an order directing that the evidence taken at the inquiry shall not be published in any newspaper or broadcast before such time as, in respect of each of the accused,**

**(c) he is discharged; or**

**(d) if he is ordered to stand trial, the trial is ended.**

**(2) Where an accused is not represented by counsel at a preliminary inquiry, the justice holding the inquiry shall, prior to the commencement of the taking of evidence at the inquiry, inform the accused of his right to make application under subsection (1).**

**(3) Everyone who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.**

**(4) In this section, “newspaper” has the same meaning as it has in section 297. R.S., c. C-34, s. 467; R.S.C. 1985, c. 27 (1st Supp.), s. 97.**

## CROSS-REFERENCES

The trial of the offence under s. 539(3) is conducted by a summary conviction court in accordance with Part XXVII. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

## SYNOPSIS

This section authorizes the justice conducting the preliminary inquiry to make an order, prior to the commencing of the taking of evidence, banning the publication or broadcast



of the evidence called at the inquiry until such time as the accused is either discharged (subsec. (1)(c)) or, where there is an order to stand trial, until the trial has ended (subsec. (1)(d)). Its purpose is to protect the accused's right to a fair trial. Such an order is mandatory if sought by the accused (subsec. (1)(b)), discretionary if sought by the Crown (subsec. (1)(a)).

If the accused is not represented by counsel at the preliminary inquiry, the justice holding the inquiry must inform the accused of his right to make application under subsec. (1) prior to the commencement of the taking of evidence.

It is a summary conviction offence to breach an order made under subsec. (1) (subsec. (3)).

## ANNOTATIONS

**Subsec. (1)** – This subsection, which is directed at ensuring a fair trial for the accused as guaranteed by s. 11 (d) of the Charter of Rights and Freedoms, does not constitute an unconstitutional infringement on the guarantee to freedom of the press as guaranteed by s. 2 (b) of the Charter: *R. v. Banville* (1983), 3 C.C.C. (3d) 312, 34 C.R. (3d) 20 (N.B.Q.B.).

Where the application for a ban on publication is made only during the course of the preliminary inquiry the justice has a discretion whether or not to make the order and he is also entitled to lift the ban in proper circumstances: *R. v. Harrison* (1984), 14 C.C.C. (3d) 549 (Que. Ct. Sess.).

**Subsec. (3)** – A reporter for a United States newspaper who submitted a story containing a report of evidence at a preliminary inquiry notwithstanding an order under subsec. (1) could be tried in Canadian Courts for the offence under this subsection where the United States newspaper was circulated in Canada: *R. v. Banville* (1983), 3 C.C.C. (3d) 312, 34 C.R. (3d) 20 (N.B.Q.B.).

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## TAKING EVIDENCE / Reading and signing depositions / Authentication by justice / Stenographer to be sworn / Authentication of transcript / Transcription of record taken by sound recording apparatus.

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**540. (1)** Where an accused is before a justice holding a preliminary inquiry, the justice shall

- (a) take the evidence under oath, in the presence of the accused, of the witnesses called on the part of the prosecution and allow the accused or his counsel to cross-examine them; and
- (b) cause a record of the evidence of each witness to be taken
  - (i) in legible writing in the form of a deposition, in Form 31, or by a stenographer appointed by him or pursuant to law, or
  - (ii) in a province where a sound recording apparatus is authorized by or under provincial legislation for use in civil cases, by the type of apparatus so authorized and in accordance with the requirements of the provincial legislation.

**(2)** Where a deposition is taken down in writing, the justice shall, in the presence of the accused, before asking the accused if he wishes to call witnesses,

- (a) cause the deposition to be read to the witness;
- (b) cause the deposition to be signed by the witness; and
- (c) sign the deposition himself.

**(3)** Where depositions are taken down in writing, the justice may sign

- (a) at the end of each deposition; or
- (b) at the end of several or of all the depositions in a manner that will indicate that his signature is intended to authenticate each deposition.

**(4)** Where a stenographer appointed to take down the evidence is not a duly sworn

court stenographer, he shall make oath that he will truly and faithfully report the evidence.

(5) Where the evidence is taken down by a stenographer appointed by the justice or pursuant to law, it need not be read to or signed by the witnesses, but shall be transcribed by the stenographer and the transcript shall be accompanied by

- (a) an affidavit of the stenographer that it is a true report of the evidence; or
- (b) a certificate that it is a true report of the evidence if the stenographer is a duly sworn court stenographer.

(6) Where, in accordance with this Act, a record is taken in any proceedings under this Act by a sound recording apparatus, the record so taken shall be dealt with and transcribed and the transcription certified and used in accordance with the provincial legislation with such modifications as the circumstances require mentioned in subsection (1). R.S., c. C-34, s. 468; R.S.C. 1985, c. 27 (1st Supp.), s. 98.

### CROSS-REFERENCES

For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537. As to taking evidence of children and persons whose competency is objected, see s. 16 of the Canada Evidence Act.

### SYNOPSIS

This section requires that a permanent record be made of the evidence called at a preliminary inquiry. This is usually done by either a court stenographer or through the use of sound recording equipment approved under provincial legislation. In either case a transcript of the evidence will be produced.

Subsection (1)(a) provides that the accused has a right to cross-examine any witness called by the Crown.

Although written depositions are provided for, such are rarely used.

For the most part the normal rules of evidence apply. One major exception is s. 24(2) of the Charter. As the Supreme Court of Canada has held that a justice or judge presiding at a preliminary inquiry is not “a court of competent jurisdiction” for the purpose of granting Charter remedies, there is no power to exclude evidence obtained in a manner which breached one of its provisions (*e.g.*, s. 8 – unreasonable search or seizure).

### ANNOTATIONS

**Recalling of witnesses** – A justice may allow a witness to be recalled to correct any wrong evidence that he has given: *R. v. Jones, ex p. Ponak et al.* [1970] 1 C.C.C. 250, 7 D.L.R. (3d) 381 (B.C.C.A.).

**Right to cross-examine** – The arbitrary fixing of a time limitation on cross-examination of a witness constituted a refusal to exercise jurisdiction and was cured by a *mandamus* order to allow counsel to continue: *Re Regina and Roulette* (1972), 7 C.C.C. (2d) 244, [1972] 4 W.W.R. 508 (Man. Q.B.).

The right of cross-examination contemplated by this subsection is that of full, detailed and careful cross-examination based on a known examination-in-chief; and thus where counsel for accused was delayed in attending the preliminary hearing because of attendance in another Court, so that he was not present for the examination-in-chief of the principal Crown witness, the committal for trial was quashed: *Re Durette and The Queen* (1979), 47 C.C.C. (2d) 170 (Ont. H.C.J.).

Although the accused has counsel he may personally exercise the right to cross-examine all or some of the witnesses. The justice does not have a discretion to decide who will cross-examine: *Re Zaor and The Queen* (1984), 12 C.C.C. (3d) 265 (Que. C.A.).

**Review of evidentiary rulings** – *Mandamus* with *certiorari* in aid will not lie to supervise a justice's conduct of a preliminary inquiry as where review is sought of a justice's refusal

to allow certain cross-examination: *Re Depagie and The Queen* (1976), 32 C.C.C. (2d) 89, [1976] 6 W.W.R. 1 (Alta. S.C. App. Div.) (2:1).

The decision of the justice concerning the admissibility of evidence even if erroneous, does not affect jurisdiction and is therefore not reviewable on *certiorari*: *A.-G. Que. v. Cohen* (1979), 46 C.C.C. (2d) 473, [1979] 2 S.C.R. 305, 13 C.R. (3d) 36 (7:0).

The decision of a justice refusing to order production of a police witness' notebook to defence counsel is not reviewable on *certiorari*. The refusal does not amount to a denial of natural justice or of the right to cross-examine: *Re Martin, Simard and Desjardins and The Queen*; *Re Nichols and The Queen* (1977), 41 C.C.C. (2d) 308, 87 D.L.R. (3d) 634 (Ont. C.A.).

**Admissibility of statement of facts or evidence from another proceeding** – A statement of facts agreed to by defence counsel and Crown counsel may be admitted without calling *viva voce* evidence and constitutes evidence upon which the Justice may base his decision as to committal: *Re Ulrich and The Queen* (1977), 38 C.C.C. (2d) 1, [1978] 1 W.W.R. 422 (Alta. S.C.T.D.).

The accused may waive strict compliance with the requirement that evidence be adduced through witnesses who have been sworn or affirmed and heard at the trial before the trier of fact, but this requires that the consent to the procedure of both the accused and the Crown be conveyed to the Court and that for example, the evidence taken on a previous proceeding enter the record during the trial: *Matheson v. The Queen* (1981), 59 C.C.C. (2d) 289, 22 C.R. (3d) 289 (S.C.C.) (7:0).

**Interpreter** – An interpreter is like an expert witness and should be sworn prior to interpreting for a witness testifying in a foreign language. The accused may, however, waive compliance with this requirement and in certain circumstances counsel's acquiescence can constitute a waiver: *Re Hiltz and The Queen* (1984), 14 C.C.C. (3d) 187 (Ont. H.C.J.).

**Power to order production [Also see notes under s. 603]** – A preliminary inquiry is not a trial, so s.10(1) of the Canada Evidence Act is not applicable and the presiding judge does not have the power to order production for the defence of a Crown witness' previous written statement: *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 10 C.R.N.S.55 (S.C.C.) (5:2).

While the preliminary inquiry protects the accused from a needless and improper exposure to a public trial it is also a forum where the accused is afforded an opportunity to discover and to appreciate the case to be made against him at trial: *Re Skogman and The Queen* (1984), 13 C.C.C. (3d) 161, 41 C.R. (3d) 1, [1984] 2 S.C.R. 93 (4:3).

A provincial court judge presiding at a preliminary hearing has power to order a police officer to produce notes from which he refreshed his memory prior to testifying which were relevant to the evidence given by the officer and to the issues in the case: *Re Regina v. Monfils and four others* (1971), 4 C.C.C. (2d) 163, [1972] 1 O.R. 11 (C.A.).

A judge presiding at a preliminary inquiry is competent to make all evidentiary rulings, including rulings on claims of privilege. It may, however, be necessary to follow certain procedural steps to bring the relevant evidence before the court, as where the records sought by the accused are kept in accordance with provincial legislation: *R. v. R. (L.)* (1995), 100 C.C.C. (3d) 329, 39 C.R. (4th) 390, 127 D.L.R. (4th) 170 (Ont. C.A.).

**Requirement that record of evidence be taken** – The provisions for the examination of witnesses and the taking of evidence are mandatory and non-compliance therewith is fatal to a conviction: *R. v. Lacasse* (1972), 8 C.C.C. (2d) 270, [1972] 5 W.W.R.198 (B.C.C.A.).

Similarly, where the recording device used at the accused's preliminary hearing failed and no transcript was available, the mandatory provisions of this subsection have not been complied with and the committal for trial must be quashed: *Re Boylan and The*



*Queen* (1979), 46 C.C.C. (2d) 415, 8 C.R. (3d) 36, [1979] 3 W.W.R. 435 (Sask. C.A.). *Contra: Re Rupert and Frith and The Queen* (1978), 43 C.C.C. (2d) 34, 3 C.R. (3d) 351 (Ont. H.C.J.), affd without written reasons, January 23, 1979 (Ont. C.A.), where it was held the provisions are directory only and loss of the recording before a transcript could be made was not grounds for quashing the committal for trial.

Malfunctioning of the sound recording equipment at the preliminary inquiry is not necessarily fatal to the validity of the order to stand trial and where that portion of the evidence which has been transcribed supports the order there has not been a failure to comply with the provisions of this subsection: *Re Rayer and Labarre and The Queen* (1981), 61 C.C.C. (2d) 331 (B.C.S.C.).

Provisions of this type are directory and the judge's failure to abide by them will not result in his loss of jurisdiction. Where, however, his notes under Form 31 fail to establish whether the witnesses had sworn to or affirmed their evidence a new trial was ordered: *R. v. Czyszczon*, [1963] 3 C.C.C. 106, 41 C.R. 17 (Alta.S.C.App.Div.).

**Application of Charter** – A provincial court judge presiding at a preliminary inquiry is not a court of competent jurisdiction under s. 24 of the Canadian Charter of Rights and Freedoms and therefore has no power to grant a remedy under that section, including exclusion of evidence, for violation of a Charter right: *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863 (4:3).

The accused has the right to cross-examine a police officer as to the basis for obtaining a search warrant to establish a foundation for submissions at trial relevant to his rights under ss. 8 and 24(2) of the Charter of Rights and Freedoms: *R. v. Cover* (1988), 44 C.C.C. (3d) 34 (Ont. H.C.J.).

An accused is entitled to cross-examine Crown witnesses at a preliminary inquiry relating to Charter defences which are not of concern to the judge conducting the inquiry. However, the refusal of the provincial court judge to allow certain questions relating to a Charter issue will not amount to jurisdictional error so as to require that the order to stand trial be quashed: *R. v. George* (1991), 69 C.C.C. (3d) 148, 5 O.R. (3d) 144 (C.A.).

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#### HEARING OF WITNESSES / Contents of address to accused / Statement of accused / Witnesses for accused / Depositions of such witnesses.

541. (1) When the evidence of the witnesses called on the part of the prosecution has been taken down and, where required by this Part, has been read, the justice shall, subject to this section, hear the witnesses called by the accused.

(2) Before hearing any witness called by an accused who is not represented by counsel, the justice shall address the accused as follows or to the like effect:

“Do you wish to say anything in answer to these charges or to any other charges which might have arisen from the evidence led by the prosecution? You are not obliged to say anything, but whatever you do say may be given in evidence against you at your trial. You should not make any confession or admission of guilt because of any promise or threat made to you but if you do make any statement it may be given in evidence against you at your trial in spite of the promise or threat.”

(3) Where the accused who is not represented by counsel says anything in answer to the address made by the justice pursuant to subsection (2), the answer shall be taken down in writing and shall be signed by the justice and kept with the evidence of the witnesses and dealt with in accordance with this Part.

(4) Where an accused is not represented by counsel, the justice shall ask the accused if he or she wishes to call any witnesses after subsections (2) and (3) have been complied with.

(5) The justice shall hear each witness called by the accused who testifies to any mat-

ter relevant to the inquiry, and for the purposes of this subsection, section 540 applies with such modifications as the circumstances require. R.S., c. C-34, s. 469; R.S.C. 1985, c. 27 (1st Supp.), s. 99; 1994, c. 44, s. 54.

#### CROSS-REFERENCES

For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

#### SYNOPSIS

This section sets out the procedure to be followed after the Crown has closed its case at a preliminary inquiry.

Subsection (1) contains the "address" to be read by the justice to an unrepresented accused. It essentially advises the accused that he is not obliged to answer to the charge but that anything that the accused does say may be given in evidence at any subsequent trial. It is rare that an accused will make a statement or give evidence at this stage of a matter.

The accused has the right to call witnesses and an unrepresented accused must be advised of this right.

#### ANNOTATIONS

**Giving of warning** – After the Crown has closed its case and the accused has been given the warning under this subsection, *semble*, the Crown may not then be permitted to reopen its case to call additional evidence: *Re Ulrich and The Queen* (1977), 38 C.C.C. (2d) 1, [1978] 1 W.W.R. 442 (Alta.S.C.T.D.).

The accused may move for discharge after the Crown's case on the ground that the evidence is insufficient either before or after the warning is given under this subsection but before he elects whether or not to call evidence: *R. v. Hardy*; *R. v. Johnston* (1979), 50 C.C.C. (2d) 34 (Que. Ct. Sess.).

However, in *A.-G. Que. v. Beauchemin J.S.P. et al.* (1980), 30 C.R. (3d) 51 (Que. S.C.), Hugessen, A.C.J.S.C. expressed the view that it would have been better for the Judge to comply with the provisions of this section and give the accused the warning prior to ruling on a motion for dismissal.

This section requires that the judge inform the accused in general terms that he is liable to be ordered to stand trial for additional offences in respect of the same transaction. Thus, the fact that the judge provides the accused with more specific information, by indicating the charges which he feels may arise from the Crown's case, is not improper where there is nothing to indicate that the judge had predetermined the issue before hearing defence evidence and submissions: *R. v. Melaragni* (1990), 73 C.C.C. (3d) 356 (Ont. H.C.J.).

However, where all the counts are contained in one information, it is not necessary to address the accused separately with respect to each count: *Re Eusler and Budovitch and The Queen* (1978), 43 C.C.C. (2d) 501, 23 N.B.R. (2d) 643 (N.B.S.C. App. Div.).

**Right of accused to call witnesses** – Despite the fact that the Crown need only present sufficient evidence to make out a *prima facie* case to obtain an order that the accused stand trial, this subsection is mandatory and the justice does not have a discretion to order that the accused stand trial without giving the accused an opportunity to call witnesses notwithstanding at the time of the Crown's case the justice is satisfied there is sufficient evidence to order that the accused stand trial: *Re Ward and The Queen* (1976), 31 C.C.C. (2d) 446, 35 C.R.N.S. 117 (Ont.H.C.J.), *affd* 31 C.C.C. (2d) 446n (C.A.).

This section does not require the presiding judge to grant an adjournment in all cases in order to obtain the attendance of a material witness. Ordinarily, where an application is made for an adjournment to call a witness, it must be shown that the applicant has been guilty of no neglect in procuring the attendance of the witness and that there is a reasonable expectation that the witness' attendance can be procured for the future time

to which it is sought to put off the case: *R. v. McKenzie* (1989), 51 C.C.C. (3d) 285 (B.C.S.C.).

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**CONFESSION OR ADMISSION OF ACCUSED / Restriction of publication of reports of preliminary inquiry / Definition of “newspaper”.**

**542. (1) Nothing in this Act prevents a prosecutor giving in evidence at a preliminary inquiry any admission, confession or statement made at any time by the accused that by law is admissible against him.**

**(2) Every one who publishes in any newspaper, or broadcasts, a report that any admission or confession was tendered in evidence at a preliminary inquiry or a report of the nature of such admission or confession so tendered in evidence unless**

- (a) the accused has been discharged, or**
- (b) if the accused has been ordered to stand trial, the trial has ended, is guilty of an offence punishable on summary conviction.**

**(3) In this section “newspaper” has the same meaning as in section 297. R.S., c. C-34, s. 470; R.S.C. 1985, c. 27 (1st Supp.), s. 101(2)(c).**

**CROSS-REFERENCES**

The trial of the offence under s. 542(2) is conducted by a summary conviction court in accordance with Part XXVII. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

**SYNOPSIS**

This section codifies the Crown’s right to introduce into evidence a statement made by the accused. The normal rules of admissibility apply and, therefore, the “voluntariness” of the statement must be proven beyond a reasonable doubt.

Subsection (2) makes it an offence, punishable on summary conviction, to publish any confession tendered in evidence until the accused has been discharged or the trial has ended. (Also see s. 539.)

**ANNOTATIONS**

**Burden of proof of voluntariness** – An accused’s statement may only be admitted on the same basis as it would before a trial Judge who must be satisfied beyond a reasonable doubt as to its voluntary nature: *R. v. Pickett* (1975), 28 C.C.C. (2d) 297, 31 C.R.N.S. 239 (Ont. C.A.).

On this latter point it should be noted that in *R. v. Leboeuf* (1979), 57 C.C.C. (2d) 257 (Que. C.A.) the Court adopted a standard requiring proof that was “sufficiently strong and conclusive” to satisfy the trial Judge as to the voluntariness of the statement, rather than proof beyond a reasonable doubt.

**Waiver of *voir dire*** – An accused or his counsel may waive the necessity of a *voir dire* to determine the voluntariness of a confession: *R. v. Park* (1981), 59 C.C.C. (2d) 385, 21 C.R. (3d) 182, [1981] 2 S.C.R. 64 (9:0).

**Right to inquire into circumstances of taking statement** – Although the Crown has a discretion not to introduce a statement made by the accused to the police, counsel for the accused is entitled to fully cross-examine the officers as to the circumstances surrounding the taking of the statement: *R. v. Williams, ex p. Barnett* (1970), 2 C.C.C. (2d) 298, [1971] 1 O.R. 703 (H.C.J.). Also see *R. v. Poirier, Prov. J.* (1988), 68 C.R. (3d) 67, [1989] R.L. 6 (Que. C.A.).



***Remand Where Offence Committed in Another Jurisdiction***

**ORDER THAT ACCUSED APPEAR OR BE TAKEN BEFORE JUSTICE WHERE OFFENCE COMMITTED / Transmission of transcript and documents and effect of order or warrant.**

543. (1) Where an accused is charged with an offence alleged to have been committed out of the limits of the jurisdiction in which he has been charged, the justice before whom he appears or is brought may, at any stage of the inquiry after hearing both parties,

(a) order the accused to appear, or

(b) if the accused is in custody, issue a warrant in Form 15 to convey the accused

before a justice having jurisdiction in the place where the offence is alleged to have been committed, who shall continue and complete the inquiry.

(2) Where a justice makes an order or issues a warrant pursuant to subsection (1), he shall cause the transcript of any evidence given before him in the inquiry and all documents that were then before him and that are relevant to the inquiry to be transmitted to a justice having jurisdiction in the place where the offence is alleged to have been committed and

(a) any evidence the transcript of which is so transmitted shall be deemed to have been taken by the justice to whom it is transmitted; and

(b) any appearance notice, promise to appear, undertaking or recognizance issued to or given or entered into by the accused under Part XVI shall be deemed to have been issued, given or entered into in the jurisdiction where the offence is alleged to have been committed and to require the accused to appear before the justice to whom the transcript and documents are transmitted at the time provided in the order made in respect of the accused under paragraph (1)(a). R.S., c. C-34, s. 471; R.S., c. 2 (2nd Supp.), s. 7.

**CROSS-REFERENCES**

As to territorial jurisdiction generally see ss. 470, 476 to 481. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

**SYNOPSIS**

An accused charged in one jurisdiction may be arrested in another and brought before a justice sitting in the latter location. In these circumstances, the court can deal with bail (under Part XVI) and order that the accused appear, or be conveyed in custody, before a justice in the jurisdiction where the matter arose. Provision is also made in subsec. (2) for the transferability of transcript evidence and obligations relating to such matters as undertakings.

**ANNOTATIONS**

Even if an information was defective in that it failed to indicate where the offence occurred, the refusal of the provincial court judge to quash or order particulars would not be reviewable by way of *certiorari* unless the evidence adduced revealed that the alleged offence took place outside the court's jurisdiction. In that event, *certiorari* would lie if the judge persisted in continuing to exercise a jurisdiction he did not have: *R. v. Webster* (1993), 78 C.C.C. (3d) 302, [1993] 1 S.C.R. 3, 17 C.R. (4th) 393 (7:0).

## *Absconding Accused*

ACCUSED ABSCONDING DURING INQUIRY / Adverse inference / Accused not entitled to re-opening / Counsel for accused may continue to act / Accused calling witnesses.

544. (1) Notwithstanding any other provision of this Act, where an accused, whether or not he is charged jointly with another, absconds during the course of a preliminary inquiry into an offence with which he is charged,

- (a) he shall be deemed to have waived his right to be present at the inquiry, and
- (b) the justice

- (i) may continue the inquiry and, when all the evidence has been taken, shall dispose of the inquiry in accordance with section 548, or

- (ii) if a warrant is issued for the arrest of the accused, may adjourn the inquiry to await his appearance,

but where the inquiry is adjourned pursuant to subparagraph (b)(ii), the justice may continue it at any time pursuant to subparagraph (b)(i) if he is satisfied that it would no longer be in the interests of justice to await the appearance of the accused.

(2) Where the justice continues a preliminary inquiry pursuant to subsection (1), he may draw an inference adverse to the accused from the fact that he has absconded.

(3) Where an accused reappears at a preliminary inquiry that is continuing pursuant to subsection (1), he is not entitled to have any part of the proceedings that was conducted in his absence re-opened unless the justice is satisfied that because of exceptional circumstances it is in the interests of justice to re-open the inquiry.

(4) Where the accused has absconded during the course of a preliminary inquiry and the justice continues the inquiry, counsel for the accused is not thereby deprived of any authority he may have to continue to act for the accused in the proceedings.

(5) Where, at the conclusion of the evidence on the part of the prosecution at a preliminary inquiry that has been continued pursuant to subsection (1), the accused is absent but counsel for the accused is present, he or she shall be given an opportunity to call witnesses on behalf of the accused and subsection 541(5) applies with such modifications as the circumstances require. 1974-75-76, c. 93, s. 59; 1994, c. 44, s. 55.

### CROSS-REFERENCES

A similar provision where the accused absconds during trial is found in s. 475. In addition an accused who fails to appear for his jury trial may forfeit the right to trial by jury by virtue of s. 598. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

### SYNOPSIS

This section deals with the situation where an accused, having “elected” for trial in a higher court, fails to appear at the preliminary inquiry. If the justice is satisfied that the accused has absconded, he can either continue the hearing (subsec. (1)(b)(i)) or issue a warrant and adjourn the proceedings (subsec. (1)(b)(ii)). If the latter course is followed the proceedings can be resumed if the court is of the opinion that it is no longer in the interests of justice to await the accused’s appearance. The adjournment need only be for a few minutes.

Subsection (2) permits the court to draw an adverse inference from the fact that the accused has absconded (*e.g.*, consciousness of guilt).

Counsel for the accused may continue to act and retains the right to call witnesses on the accused’s behalf (subsecs. (4), (5)).

An accused who reappears does not have the right to have reopened that portion of the proceedings conducted in his or her absence (subsec. (3)). The proceedings will only be reopened where the justice finds that there are exceptional circumstances and that it is in the interests of justice to do so. (Also see s. 475 – absconding at trial.)

#### ANNOTATIONS

An accused may be found to have absconded “during the course of a preliminary inquiry” where having elected trial by judge and jury he fails to appear on the return date of an adjournment: *Re Plummer and The Queen* (1983), 5 C.C.C. (3d) 17, [1983] 4 W.W.R. 351 (B.C.C.A.).

### *Procedure Where Witness Refuses to Testify*

#### WITNESS REFUSING TO BE EXAMINED / Further commitment / Saving.

545. (1) Where a person, being present at a preliminary inquiry and being required by the justice to give evidence,

- (a) refuses to be sworn,
- (b) having been sworn, refuses to answer the questions that are put to him,
- (c) fails to produce any writings that he is required to produce, or
- (d) refuses to sign his deposition,

without offering a reasonable excuse for his failure or refusal, the justice may adjourn the inquiry and may, by warrant in Form 20, commit the person to prison for a period not exceeding eight clear days or for the period during which the inquiry is adjourned, whichever is the lesser period.

(2) Where a person to whom subsection (1) applies is brought before the justice upon the resumption of the adjourned inquiry and again refuses to do what is required of him, the justice may again adjourn the inquiry for a period not exceeding eight clear days and commit him to prison for the period of adjournment or any part thereof, and may adjourn the inquiry and commit the person to prison from time to time until the person consents to do what is required of him.

(3) Nothing in this section shall be deemed to prevent the justice from sending the case for trial on any other sufficient evidence taken by him. R.S., c. C-34, s. 472.

#### CROSS-REFERENCES

For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

#### SYNOPSIS

This section sets out the powers of a justice or judge in dealing with a witness who, without a reasonable excuse, refuses to be sworn, answer questions or otherwise properly participate in a preliminary inquiry. The ability to punish for contempt of court is not available.

Where this situation arises, the court may adjourn the inquiry and commit the witness to prison for no longer than eight clear days (subsec. (1)). If, upon the resumption of the hearing, the witness persists in this course of conduct, he can be recommitted for a further eight days. In theory, this process can be repeated until such time as the witness agrees to co-operate (subsec. (2)).

#### ANNOTATIONS

This section limits the power of the Justice, who may not resort to contempt of Court



proceedings for refusal to testify: *R. v. Bublely* (1976), 32 C.C.C. (2d) 79, [1976] 6 W.W.R. 179 (Alta. S.C. App. Div.).

Similarly, a superior Court has no jurisdiction to punish for contempt a witness who refuses to testify at a preliminary hearing: *R. v. Marsden* (1977), 37 C.C.C. (2d) 107, 40 C.R.N.S. 11 *sub nom. Re Kenney*, *R. v. Marsden* (Que.Sup.Ct.).

Nor may the witness be proceeded against by way of indictment for contempt of Court: *R. v. McKenzie* (1978), 41 C.C.C. (2d) 394, [1978] 4 W.W.R. 582 (Alta. S.C. App. Div.).

However, it would seem that at least where the witness was not committed to prison under this section, a charge of attempting to obstruct justice would lie under s. 139(2) for the witness' refusal to testify: *Re Lacroix and The Queen* (1987), 34 C.C.C. (3d) 94, 59 C.R. (3d) 92, [1987] 1 S.C.R. 244 (5:0), *rev'd* 15 C.C.C. (3d) 265, 41 C.R. (3d) 163 (Que. C.A.); *R. v. Mercer* (1988), 43 C.C.C. (3d) 347, 65 C.R. (3d) 275, 89 A.R. 24 (C.A.).

The words "reasonable excuse" grant a discretion to the justice to refuse to send a person to jail even if the person in law is required to answer the question: *Re Abko Medical Laboratories Ltd. et al. and The Queen* (1977), 35 C.C.C. (2d) 65, 77 D.L.R. (3d) 295 (Ont.H.C.J.). In this case the witness, a member of the Legislature, had been called as a defence witness but refused to answer questions as to how he received certain information. It was held that the justice had the authority to consider whether the witness had a reasonable excuse, by virtue of his position, to refuse to answer the question. [Note: in a subsequent reference to the Ontario Court of Appeal *Reference Re Legislative Privilege* (1978), 39 C.C.C. (2d) 226, 18 O.R. (2d) 529 it was held that a member of the Legislature has no privilege to refuse to disclose the sources of his information assuming the information to be relevant and admissible evidence.]

## Remedial Provisions

### IRREGULARITY OR VARIANCE NOT TO AFFECT VALIDITY.

**546.** The validity of any proceeding at or subsequent to a preliminary inquiry is not affected by

- (a) any irregularity or defect in the substance or form of the summons or warrant;
- (b) any variance between the charge set out in the summons or warrant and the charge set out in the information; or
- (c) any variance between the charge set out in the summons, warrant or information and the evidence adduced by the prosecution at the inquiry. R.S., c. C-34, s. 473.

### CROSS-REFERENCES

As to provisions governing the sufficiency of informations and powers of amendment see ss. 581 to 601. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

### SYNOPSIS

This section provides that irregularities or defects in the process by which the accused is brought before the court (*i.e.*, the summons or warrant) shall not affect the validity of any proceedings.

### ADJOURNMENT IF ACCUSED MISLED.

**547.** Where it appears to the justice that the accused has been deceived or misled by any irregularity, defect or variance mentioned in section 546, he may adjourn the

**inquiry and may remand the accused or grant him interim release in accordance with Part XVI. R.S., c. C-34, s. 474; 1974-75-76, c. 93, s. 59.1.**

#### CROSS-REFERENCES

The general adjournment and remand power is found in s. 537. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

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#### INABILITY OF JUSTICE TO CONTINUE.

**547.1 Where a justice acting under this Part has commenced to take evidence and dies or is unable to continue for any reason, another justice may**

- (a) continue taking the evidence at the point at which the interruption in the taking of the evidence occurred, where the evidence was recorded pursuant to section 540 and is available; or**
- (b) commence taking the evidence as if no evidence had been taken, where no evidence was recorded pursuant to section 540 or where the evidence is not available. R.S.C. 1985, c. 27 (1st Supp.), s. 100.**

#### CROSS-REFERENCES

A similar provision, where the trial judge is unable to continue, is found in s. 669.2. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

#### SYNOPSIS

Where the justice presiding at a preliminary inquiry dies or is unable to continue, another justice may continue with the hearing. If a record of the evidence previously called is available that evidence need not be recalled. However, if no record is available, the inquiry shall start again as if no evidence had yet been heard.

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## ***Adjudication and Recognizances***

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**ORDER TO STAND TRIAL OR DISCHARGE / Endorsing charge / Where accused ordered to stand trial / Defect not to affect validity.**

**548. (1) When all the evidence has been taken by the justice, he shall**

- (a) if in his opinion there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction, order the accused to stand trial; or**
- (b) discharge the accused, if in his opinion on the whole of the evidence no sufficient case is made out to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction.**

**(2) Where the justice orders the accused to stand trial for an indictable offence, other than or in addition to the one with which the accused was charged, the justice shall endorse on the information the charges on which he orders the accused to stand trial.**

**(2.1) A justice who orders that an accused is to stand trial has the power to fix the date for the trial or the date on which the accused must appear in the trial court to have that date fixed.**

**(3) The validity of an order to stand trial is not affected by any defect apparent on the face of the information in respect of which the preliminary inquiry is held or in respect of any charge on which the accused is ordered to stand trial unless, in the opinion of the court before which an objection to the information or charge is taken,**

the accused has been misled or prejudiced in his defence by reason of that defect. R.S., c. C-34, s. 475; R.S., c. 2 (2nd Supp.), s. 8; R.S.C. 1985, c. 27 (1st Supp.), s. 101(1); 1994, c. 44, s. 56.

### CROSS-REFERENCES

Procedure for waiver of the preliminary inquiry is set out in s. 549. After the accused has been ordered to stand trial the justice may vary the release or detention order where cause is shown provided the accused is not ordered to stand trial for a s. 469 offence such as murder. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

### SYNOPSIS

Subsection (1) sets out the test to be applied at a preliminary inquiry. The standard which the Crown must meet to obtain a committal (*i.e.*, “sufficient evidence”) is the same as that which applies when a “no evidence” motion is made at trial. In other words, there must be evidence before the court upon which a reasonable jury properly instructed could convict. If the evidence is insufficient, the accused will be discharged.

Where the information contains a number of counts, the test is applied separately to each charge.

In addition to the charge(s) in the information, the court can consider whether there is evidence of the commission of other indictable offences “in respect of the same transaction”. If there is, the accused can be ordered to stand trial on these matters (subsecs. (1)(a), and (2)).

The justice may also set the date for trial in the trial court.

Once there has been an order to stand trial, any defects apparent on the face of the information will not affect subsequent proceedings unless the accused can show that he or she has been misled or prejudiced in some way (subsec. (3)).

### ANNOTATIONS

**Test for order to stand trial** – In *The United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424, 34 C.R.N.S. 207 (S.C.C.), the judgment of the majority (5:4) was given by Ritchie, J. (Martland, Judson, Pigeon and de Grandpré, JJ. concurring), who wrote:

I agree that the duty imposed upon a “justice” under s. 475(1) [now s. 548(1)] is the same as that which governs a trial judge sitting with a jury in deciding whether the evidence is “sufficient” to justify him in withdrawing the case from the jury and this is to be determined according to whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty. The “justice”, in accordance with this principle, is, in my opinion, required to commit an accused person for trial in any case in which there is admissible evidence which could, if it were believed, result in a conviction.

The rule in *Hodge’s Case* does not apply to determining the sufficiency of evidence under this section. The justice is not entitled to determine whether the circumstantial evidence is consistent with guilt and inconsistent with any other rational conclusion: *Re Herman and The Queen* (1984), 11 C.C.C. (3d) 102, 38 C.R. (3d) 284 (Sask. C.A.); *Re Garton and Whelan* (1984), 14 C.C.C. (3d) 449, 47 O.R. (2d) 672 (H.C.J.).

**Order to stand trial on other indictable offences** – An accused may be ordered to stand trial on a lesser and included offence over which a Provincial Court Judge has absolute jurisdiction: *Ex p. Walker* (1974), 20 C.C.C. (2d) 539 (Ont. H.C.J.).

The test for whether the justice may order the accused to stand trial for other offences “in respect of the same transaction” is whether the other offences form part of the series of connected acts extending over a period of time which, the Crown alleges, prove the commission of the offence charged in the information. The other offence will of necessity be closely interwoven with or related to the offence charged in the information: *R. v.*



*Goldstein* (1988), 42 C.C.C. (3d) 548, 64 C.R. (3d) 360, 32 C.R.R. 320 (Ont. C.A.); *R. v. Stewart* (1988), 44 C.C.C. (3d) 109 (Ont. C.A.).

Merely because the additional offence relates to a different victim, it does not mean that it cannot be in respect of the same transaction where it was a component part or constituent element of the transaction relating to the offence charged in the information: *R. v. Brown* (1990), 54 C.C.C. (3d) 561 (Ont. H.C.J.).

The power to order that the accused stand trial for other offences may be exercised even where the accused consents to an order that he stand trial without the taking of further evidence pursuant to s. 549: *R. v. Cancor Software Corp.* (1990), 58 C.C.C. (3d) 53, 79 C.R. (3d) 22, 90 D.T.C. 6457 (Ont. C.A.).

The power to order the accused to stand trial for other indictable offences in respect of the same transaction does not infringe the guarantee in s. 11(a) of the Charter: *R. v. Cancor Software Corp.*, *supra*.

**Review by superior court** – In *Re Martin, Simard and Desjardins and The Queen; Re Nichols and The Queen* (1977), 41 C.C.C. (2d) 308, 87 D.L.R. (3d) 634 (Ont. C.A.) the Court held that the scope of review on *certiorari* of the justice's decision to commit the accused for trial was limited to grounds of excess or want of jurisdiction. The justice acts within his jurisdiction in ordering that the accused stand trial unless he does so "without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial". It is not for the superior Court to repeat the process followed by the committing magistrate in the fashion required by this section. The accused in *Re Martin, Simard and Desjardins and The Queen* appealed to the Supreme Court of Canada, 41 C.C.C. (2d) 342, 87 D.L.R. (3d) 704, [1978] 2 S.C.R. 511 where it was argued that a companion application for *habeas corpus* with *certiorari* in aid brought under the pre-Confederation Habeas Corpus Act (which is still in force in Ontario) was wrongly dismissed and the review of the sufficiency of evidence under that statute is wider than under *certiorari* alone. The Court held that the pre-Confederation statute could not enlarge the Court's authority to review the determination of the justice and the review on sufficiency must be a review "to determine whether the committal was made arbitrarily or, at the most, whether there was some evidence upon which an opinion could be formed that an accused should go to trial.

Where the record of the preliminary inquiry does not include evidence relating to each essential element of the charge then an order to stand trial may be brought forward by way of *certiorari* to a superior court and can be quashed: *Re Skogman and The Queen* (1984), 13 C.C.C. (3d) 161, 41 C.R. (3d) 1, [1984] 2 S.C.R. 93 (4:3).

An order discharging the accused may also be quashed on *certiorari* when there has been jurisdictional error as where the judge does not merely apply the wrong test for sufficiency of evidence but arrogates to himself the decision on the issue reserved to the trial court by purporting to dismiss the charge after applying the reasonable doubt standard: *Dubois v. The Queen* (1986), 25 C.C.C. (3d) 221, 51 C.R. (3d) 193, [1986] 1 S.C.R. 366.

However, an error by the judge as to the elements of the offence is one made within the scope of his jurisdiction, and *certiorari* does not lie to quash the discharge: *R. v. Tremblay* (1988), 47 C.C.C. (3d) 88, [1988] 2 S.C.R. 254, 67 C.R. (3d) 207 (4:0).

**Double jeopardy** – The defence of *res judicata* and the special pleas of *autrefois* are not available at the preliminary hearing stage: *Schmidt v. The Queen* (1984), 10 C.C.C. (3d) 564, 44 O.R. (2d) 777 (C.A.), *affd* on other grounds 33 C.C.C. (3d) 193, 58 C.R. (3d) 1, [1987] 1 S.C.R. 500.

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## ORDER TO STAND TRIAL AT ANY STAGE OF INQUIRY WITH CONSENT / Procedure.

549. (1) Notwithstanding any other provision of this Act, the justice may, at any stage of a preliminary inquiry, with the consent of the accused and the prosecutor,

order the accused to stand trial in the court having criminal jurisdiction, without taking or recording any evidence or further evidence.

(2) Where an accused is ordered to stand trial under subsection (1), the justice shall endorse on the information a statement of the consent of the accused and the prosecutor, and the accused shall thereafter be dealt with in all respects as if ordered to stand trial under section 548. R.S., c. C-34, s. 476; R.S.C. 1985, c. 27 (1st Supp.), s. 101(3).

#### CROSS-REFERENCES

For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

#### SYNOPSIS

With the prosecutor's concurrence, the accused, at any stage of a preliminary inquiry, can consent to being ordered to stand trial.

#### ANNOTATIONS

An undertaking by Crown counsel to disclose witnesses and evidence in advance of trial in return for defence counsel waiving the preliminary inquiry could not reasonably be interpreted to include evidence of which Crown counsel was not then aware and which he might be required not to disclose in the interests of the administration of justice. However, in this case, when the evidence was disclosed in the course of the trial and the accused were surprised by it, the trial judge adjourned the case to permit the accused to consider their position and their conduct of the defence and offered to recall any witnesses for further cross-examination. In the result, the accused were not prejudiced by the late disclosure: *R. v. Mitchell* (1989), 70 C.R. (3d) 71, 33 O.A.C. 360 (C.A.).

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#### RECOGNIZANCE OF WITNESS / Form / Sureties or deposit for appearance of witness / Witness refusing to be bound / Discharge.

550. (1) Where an accused is ordered to stand trial, the justice who held the preliminary inquiry may require any witness whose evidence is, in his opinion, material to enter into a recognizance to give evidence at the trial of the accused and to comply with such reasonable conditions prescribed in the recognizance as the justice considers desirable for securing the attendance of the witness to give evidence at the trial of the accused.

(2) A recognizance entered into pursuant to this section may be in Form 32, and may be set out at the end of a deposition or be separate therefrom.

(3) A justice may, for any reason satisfactory to him, require any witness entering into a recognizance pursuant to this section

(a) to produce one or more sureties in such amount as he may direct; or

(b) to deposit with him a sum of money sufficient in his opinion to ensure that the witness will appear and give evidence.

(4) Where a witness does not comply with subsection (1) or (3) when required to do so by a justice, he may be committed by the justice, by warrant in Form 24, to a prison in the territorial division where the trial is to be held, there to be kept until he does what is required of him or until the trial is concluded.

(5) Where a witness has been committed to prison pursuant to subsection (4), the court before which the witness appears or a justice having jurisdiction in the territorial division where the prison is situated may, by order in Form 39, discharge the witness from custody when the trial is concluded. R.S., c. C-34, s. 477; 1974-75-76, c. 39, s. 60; R.S.C. 1985, c. 27 (1st Supp.), s. 101(3).

**CROSS-REFERENCES**

Procedure for enforcement of recognizances is set out in Part XXV. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

**SYNOPSIS**

This section deals with what may otherwise be referred to as “material” witnesses. If, following committal, the justice considers it necessary, he can order that a witness enter into a recognizance, with or without sureties, conditions or deposit, for the purpose of securing that person’s attendance at the trial. A witness who fails to comply with such an order may be incarcerated.

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***Transmission of Record*****TRANSMITTING RECORD.**

551. Where a justice orders an accused to stand trial, he shall forthwith send to the clerk or other proper officer of the court by which the accused is to be tried, the information, the evidence, the exhibits, the statement if any of the accused taken down in writing under section 541, any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, or any evidence taken before a coroner, that is in the possession of the justice. R.S., c. C-34, s. 478; R.S., c. 2 (2nd Supp.), s. 9; R.S.C. 1985, c. 27 (1st Supp.), s. 102.

**CROSS-REFERENCES**

The accused has the right to inspect the record which is transmitted to the trial court under this section, by virtue of s. 603. For a discussion of the procedure on preliminary inquiries and cross-references, see *Note on procedure at preliminary inquiry* under s. 537.

**SYNOPSIS**

Following the order to stand trial, the complete file is transferred from the Provincial Court to the court before which the trial is to be held. The obligation of the accused to appear is also transferred.

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**Part XIX / INDICTABLE OFFENCES – TRIAL WITHOUT JURY*****Interpretation*****DEFINITIONS / “Judge”.**

552. In this Part,

“judge” means,

- (a) in the Province of Ontario, a judge of the superior court of criminal jurisdiction of the Province,
- (b) in the Province of Quebec, a judge of the Court of Quebec,
- (c) in the Province of Nova Scotia, a judge of the superior court of criminal jurisdiction of the Province,
- (d) in the Province of New Brunswick, a judge of the Court of Queen’s Bench,
- (e) in the Province of British Columbia, the Chief Justice or a puisne judge of the Supreme Court,
- (f) in the Provinces of Prince Edward Island and Newfoundland, a judge of the Supreme Court,



- (g) in the Province of Manitoba, the Chief Justice or a puisne judge of the Court of Queen's Bench,
- (h) in the Provinces of Saskatchewan and Alberta, a judge of the superior court of criminal jurisdiction of the province, and
- (i) in the Yukon Territory and the Northwest Territories, a judge of the Supreme Court. R.S., c. C-34, s. 482; 1972, c. 13, s. 39, c. 17, s. 2; 1974-75-76, c. 48, s. 25, c. 93, s. 61; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 11 (1st Supp.), s. 2, c. 27 (1st Supp.), s. 103(1); c. 27 (2nd Supp.), s. 10; c. 40 (4th Supp.), s. 2; 1990, c. 16, s. 6; 1990, c. 17, s. 13; 1992, c. 51, s. 38.

**NOTE:** Definition "judge" amended 1993, c. 28, s. 78 (to come into force April 1, 1999) by re-enacting para. (i). The text of para. (i), which is not yet in force and therefore printed in *lightface italics*, reads as follows:

- (i) *in the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court.*

"magistrate". [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 103(2).]

#### CROSS-REFERENCES

The term "superior court of criminal jurisdiction" is defined in s. 2. In addition to the definitions in this section, see s. 2 and notes to that section.

## *Jurisdiction of Provincial Court Judges*

### **Absolute Jurisdiction**

#### **ABSOLUTE JURISDICTION.**

553. The jurisdiction of a provincial court judge to try an accused is absolute and does not depend on the consent of the accused where the accused is charged in an information

- (a) with
  - (i) theft, other than theft of cattle,
  - (ii) obtaining money or property by false pretences,
  - (iii) unlawfully having in his possession any property or thing or any proceeds of any property or thing knowing that all or a part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from the commission in Canada of an offence punishable by indictment or an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence punishable by indictment,
  - (iv) having, by deceit, falsehood or other fraudulent means, defrauded the public or any person, whether ascertained or not, of any property, money or valuable security, or
  - (v) mischief under subsection 430(4), where the subject-matter of the offence is not a testamentary instrument and the alleged value of the subject-matter of the offence does not exceed five thousand dollars;
- (b) with counselling or with a conspiracy or attempt to commit or with being an accessory after the fact to the commission of
  - (i) any offence referred to in paragraph (a) in respect of the subject-matter and value thereof referred to in that paragraph, or
  - (ii) any offence referred to in paragraph (c); or
- (c) with an offence under
  - (i) section 201 (keeping gaming or betting house),

- (ii) section 202 (betting, pool-selling, book-making, etc.),
- (iii) section 203 (placing bets),
- (iv) section 206 (lotteries and games of chance),
- (v) section 209 (cheating at play),
- (vi) section 210 (keeping common bawdy-house),
- (vii) subsection 259(4) (driving while disqualified), or
- (viii) section 393 (fraud in relation to fares). R.S., c. C-34, s. 483; 1972, c. 13, s. 40; 1974-75-76, c. 93, s. 62; R.S.C. 1985, c. 27 (1st Supp.), s. 104; 1992, c. 1, s. 58; 1994, c. 44, s. 57.

**NOTE:** Section 553(c) amended 1995, c. 22, s. 2 (to come into force by order of the Governor in Council) by striking out the word “or” at the end of subpara. (vii), by adding the word “or” at the end of subpara. (viii) and by adding new subpara. (ix). The text of subpara. (ix), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(ix) *subsection 733.1(1) (failure to comply with probation order).*

**NOTE:** Paragraph (c) amended 1996, Bill C-8, s. 72 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996) by striking out the word “or” at the end of subpara. (vii) and by adding new subparas. (ix) and (x). The text of those new subparas., which is not yet in force and also may change before receiving Royal Assent, is therefore printed in *lightface italics* and reads as follows:

(ix) *paragraph 4(4)(a) of the Controlled Drugs and Substances Act, or*

(x) *subsection 5(4) of the Controlled Drugs and Substances Act.*

## CROSS-REFERENCES

The terms “provincial court judge” and “testamentary instrument” are defined in s. 2. Note that s. 3 provides that the descriptions in parenthesis after the section number are inserted for convenience of reference only and are not part of the provision.

**Note on mode of trial** – The scheme of the Criminal Code is to classify offences as pure indictable [e.g., robbery, s. 344], purely summary [e.g., soliciting, s. 213] or hybrid, *i.e.*, the prosecution may elect whether to proceed by way of summary conviction or by indictment [e.g., assault, s. 266]. The effect of s. 468 is that the superior court of criminal jurisdiction may try any purely indictable offence or any hybrid offence where the prosecution elects to proceed by way of indictment. Other courts of criminal jurisdiction (defined in s. 2) may, however, try indictable offences except those offences listed in s. 469 [e.g., murder, s. 235]. The offences listed in s. 469 may only be tried by the superior court of criminal jurisdiction with a jury subject to a re-election in conformity with s. 473.

Indictable offences not listed in s. 469 fall into two categories. For the majority of the indictable offences not listed in s. 469 the accused may elect the mode of trial as set out in s. 536(2) and within limits may change an election [see, e.g., s. 561]. While the Attorney General is given a narrow discretion to override this election and require a jury trial under s. 568 in the circumstances defined therein and in addition a provincial court judge has a discretion to override or not record an accused's election for trial by provincial court judge and hold a preliminary inquiry [see for example ss. 555 and 567] the thrust of the provisions is to give the accused the right to determine the manner of trial. [In those provinces which still maintain two levels of courts in addition to the provincial court it is in the discretion of the Crown whether to place the indictment in the superior court or the other court, however described, e.g., county court, where the accused elects trial other than by provincial court judge.] Where the accused elects trial by provincial court judge then jurisdiction is given to such judge to try the case by virtue of s. 554. The trial takes place on the basis of the information. Where the case is tried in a court other than the provincial court then the trial is conducted on the basis of an indictment preferred in accordance with ss. 574 and 577, usually following an order to stand trial. For notes on conduct of the preliminary inquiry see s. 537.

The other group of indictable offences are those offences listed in s. 553 [e.g., keeping common bawdy house, s. 210(1)] which fall within the absolute jurisdiction of a provincial court judge, meaning that the accused does not have a normal election as to the mode of trial under s. 536(2).

Nevertheless, the other courts with jurisdiction to try indictable offences have jurisdiction to try the offences listed in s. 553, if the provincial court judge elects not to try the offence and requires that the case proceed by way of preliminary inquiry pursuant to s. 555(1): see *R. v. Scherbank*, [1967] 2 C.C.C. 279, 50 C.R. 170 (Ont. C.A.); *R. v. Coupland* (1978), 45 C.C.C. (2d) 437 (Alta. C.A.). In that case the accused is deemed to have elected trial by judge and jury by virtue of s. 565(1)(a). If in the course of the trial before the provincial court judge pursuant to s. 553 it is disclosed that in fact the offence is not one over which the provincial court judge has absolute jurisdiction, then the accused must then be put to his election under s. 536(2) [for example a charge of theft of goods of a value not exceeding \$5,000 where the evidence discloses that the value of the goods exceeds \$5,000]. If he fails to elect then he is deemed to have elected trial by judge and jury under s. 565(1)(c). The accused may re-elect in accordance with s. 561.

For all summary conviction offences meaning purely summary conviction or hybrid offences where the prosecution elects to proceed by way of summary conviction only the summary conviction court (defined in s. 785) may try the accused. The procedure for trial of summary conviction offences generally resembles trial of an indictable offence by a provincial court judge but that procedure including special rights of appeal is set out in Part XXVII.

## ANNOTATIONS

**Para. (a)** – In order to vest absolute jurisdiction in the provincial court judge the information must contain the statement that the alleged value of the property in question is less than the prescribed limit: *R. v. Miller And Newman* (1973), 14 C.C.C. (2d) 370, 24 C.R.N.S. 109 (Ont. C.A.).

## *Provincial Court Judge's Jurisdiction with Consent*

### TRIAL BY PROVINCIAL COURT JUDGE WITH CONSENT.

**554. (1)** Where an accused is charged in an information with an indictable offence other than an offence that is mentioned in section 469, and the offence is not one over which a provincial court judge has absolute jurisdiction under section 553, a provincial court judge may try the accused if the accused elects to be tried by a provincial court judge. **R.S., c. C-34, s. 484.**

**(2)-(4)** [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 105.*]

## CROSS-REFERENCES

The term “provincial court judge” is defined in s. 2. For procedure respecting election for mode of trial, including trial by provincial court judge, see *Note on mode of trial* under s. 553.

## SYNOPSIS

This section is a companion provision to s. 536. An accused charged with an indictable offence that is not one which is to be tried before a superior court of criminal jurisdiction (see s. 469) or before a provincial court judge (see s. 553) may “elect” to be tried in provincial court. Where this occurs there will not be a preliminary inquiry.

## ANNOTATIONS

**Jurisdiction** – Notwithstanding the accused elects trial by provincial court judge he is tried under the provisions of this Part and not the summary conviction provisions of Part XXVII: *Edmunds v. The Queen* (1981), 58 C.C.C. (2d) 485, 21 C.R. (3d) 168, [1981] 1 S.C.R. 233 (4:1).

A provincial court judge before whom an accused elects to be tried and pleads not guilty is not seised of exclusive jurisdiction and accordingly the accused may later be tried by another judge: *R. v. Wiseberg* (1973), 15 C.C.C. (2d) 26 (Ont. C.A.); *R. v. Gillis*, [1967] 1 C.C.C. 266, 57 W.W.R. 296 (Sask. C.A.).



**Arraignment** – Even though the accused was not deceived or misled by the substantial differences between the information and the charge upon which he was arraigned, his conviction must be set aside: *R. v. Arnott and St. James*, [1970] 5 C.C.C. 190, 11 C.R.N.S. 233 (Ont. C.A.).

**Joint trial of summary and indictable offences** – A provincial court judge may jointly try summary and indictable offences even where they are contained on separate informations, provided that the accused has not elected trial by a higher court in respect of the indictable offence. In the event of any conflict as to the applicable procedure, indictable offence procedures would apply. Where, following the trial, both charges have gone for appeal, the summary conviction appeal court should await the decision of the court of appeal in the indictable proceeding: *R. v. Clunas* (1992), 70 C.C.C. (3d) 115, 11 C.R. (4th) 238, [1992] 1 S.C.R. 595 (5:0).

**Failure of Crown to elect on hybrid offence** – Where the accused is charged with a Crown option offence and the Crown fails to elect the mode of procedure the Crown is deemed to proceed on a summary conviction basis if the case proceeds in a summary conviction Court: *R. v. Robert* (1973), 13 C.C.C. (2d) 43 (Ont. C.A.).

On arraignment for a Crown-election offence the prosecution failed to elect and then the Magistrate [now Provincial Court Judge] failed to put the accused to his complete election with the result that although the accused had indicated that he wished to be tried by the Magistrate, that Judge did not obtain jurisdiction under this Part of the Code and accordingly the Magistrate is deemed to have been sitting as a summary conviction Court. Accordingly, no appeal from conviction lay to the Court of Appeal: *R. v. Hawryluk* (1975), 29 C.C.C. (2d) 41, 12 N.B.R. (2d) 334 (N.B.S.C.App.Div.) (2:1). Limerick, J.A., dissenting held that where the Crown fails to elect the Magistrate has the option of determining the mode of trial and in this case by commencing to give the accused his election under subsec. (2) the Magistrate indicated he was treating the offence as indictable. The failure to give the complete election resulted in a lack of jurisdiction to try the case and the conviction should be quashed.

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**PROVINCIAL COURT JUDGE MAY DECIDE TO HOLD PRELIMINARY INQUIRY /**  
**Where subject-matter is a testamentary instrument or exceeds \$1,000 in value /**  
**Continuing proceedings.**

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555. (1) Where in any proceedings under this Part an accused is before a provincial court judge and it appears to the provincial court judge that for any reason the charge should be prosecuted by indictment, he may, at any time before the accused has entered upon his defence, decide not to adjudicate and shall thereupon inform the accused of his decision and continue the proceedings as a preliminary inquiry.

(2) Where an accused is before a provincial court judge charged with an offence mentioned in paragraph 553(a) or subparagraph 553(b)(i), and, at any time before the provincial court judge makes an adjudication, the evidence establishes that the subject-matter of the offence is a testamentary instrument or that its value exceeds five thousand dollars, the provincial court judge shall put the accused to his or her election in accordance with subsection 536(2).

(3) Where an accused is put to his election pursuant to subsection (2), the following provisions apply, namely,

- (a) if the accused elects to be tried by a judge without a jury or a court composed of a judge and jury or does not elect when put to his election, the provincial court judge shall continue the proceedings as a preliminary inquiry under Part XVIII and, if he orders the accused to stand trial, the provincial court judge shall comply with subsection 536(4); and
- (b) if the accused elects to be tried by a provincial court judge, the provincial court judge shall endorse on the information a record of the election and continue

with the trial. R.S., c. C-34, s. 485; 1972, c. 13, s. 41; R.S.C. 1985, c. 27 (1st Supp.), s. 106; 1994, c. 44, s. 58.

### CROSS-REFERENCES

The term “provincial court judge” is defined in s. 2. Where the judge continues the case as a preliminary inquiry under subsec. (1) then the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(a), but may re-elect by complying with s. 561. Where the accused refuses to elect under subsec. (1) then again he is deemed to have elected trial by judge and jury pursuant to s. 565(1)(c), but may re-elect by complying with s. 561. Where accused are jointly charged and do not all elect the same mode of trial then the judge may refuse to record the election pursuant to s. 567 and by virtue of s. 565(1)(b) they are all deemed to have elected trial by judge and jury pursuant to s. 565(1)(c), but may re-elect by complying with s. 561. For procedure respecting election for mode of trial, including trial by provincial court judge, see *Note on mode of trial* under s. 553. For procedure respecting conduct of preliminary inquiry, see the note following s. 537.

### SYNOPSIS

This section deals with situations where a trial in the provincial court may be transformed into a preliminary inquiry, even when the accused has elected to be tried in that forum or, by virtue of s. 553, the offence is within the absolute jurisdiction of the provincial court judge.

Where, before the accused has been called upon to enter a defence, a provincial court judge presiding at the trial of an indictable offence under Part XIX is of the opinion that the matter should be tried in a higher court, he can convert the proceedings into a preliminary inquiry. Should this occur, the accused will be deemed to have elected to be tried by a judge sitting with a jury (see s. 565(1)(a)).

Where the trial is in relation to an offence within the absolute jurisdiction of the provincial court, on the basis that the subject-matter of the charge does not exceed \$5,000 (see s. 553), and before the conclusion of the proceedings the evidence establishes a greater value, the accused will be asked to elect the mode of trial (see s. 536(2)). Depending on the election, the matter will continue as either a trial or become a preliminary inquiry. If the accused refuses to elect, the proceedings will convert to an inquiry.

### ANNOTATIONS

**Subsec. (1)** – Completion of an unsuccessful motion for dismissal at the conclusion of the Crown’s case is a proceeding before the accused has entered upon his defence and at that point the Court may continue the proceedings as a preliminary inquiry: *Re R. v. Nadeau* (1971), 3 C.C.C. (2d) 276, 3 N.B.R. (2d) 591 *sub nom. Re Nadeau* (N.B.S.C.App.Div.).

This subsection only applies to indictable proceedings under Part XIX and therefore could have no application to a trial commenced as a summary conviction trial under Part XXVII. Thus, a judge having commenced a trial under Part XXVII for assault, the Crown having elected to proceed by way of summary conviction, could not invoke this subsection and continue the proceedings as a preliminary inquiry: *R. v. Turton* (1988), 44 C.C.C. (3d) 49, 89 A.R. 78 (C.A.).

While the language of this section is very broad, unless there is a judicial reason for overruling the accused’s election to be tried by a provincial court judge then the accused should be entitled to proceed in that way: *R. v. Babcock* (1989), 68 C.R. (3d) 285, 31 O.A.C. 354, 38 C.R.R. 178 (C.A.).

### CORPORATION / Non-appearance / Corporation not electing.

556. (1) An accused corporation shall appear by counsel or agent.

(2) Where an accused corporation does not appear pursuant to a summons and service of the summons on the corporation is proved, the provincial court judge

- (a) may, if the charge is one over which he has absolute jurisdiction, proceed with the trial of the charge in the absence of the accused corporation; and
- (b) shall, if the charge is not one over which he has absolute jurisdiction, hold a preliminary inquiry in accordance with Part XVIII in the absence of the accused corporation.

(3) Where an accused corporation appears but does not elect when put to an election under subsection 536(2), the provincial court judge shall hold a preliminary inquiry in accordance with Part XVIII. R.S., c. C-34, s. 486; R.S.C. 1985, c. 27 (1st Supp.), s. 107.

#### CROSS-REFERENCES

The term "provincial court judge" is defined in s. 2. Service on a corporation is effected pursuant to s. 703.2.

#### SYNOPSIS

An accused corporation charged with an offence must appear either by counsel or agent (usually an officer of the company). Where an accused corporation does not appear pursuant to a summons, and service of the summons is proved, a provincial court judge *may* proceed to trial in the absence of the accused if the charge is within his absolute discretion (subsec. (2)(a)). Where the charge is not one over which the provincial court judge has absolute jurisdiction, he *shall* conduct a preliminary inquiry in the accused corporation's absence.

Where the corporation appears but refuses to enter an election under s. 536(2), there must be a preliminary inquiry (subsec. (3)).

#### ANNOTATIONS

An amalgamated company is responsible for the criminal acts of its amalgamating companies: *R. v. Black & Decker Manufacturing Co. Ltd.* (1974), 15 C.C.C. (2d) 193, 43 D.L.R. (3d) 393 (S.C.C.) (9:0).

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#### TAKING EVIDENCE.

557. Where an accused is tried by a provincial court judge in accordance with this Part, the evidence of witnesses for the prosecutor and the accused shall be taken in accordance with the provisions of Part XVIII relating to preliminary inquiries. R.S., c. C-34, s. 487.

#### CROSS-REFERENCES

The term "provincial court judge" is defined in s. 2. The principle provision respecting taking of evidence in Part XVIII is s. 540.

#### SYNOPSIS

At a provincial court trial the evidence shall be taken down in the same manner as prescribed in relation to preliminary inquiries by Part XVIII.

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## *Jurisdiction of Judges*

### **Judge's Jurisdiction with Consent**

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#### TRIAL BY JUDGE WITHOUT A JURY.

558. Where an accused who is charged with an indictable offence, other than an offence listed in section 469, elects under section 536 or re-elects under section 561



**to be tried by a judge without a jury, the accused shall, subject to this Part, be tried by a judge without a jury. R.S., c. C-34, s. 488; R.S.C. 1985, c. 27 (1st Supp.), s. 108.**

#### CROSS-REFERENCES

By virtue of s. 566 the trial before a judge without a jury, other than before a provincial court judge, shall be on an indictment preferred in accordance with ss. 574 and 577. An accused may re-elect his mode of trial by complying with s. 561. Where accused are jointly charged but have not re-elected the same mode of trial then the judge may decline to record the re-election pursuant to s. 567 and they are deemed to have elected trial by judge and jury, by virtue of s. 565(1)(b). For procedure respecting election for mode of trial generally, see *Note on mode of trial* under s. 553. For procedure respecting conduct of preliminary inquiry, see the note following s. 537. For cross-references respecting trial by judge alone, see s. 559.

#### SYNOPSIS

This section provides the statutory authority for trial by judge alone as permitted by this Part in accordance with the procedure in this Part.

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#### COURT OF RECORD / Custody of records.

**559. (1) A judge who holds a trial under this Part shall, for all purposes thereof and proceedings connected therewith or relating thereto, be a court of record.**

**(2) The record of a trial that a judge holds under this Part shall be kept in the court over which the judge presides. R.S., c. C-34, s. 489.**

#### CROSS-REFERENCES

For notes on power of a court of record to find a person in contempt of court, see notes following ss. 9 and 10. Where the judge has not commenced to hear evidence then any judge having jurisdiction to try the accused has jurisdiction for purpose of the hearing and adjudication by virtue of s. 669.1. Where the trial judge is unable to continue, see s. 669.2. Where the accused absconds during his trial, the trial may be continued in his absence under s. 475. The procedure respecting conduct of trial is generally found in Part XX, made applicable to trials under this Part by s. 572. Appeals in indictable proceedings are governed by Part XXI. Sentence is imposed in accordance with Part XXIII, except in the case of dangerous-offender proceedings, in which case, see Part XXIV.

#### SYNOPSIS

Judges who conduct trials under this Part are courts of record, and the records of such trials are to be kept in the court of the judge who conducts the trial.

#### ANNOTATIONS

A provincial court judge acting under this Part has the power in appropriate circumstances to impose a ban on publication of the proceedings before him where publication could impair the actual or apparent fairness of the trials of co-accused thereafter taking place: *Re Church of Scientology of Toronto et al. and The Queen* (No. 6) (1986), 27 C.C.C. (3d) 193 (Ont. H.C.J.).

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## Election

**DUTY OF JUDGE / Notice by sheriff, when given / Duty of sheriff when date set for trial / Duty of accused when not in custody.**

**560. (1) Where an accused elects, under section 536 to be tried by a judge without a jury, a judge having jurisdiction shall,**

- (a) on receiving a written notice from the sheriff or other person having custody of the accused stating that the accused is in custody and setting out the nature of the charge against him, or
  - (b) on being notified by the clerk of the court that the accused is not in custody and of the nature of the charge against him,
- fix a time and place for the trial of the accused.
- (2) The sheriff or other person having custody of the accused shall give the notice mentioned in paragraph (1)(a) within twenty-four hours after the accused is ordered to stand trial, if the accused is in custody pursuant to that order or if, at the time of the order, he is in custody for any other reason.
- (3) Where, pursuant to subsection (1), a time and place is fixed for the trial of an accused who is in custody, the accused
- (a) shall be notified forthwith by the sheriff or other person having custody of the accused of the time and place so fixed, and
  - (b) shall be produced at the time and place so fixed.
- (4) Where an accused is not in custody, the duty of ascertaining from the clerk of the court the time and place fixed for the trial, pursuant to subsection (1), is on the accused, and he shall attend for his trial at the time and place so fixed. R.S., c. C-34, s. 490; R.S.C. 1985, c. 27 (1st Supp.), ss. 101(3), 109(1).
- (5) [*Repealed. R.S.C. 1985, c.27 (1st Supp.), s. 109(2).*]

#### CROSS-REFERENCES

The term "clerk of the court" is defined in s. 2. For notes respecting trial by judge alone see cross-references under s. 559. Power to issue a bench warrant where the accused fails to attend for trial is found in s. 597. The attendance of an accused who is in custody may be procured by compliance with s. 527. Where the accused absconds during his trial the trial may be continued in his absence under s. 475.

#### SYNOPSIS

This section deals with the fixing of trial dates where the accused has been committed following a preliminary inquiry and has elected to be tried by a judge sitting without a jury. Local practices will govern how arrangements are made to set the matter down, having regard to the court's rota and the availability of counsel and the witnesses. The person having custody of an incarcerated accused is required to initiate the setting of a trial date within 24 hours of the accused being ordered to stand trial.

Where the accused is in custody, he will have to be brought to court for trial (subsec. (3)). An accused who is not in custody is responsible for ascertaining the date which has been set and for appearing at the required time and place (subsec. (4)).

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#### RIGHT TO RE-ELECT / Idem / Notice / Idem / Notice and transmitting record / Time and place for re-election / Proceedings on re-election.

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561. (1) An accused who elects or is deemed to have elected a mode of trial other than trial by a provincial court judge may re-elect
- (a) at any time before or after the completion of the preliminary inquiry, with the written consent of the prosecutor, to be tried by a provincial court judge;
  - (b) at any time before the completion of the preliminary inquiry or before the fifteenth day following the completion of the preliminary inquiry, as of right, another mode of trial other than trial by a provincial court judge; and
  - (c) on or after the fifteenth day following the completion of the preliminary inquiry, any mode of trial with the written consent of the prosecutor.
- (2) An accused who elects to be tried by a provincial court judge may, not later than

fourteen days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so thereafter with the written consent of the prosecutor.

(3) Where an accused wishes to re-elect under subsection (1) before the completion of the preliminary inquiry, the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, where such consent is required, to the justice presiding at the preliminary inquiry who shall on receipt of the notice,

(a) in the case of a re-election under paragraph (1)(b), put the accused to his re-election in the manner set out in subsection (7); or

(b) where the accused wishes to re-elect under paragraph (1)(a) and the justice is not a provincial court judge, notify a provincial court judge or clerk of the court of the accused's intention to re-elect and send to the provincial court judge or clerk the information and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, or any evidence taken before a coroner, that is in the possession of the justice.

(4) Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect together with the written consent of the prosecutor, where such consent is required, to the provincial court judge before whom the accused appeared and pleaded or to a clerk of the court.

(5) Where an accused wishes to re-elect under subsection (1) after the completion of the preliminary inquiry, the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, where that consent is required, to a judge or clerk of the court of his original election who shall, on receipt of the notice, notify the judge or provincial court judge or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or provincial court judge or clerk the information, the evidence, the exhibits and the statement, if any, of the accused taken down in writing under section 541 and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk.

(6) Where a provincial court judge or judge or clerk of the court is notified under paragraph (3)(b) or subsection (4) or (5) that the accused wishes to re-elect, the provincial court judge or judge shall forthwith appoint a time and place for the accused to re-elect and shall cause notice thereof to be given to the accused and the prosecutor.

(7) The accused shall attend or, if he is in custody, shall be produced at the time and place appointed under subsection (6) and shall, after

(a) the charge on which he has been ordered to stand trial or the indictment, where an indictment has been preferred pursuant to section 556, 574 or 577 or is filed with the court before which the indictment is to be preferred pursuant to section 577, or

(b) in the case of a re-election under subsection (1) before the completion of the preliminary inquiry or under subsection (2), the information has been read to the accused, be put to his re-election in the following words or in words to the like effect:

You have given notice of your wish to re-elect the mode of your trial. You now have the option to do so. How do you wish to re-elect? R.S., c. C-34, s. 491; R.S.C. 1985, c. 27 (1st Supp.), s. 110.

#### CROSS-REFERENCES

Where the accused re-elects under s. 561(1) for trial by provincial court judge or judge alone then s. 562(1) sets out the procedure to be followed. Where the accused re-elects under s. 561(1)(b) or (2)



then the justice proceeds with the preliminary inquiry under s. 562(2). Where the accused re-elects trial by provincial court judge then, pursuant to s. 563, the trial takes place on the information and the re-election is to be endorsed on the information. Section 565 sets out the circumstances when the accused is deemed to have elected judge and jury. Note s. 567 giving the judge or justice power not to record the re-election where jointly charged accused do not all re-elect the same mode of trial. Under s. 568, the Attorney General may override an election or re-election and require a jury trial except where the offence is punishable by five years or less. For offences listed in s. 469, the right of re-election is limited according to s. 473. An accused, against whom a direct indictment has been preferred under s. 577, may re-elect only with the consent of the prosecutor under s. 565(2).

## SYNOPSIS

This section sets out the procedure to be followed when an accused wishes to change his or her election (or deemed election) as to the mode of trial.

Where the accused has chosen to be tried other than before a provincial court judge, the consent of the Crown is required to re-elect for trial in the provincial court (subsec. (1)(a)).

Where the accused wishes to change from judge alone to judge and jury, or vice versa, he has a "right" to do so for up to two weeks following the completion of the preliminary inquiry (subsec. (1)(b)). Afterwards the written consent of the prosecutor is required (subsec. (1)(c)).

Where the election is for trial before a provincial court judge, the accused can exercise a "right" of re-election up to two weeks before the first trial date that has been fixed. Thereafter, the written consent of the prosecutor is needed (subsec. (2)).

Written notice of a desire to re-elect must be given to the court and the prosecutor in accordance with subssecs. (3), (4) and (5). The procedure to be followed by the court is set out in subssecs. (6) and (7). In cases where the matter is before the provincial court (*i.e.*, because the accused has elected trial in that forum or where a preliminary inquiry has not yet been completed) the re-election shall take place before a provincial court judge.

Where there has been a committal for trial and the accused wishes to re-elect "down", the procedure will take place in the provincial court. A change from judge alone to judge and jury, or vice versa, will occur before a judge of the trial court.

Where the Crown has proceeded by way of "direct" indictment, s. 565(2) applies.

## ANNOTATIONS

It was held in relation to the predecessor to this section that the accused, personally or through his counsel, may waive the procedural requirements which were enacted for his benefit. However, the Judge has a paramount right to require compliance. The validity of any waiver depends upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the right which the procedure was enacted to protect and of the effect the waiver will have on those rights: *Korponey v. A.-G. Can.* (1982), 65 C.C.C. (2d) 65, 26 C.R. (3d) 343, 132 D.L.R. (3d) 354, [1982] 1 S.C.R. 41 (9:0).

The requirement of Crown consent to re-election in the course of preliminary inquiry does not offend ss. 7 and 15 of the Charter of Rights and Freedoms: *Re Koleff and The Queen* (1987), 33 C.C.C. (3d) 460, 46 Man. R. (2d) 190 (Q.B.).

To avoid a violation of s. 11(f) of the Charter, this section must be interpreted so as to give the accused the right to re-elect trial by judge and jury within 15 days of learning of a substantial change in the Crown's case, even though this is beyond 15 days following the completion of the preliminary inquiry: *R. v. Ruston* (1991), 63 C.C.C. (3d) 419 (Man. C.A.).

Absent conduct on the part of the Crown amounting to an abuse of process, the court

has no power to override the Crown's decision refusing to consent to a re-election for trial by judge alone: *R. v. E. (L.)* (1994), 94 C.C.C. (3d) 228, 75 O.A.C. 244 (C.A.).

It will only be in unusual circumstances that the discretionary power, given to the Crown under this section, to refuse to consent to a re-election after expiration of the 15-day period from the date of the order to stand trial, will be subject to judicial review. The accused, it would seem, must establish improper motives or some other factor amounting to an abuse of process. The mere fact that the Crown perceived a tactical advantage from a trial by judge alone is not an improper motive or an abuse of process: *R. v. Mohammed* (1990), 60 C.C.C. (3d) 296 (Man. Q.B.).

Where an indictment has been preferred under s. 574(1)(b) containing additional counts founded on the evidence at the preliminary inquiry, the accused, if he wishes to re-elect his mode of trial, must re-elect in respect of the entire indictment. He does not have the right to "elect" his mode of trial in relation to the additional counts: *R. v. Puric* (1990), 54 C.C.C. (3d) 373 (Sask. Q.B.).

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#### PROCEEDINGS FOLLOWING RE-ELECTION / *Idem.*

**562. (1) Where the accused re-elects under paragraph 561(1)(a) before the completion of the preliminary inquiry or under subsection 561(1) after the completion of the preliminary inquiry, the provincial court judge or judge, as the case may be, shall proceed with the trial or appoint a time and place for the trial.**

**(2) Where the accused re-elects under paragraph 561(1)(b) before the completion of the preliminary inquiry or under subsection 561(2), the justice shall proceed with the preliminary inquiry. R.S., c. C-34, s. 492; R.S.C. 1985, c. 27 (1st Supp.), s. 110.**

#### CROSS-REFERENCES

Where the accused re-elects trial by provincial court judge, see s. 563. For circumstances where the accused may not re-elect, see s. 561, cross-reference.

#### SYNOPSIS

This section provides that after re-election by the accused under s. 561(1) or (2), the trial or preliminary inquiry, as the case may be, shall proceed. In the case of a trial, the judge or provincial court judge may also set a time and place for trial.

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#### PROCEEDINGS ON RE-ELECTION TO BE TRIED BY PROVINCIAL COURT JUDGE WITHOUT JURY.

**563. Where an accused re-elects under section 561 to be tried by a provincial court judge,**

- (a) the accused shall be tried on the information that was before the justice at the preliminary inquiry, subject to any amendments thereto that may be allowed by the provincial court judge by whom the accused is tried; and**
- (b) the provincial court judge before whom the re-election is made shall endorse on the information a record of the re-election. R.S., c. C-34, s. 493; R.S.C. 1985, c. 27 (1st Supp.), s. 110.**

#### CROSS-REFERENCES

The terms "justice" and "provincial court judge" are defined in s. 2. The term "judge" is defined in s. 552. For circumstances where the accused may not re-elect, see s. 561.

#### SYNOPSIS

This section sets the procedure where an accused re-elects under s. 561 to be tried before a provincial court judge. Its principal effect is to confirm that the trial takes place on the original information that was before the justice conducting the preliminary inquiry. The fact of the re-election is enclosed in the information.

## ANNOTATIONS

Where the accused re-elects trial by provincial court judge and intends to have the evidence taken on the preliminary inquiry apply at the trial, both he and the Crown must consent to such procedure and their consent must be conveyed to the court and then the evidence must in some way, be it by the filing of transcripts or by some reference to the previous judicial proceedings, enter the record during the trial: *Matheson v. The Queen* (1981), 59 C.C.C. (2d) 289, 22 C.R. (3d) 289, [1981] 6 W.W.R. 277 (S.C.C.) (7:0).

564. [*Repealed*. R.S.C. 1985, c. 27 (1st Supp.), s. 110.]

**ELECTION DEEMED TO HAVE BEEN MADE / Where direct indictment preferred / Notice of re-election / Application.**

565. (1) Where an accused is ordered to stand trial for an offence that, under this Part, may be tried by a judge without a jury, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury if

- (a) the accused was ordered to stand trial by a provincial court judge who, pursuant to subsection 555(1), continued the proceedings before him as a preliminary inquiry;
- (b) the justice, provincial court judge or judge, as the case may be, declined pursuant to section 567 to record the election or re-election of the accused; or
- (c) the accused does not elect when put to an election under section 536.

(2) Where an accused is to be tried after an indictment has been preferred against the accused pursuant to a consent or order given under section 577, the accused shall, for the purposes of the provisions of this Part relating to election and re-election, be deemed to have elected to be tried by a court composed of a judge and jury and may, with the written consent of the prosecutor, re-elect to be tried by a judge without a jury.

(3) Where an accused wishes to re-elect under subsection (2), the accused shall give notice in writing that he wishes to re-elect, together with the written consent of the prosecutor, to a judge or clerk of the court where the indictment has been filed or preferred who shall, on receipt of the notice, notify a judge having jurisdiction or clerk of the court by which the accused wishes to be tried of the accused's intention to re-elect and send to that judge or clerk the indictment and any promise to appear, undertaking or recognizance given or entered into in accordance with Part XVI, any summons or warrant issued under section 578, or any evidence taken before a coroner, that is in the possession of the first-mentioned judge or clerk.

(4) Subsections 561(6) and (7) apply to a re-election made under subsection (3). R.S., c. C-34, s. 495; R.S.C. 1985, c. 27 (1st Supp.), s. 111.

## CROSS-REFERENCES

The terms "justice", "clerk of the court" and "provincial court judge" are defined in s. 2. The term "judge" is defined in s. 552.

## SYNOPSIS

Subsection (1) sets out the circumstances where an accused will be "deemed" to have elected trial by judge and jury. This will be the case where: (a) a provincial court judge acting under s. 555(1) has converted a trial into a preliminary inquiry (subsec. (1)(a)); (b) the accused's election has not been recorded as provided for in s. 567 (subsec. (1)(b)), and (c) the accused has stood mute and refused to enter an election (subsec. (1)(c)).

Where the Crown has proceeded by way of "direct" indictment (see s. 577), the trial



will be before a jury unless the accused, with the consent of the Crown, re-elects to be tried by a judge alone (subsec. (2)).

Written notice is required; the procedure to be followed is set out in subsecs. (3) and (4).

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## **Trial**

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**INDICTMENT / Preferring indictment / What counts may be included and who may prefer indictment.**

**566. (1) The trial of an accused for an indictable offence, other than a trial before a provincial court judge, shall be on an indictment in writing setting forth the offence with which he is charged.**

**(2) Where an accused elects under section 536 or re-elects under section 561 to be tried by a judge without a jury, an indictment in Form 4 may be preferred.**

**(3) Section 574 and subsection 576(1) apply, with such modifications as the circumstances require, and section 577 does not apply, to the preferring of an indictment pursuant to subsection (2). R.S., c. C-34, s. 496; R.S.C. 1985, c. 27 (1st Supp.), s. 111.**

### **CROSS-REFERENCES**

The term “provincial court judge” is defined in s. 2. The term “judge” is defined in s. 552. As to trial before a provincial court judge, see s. 563.

### **SYNOPSIS**

This section provides that trial by judge alone shall be on an indictment in writing, other than in a trial before a provincial court judge (in which case, the trial is on an information) (subsec. (1)). The procedure to prefer indictments in jury trials is adopted for the purposes of this Part (see ss. 574 and 576), but not the provision for direct indictment under s. 577 (subsecs. (2) and (3)).

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## **General**

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### **MODE OF TRIAL WHERE TWO OR MORE ACCUSED.**

**567. Notwithstanding any other provision of this Part, where two or more persons are charged with the same offence, unless all of them elect or re-elect or are deemed to have elected, as the case may be, the same mode of trial, the justice, provincial court judge or judge**

- (a) may decline to record any election, re-election or deemed election for trial by a provincial court judge or a judge without a jury; and**
  - (b) if he declines to do so, shall hold a preliminary inquiry unless a preliminary inquiry has been held prior to the election, re-election or deemed election.**
- R.S., c. C-34, s. 497; R.S.C. 1985, c. 27 (1st Supp.), s. 111.**

### **CROSS-REFERENCES**

The terms “justice” and “provincial court judge” are defined in s. 2. The term “judge” is defined in s. 552. Where the justice or judge declines to record the election or re-election then the accused is deemed to have elected trial by judge and jury pursuant to s. 565(1)(b). As to right to re-elect, see s. 561.

## SYNOPSIS

This section gives a provincial court judge jurisdiction to decline to record an election for other than trial by jury where there is more than one accused and all do not elect the same mode of trial. Where this occurs, the election will be deemed to be for a judge sitting with a jury (see s. 565(1)(b)), and the hearing shall continue as a preliminary inquiry. This provision is designed to enable the court to avoid jointly charged accused obtaining severance by selecting different methods of trial.

## ANNOTATIONS

It was held in relation to the predecessor to this section that even where there is no objection to the procedure by the accused a provincial court judge has no power to simultaneously conduct the trial of one accused who has elected trial by provincial court judge, and the preliminary hearing of another who has elected trial by judge: *Re Regina and Niedzwieki and Tribe* (1980), 57 C.C.C. (2d) 184, [1981] 3 W.W.R. 151 (B.C.S.C.).

## ATTORNEY GENERAL MAY REQUIRE TRIAL BY JURY.

**568.** The Attorney General may, notwithstanding that an accused elects under section 536 or re-elects under section 561 to be tried by a judge or provincial court judge, as the case may be, require the accused to be tried by a court composed of a judge and jury, unless the alleged offence is one that is punishable with imprisonment for five years or less, and where the Attorney General so requires, a judge or provincial court judge has no jurisdiction to try the accused under this Part and a preliminary inquiry shall be held before a justice unless a preliminary inquiry has been held prior to the requirement by the Attorney General that the accused be tried by a court composed of a judge and jury. R.S., c. C-34, s. 498; R.S.C. 1985, c. 27 (1st Supp.), s. 111.

## CROSS-REFERENCES

The terms "Attorney General", "justice" and "provincial court judge" are defined in s. 2. The term "judge" is defined in s. 552.

## SYNOPSIS

Unless the offence is punishable with imprisonment for five years or less, the Attorney General has the right to require that an accused be tried by a jury. Once this provision has been invoked, the accused cannot select another mode of trial.

An example of a situation where this provision might be used is where jointly charged accused select different methods of trial, a provincial court judge having chosen not to exercise the power in s. 567 to decline to record the non-jury elections. In these circumstances, the Attorney General may act so that all are tried before the same court. Of course, this in no way precludes the trial court from ordering severance if such is determined appropriate (see s. 591(3)(b)).

## ANNOTATIONS

This section is not limited to a superior court of criminal jurisdiction: *Re Essiambre et al.* (1974), 17 C.C.C. (2d) 44 (B.C.S.C.).

The Attorney-General may exercise his jurisdiction under this section notwithstanding the accused has previously re-elected trial by Judge alone with the consent of counsel for the Attorney-General: *R. v. Pontbriand* (1978), 39 C.C.C. (2d) 145, 82 D.L.R. (3d) 389, 1 C.R. (3d) 97 (Que. S.C.).

Where the Attorney-General has exercised his power under this section, then the accused has no right to re-elect trial by judge alone, even with the consent of Crown counsel: *R. v. Thompson* (1987), 40 C.C.C. (3d) 365 (N.S.C.A.).

The exercise of his power under this section by the Attorney-General is not subject to

review by the Courts: *Re M. and The Queen* (1982), 1 C.C.C. (3d) 465, 143 D.L.R. (3d) 487 (Ont. H.C.J.).

This section does not infringe the rights to fundamental justice and equality guaranteed by ss. 7 and 15 of the Canadian Charter of Rights and Freedoms: *Re Haneson and The Queen* (1987), 31 C.C.C. (3d) 560, 27 C.R.R. 278 (Ont. H.C.J.).

**569. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 111.]**

**RECORD OF CONVICTION OR ORDER / Acquittal and record of acquittal / Transmission of record / Proof of conviction, order or acquittal / Warrant of committal / Admissibility of certified copy.**

**570. (1)** Where an accused who is tried under this Part is determined by a judge or provincial court judge to be guilty of an offence on acceptance of a plea of guilty or on a finding of guilt, the judge or provincial court judge, as the case may be, shall endorse the information accordingly and shall sentence the accused or otherwise deal with the accused in the manner authorized by law and, on request by the accused, the prosecutor, a peace officer or any other person, shall cause a conviction in Form 35 and a certified copy of it, or an order in Form 36 and a certified copy of it, to be drawn up and shall deliver the certified copy to the person making the request.

**(2)** Where an accused who is tried under this Part is found not guilty of an offence with which he is charged, the judge or provincial court judge, as the case may be, shall immediately acquit the accused in respect of that offence and shall cause an order in Form 37 to be drawn up, and on request shall make out and deliver to the accused a certified copy of the order.

**(3)** Where an accused elects to be tried by a provincial court judge under this Part, the provincial court judge shall transmit the written charge, the memorandum of adjudication and the conviction, if any, into such custody as the Attorney General may direct.

**(4)** A copy of a conviction in Form 35 or of an order in Form 36 or 37, certified by the judge or by the clerk or other proper officer of the court, or by the provincial court judge, as the case may be, or proved to be a true copy, is, on proof of the identity of the person to whom the conviction or order relates, sufficient evidence in any legal proceedings to prove the conviction of that person or the making of the order against him or his acquittal, as the case may be, for the offence mentioned in the copy of the conviction or order.

**(5)** Where an accused other than a corporation is convicted, the judge or provincial court judge, as the case may be, shall issue or cause to be issued a warrant of committal in Form 21, and section 528 applies in respect of a warrant of committal issued under this subsection.

**(6)** Where a warrant of committal is issued by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding. R.S., c. C-34, s. 500; R.S.C. 1985, c. 27 (1st Supp.), s. 112; 1994, c. 44, s. 59.

#### CROSS-REFERENCES

The terms “justice”, “clerk of the court” and “provincial court judge” are defined in s. 2. The term “judge” is defined in s. 552. Procedure with respect to pleas is set out in ss. 606 to 613. Previous convictions may be proved in accordance with ss. 665 to 667. Also see s. 12 of the Canada Evidence Act, R.S.C. 1985, c. C-5. An accused found guilty is entitled to speak to sentence, s. 668.

#### SYNOPSIS

This section sets out the forms to be used for the recording of convictions, acquittals,



warrants and orders under this Part. A certified or proved copy of such forms is proof of the result referred to therein.

### ANNOTATIONS

Where there were two informations each charging a separate fraud offence it was wrong for the convicting Court to impose one joint sentence for both offences and embody it on one conviction certificate: *R. v. Pretty* (1971), 5 C.C.C. (2d) 332, 2 N.&P.E.I. R.10 (P.E.I.S.C.).

A minute of conviction, setting out all the essential ingredients of a warrant of committal, is a document satisfactory to authorize an accused's confinement for sentence: *Ex P. Leclerc* (1973), 21 C.C.C. (2d) 16 (Que. C.A.).

The ministerial act of signing a warrant of committal may be committed by a rubber stamp facsimile: *R. v. Bellefontaine* (1975), 27 C.C.C. (2d) 200, 37 C.R.N.S. 100 (N.S.Co.Ct.).

A driving prohibition order made in summary conviction proceedings is not admissible pursuant to subsec. (4): *R. v. Tatomir* (1989), 51 C.C.C. (3d) 321, [1990] 1 W.W.R. 470, 99 A.R. 188 (C.A.).

Until the trial judge has endorsed the indictment he retains jurisdiction to correct an error made in pronouncing sentence and to ensure that the judgment of the court as recorded accurately reflects the court's intentions: *R. v. Maider* (1991), 64 C.C.C. (3d) 62 (B.C.C.A.).

### ADJOURNMENT.

**571. A judge or provincial court judge acting under this Part may from time to time adjourn a trial until it is finally terminated. R.S., c. C-34, s. 501.**

### CROSS-REFERENCES

The term "provincial court judge" is defined in s. 2. The term "judge" is defined in s. 552. As to curative provisions respecting adjournments, see ss. 485 and 485.1. For procedure respecting continuation of trial before any evidence has been taken, see s. 669.1 and where the trial judge is unable to continue, see s. 669.2.

### ANNOTATIONS

In *R. v. Heminger and Hornigold*, [1969] 3 C.C.C. 201 (Man. C.A.), it was decided that for an offence mentioned in s. 553 the more than eight-clear-days adjournment consent rule in s. 537(1)(a) did not apply to pre-trial proceedings to a Part XIX trial.

Where a Judge was unable to attend Court it was held that the Court clerk acting under a Judge's instruction could adjourn the case: *Re Pattyson and The Queen* (1974), 19 C.C.C. (2d) 537, [1975] 1 W.W.R.91 (Sask.Q.B.).

In *R. v. Pickett* (1971), 5 C.C.C. (2d) 371 (Ont. C.A.) a conviction was quashed where the accused was refused an adjournment although his counsel was unavoidably engaged in another Court. The trial had proceeded with the accused being represented by an inexperienced solicitor who had virtually no knowledge of the facts of the case and had been sent by counsel to request the adjournment. The trial proceeding in this manner lacked the appearance of justice. [Also see notes re "Right to counsel" under s. 650, *infra*.]

### APPLICATION OF PARTS XVI, XVIII, XX and XXIII.

**572. The provisions of Part XVI, the provisions of Part XVIII relating to transmission of the record by a provincial court judge where he holds a preliminary inquiry, and the provisions of Parts XX and XXIII, in so far as they are not inconsistent with this Part, apply, with such modifications as the circumstances require, to proceedings under this Part. R.S., c. C-34, s. 502; R.S., c. 2 (2nd Supp.), s. 10.**

## CROSS-REFERENCES

The term “provincial court judge” is defined in s. 2.

## SYNOPSIS

This section provides that Part XVI (compelling appearance of accused), Part XX (jury trials) and Part XXIII (punishment) apply to this Part, *mutatis mutandis*. The provisions of Part XVIII relating to transmission of the record by a provincial court judge after a preliminary inquiry also apply.

## ANNOTATIONS

By virtue of this section a provincial court judge has power to take a view as provided in s. 652: *R. v. Prentice*, [1965] 4 C.C.C. 118, 47 C.R. 231 (B.C.C.A.).

573. [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 113.*]

## Part XX / PROCEDURE IN JURY TRIALS AND GENERAL PROVISIONS

### *Preferring Indictment*

PROSECUTOR MAY PREFER INDICTMENT / Consent to inclusion of other charges / Private prosecutor requires consent.

574. (1) Subject to subsection (3) and section 577, the prosecutor may prefer an indictment against any person who has been ordered to stand trial in respect of

- (a) any charge on which that person was ordered to stand trial, or
- (b) any charge founded on the facts disclosed by the evidence taken on the preliminary inquiry, in addition to or in substitution for any charge on which that person was ordered to stand trial,

whether or not the charges were included in one information.

(2) An indictment preferred under subsection (1) may, if the accused consents, include any charge that is not referred to in paragraph (1)(a) or (b), and the offence charged may be dealt with, tried and determined and punished in all respects as if it were an offence in respect of which the accused had been ordered to stand trial, but if the offence was committed wholly in a province other than that in which the accused is before the court, subsection 478(3) applies.

(3) In any prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene, an indictment shall not be preferred under subsection (1) before any court without the written order of a judge of that court. R.S., c. C-34, s. 504; R.S.C. 1985, c. 27 (1st Supp.), s. 113.

## CROSS-REFERENCES

The terms “prosecutor”, “Attorney General” and “indictment” are defined in s. 2. Where no preliminary inquiry has been held or the accused has been discharged following a preliminary inquiry, see s. 577. The formal requirements of an indictment are set forth in ss. 581 to 593. The Attorney General may direct a stay of an indictment pursuant to s. 579. Pursuant to s. 580, an indictment is sufficient if it is on paper and in Form 4. An indictment preferred under this part is required whenever the accused is to be tried in a court other than the provincial court, whether by a judge alone or a judge with a jury. Section 597 provides that where an indictment has been preferred against the person who is at large and the person does not appear or remain in attendance for his trial the court may issue a warrant for his arrest.

## SYNOPSIS

This section deals with the drafting and preferring of indictments.

Where, following a preliminary inquiry, there has been an order to stand trial, the prosecutor may include in the indictment not only the charge(s) on which the accused has been ordered to stand trial (subsec. (1)(a)) but also any other charge(s) disclosed by the evidence taken at the inquiry (subsec. (1)(b)).

By reason of subsec. (2), the accused can consent to adding to the indictment charges other than those referred to in subsec. (1). The only limitation is that the offences must have been committed within the province in which the indictment is being preferred, otherwise the transfer provisions of the Code must be used (see s. 478(3)). An accused may wish to use this provision as a means of bringing a number of charges before one judge for disposition by way of a guilty plea.

Subsection (3) precludes an indictment being preferred in a "private prosecution" without the approval of a judge of the court in which the trial will occur.

## ANNOTATIONS

**Editor's Note:** Some of the decisions noted below although decided under the predecessor legislation were felt to be relevant to these provisions.

It is after the presentment of the indictment that the indictment becomes the foundation of any further proceedings and the accused is precluded from attacking the regularity of the order to stand trial by way of *certiorari*. However, such an indictment is not preferred or presented until it is lodged with the trial court at the opening of the accused's trial with a court ready to proceed with the trial: *R. v. Chabot* (1980), 55 C.C.C. (2d) 385, 18 C.R. (3d) 258 (S.C.C.) (7:0).

The agent of the Attorney-General who signed the indictment is not also required to conduct the trial: *R. v. Alward* (1976), 32 C.C.C. (2d) 416, 73 D.L.R. (3d) 290 (N.B.S.C. App. Div.).

The accused's election and any subsequent re-election apply to offences added to the indictment pursuant to subsec. (1)(b): *R. v. Garcia* (1990), 75 C.R. (3d) 250 (B.C.C.A.).

The prosecutor has no power under this section to prefer an indictment including a charge which was before the judge presiding at the preliminary inquiry but upon which the judge did not order the accused to stand trial. When the judge presiding at the preliminary hearing has heard all of the evidence, the judge's refusal to order the accused to stand trial for an offence charged in an information amounts to a judicial determination that that charge is not founded on the facts disclosed by the evidence for the purpose of this section. In order to proceed with the original charge, a new charge would have to be laid either by a new information or by a preferred indictment under s. 577. However, since s. 577 does not apply to trials by judge alone under Part XIX, to prefer an indictment under that section, the Attorney General would also have to make a direction under s. 568: *R. v. Tapaquon*, [1993] 4 S.C.R. 535, 87 C.C.C. (3d) 1, 26 C.R. (4th) 193.

The refusal of the judge presiding at the preliminary inquiry to order the accused to stand trial on another offence, disclosed by the evidence pursuant to s. 548, does not mean that the accused was discharged on that other offence within the meaning of s. 577(b) and, therefore, an indictment may be preferred under this section including the charges upon which the accused was ordered to stand trial and other offences disclosed by the evidence, and s. 577 need not be complied with: *R. v. Hyde* (1990), 55 C.C.C. (3d) 251 (Man. C.A.).

The error in the labelling of the offence with which the accused was charged as sexual assault [an offence which did not exist at the time of the offence] rather than indecent assault was voidable and thus, when the error was detected, it was open to the Crown to prefer a new indictment, without the consent of the Attorney General [as required by s. 577], based on the evidence adduced at the preliminary inquiry the validity of which was never directly challenged by the accused: *R. v. Barbeau* (1992), 75 C.C.C. (3d) 129, 49 Q.A.C. 220, 140 N.R. 211 (S.C.C.).



575. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 113.]

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**INDICTMENT / Criminal information and bill of indictment / Coroner's inquisition.**

576. (1) Except as provided in this Act, no indictment shall be preferred.

(2) No criminal information shall be laid or granted and no bill of indictment shall be preferred before a grand jury.

(3) No person shall be tried on a coroner's inquisition. R.S., c. C-34, s. 506; R.S.C. 1985, c. 27 (1st Supp.), s. 114.

**CROSS-REFERENCES**

The term "indictment" is defined in s. 2. An indictment is preferred pursuant to ss. 574 and 577. Pursuant to s. 529, where a person is alleged, by a verdict on a coroner's inquest, to have committed murder or manslaughter but he has not been charged with the offence, the coroner shall direct, by warrant, that the person be taken into custody and taken before a justice or direct that the person enter into a recognizance to appear before a justice.

**SYNOPSIS**

This section, in effect, abolishes certain archaic, mostly common law, modes of proceeding and confirms that an accused may only be tried upon indictment as provided for in the Criminal Code.

**ANNOTATIONS**

In *R. v. Hemlock Park Co-Operative Farm Ltd.* (1972), 6 C.C.C. (2d) 189, 24 D.L.R. (3d) 688 (S.C.C.), it was held (5:0) that a criminal information referred to the historic laying of a charge by the Attorney-General or some other authorized person directly before a Superior Court of Criminal Jurisdiction instead of being preferred to a Grand Jury or presented by a Grand Jury.

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**DIRECT INDICTMENTS.**

577. In any prosecution,

(a) where a preliminary inquiry has not been held, an indictment shall not be preferred, or

(b) where a preliminary inquiry has been held and the accused has been discharged, an indictment shall not be preferred or a new information shall not be laid

before any court without,

(c) where the prosecution is conducted by the Attorney General or the Attorney General intervenes in the prosecution, the personal consent in writing of the Attorney General or Deputy Attorney General, or

(d) where the prosecution is conducted by a prosecutor other than the Attorney General and the Attorney General does not intervene in the prosecution, the written order of a judge of that court. R.S., c. C-34, s. 507; 1974-75-76, c. 93, s. 63; 1984, c. 40, s. 20(2); R.S.C. 1985, c. 27 (1st Supp.), s. 115.

**CROSS-REFERENCES**

The preliminary inquiry is held pursuant to Part XVIII. In particular, s. 548 sets out the test for determining whether or not the accused should be ordered to stand trial or discharged. This section is complementary to s. 574 which represents the ordinary procedure for preferring an indictment, i.e., where the accused has been ordered to stand trial. The term "indictment" is defined in s. 2. The term "Attorney General" is also defined in s. 2 but as this section indicates, the full definition of that term is not applicable since the "personal consent" of the Attorney General or the Deputy Attorney General is required. Where an indictment has been preferred pursuant to s. 577, the

court, by virtue of s. 578, may issue a summons addressed to or warrant for the arrest of the accused to compel his attendance to answer the charge in the indictment. While, by virtue of s. 566(3), a direct indictment may not be preferred under s. 577 for trial by judge alone, the accused may, pursuant to s. 565(2), re-elect trial by judge alone with the written consent of the prosecutor. Absent the re-election, the accused will be tried by judge and jury. The Attorney General may direct a stay of proceedings pursuant to s. 579.

## SYNOPSIS

Where either no preliminary inquiry has been held or one has been conducted and the accused discharged, the Crown can only prefer an indictment with the written consent of the Attorney General or the Deputy Attorney General. Such consent is also required to proceed on a new information.

In "private prosecutions" the written consent of a judge is required in these circumstances.

## ANNOTATIONS

**Editor's Note:** Some of the decisions noted below although decided under the predecessor legislation were felt to be relevant to these provisions.

**Formalities of preferring indictment** – Where the Attorney-General consents to the preferring of the indictment it is sufficient that the Attorney-General has personally signed the indictment and he is not required to be present in court when the indictment is actually preferred: *R. v. Philbin and Henderson* (1977), 37 C.C.C. (2d) 528, [1978] 1 W.W.R. 122 (Alta. S.C. App. Div.); *R. v. Dwyer and Lauzon* (1978), 42 C.C.C. (2d) 83 (Ont. C.A.), rev'd on other grounds 47 C.C.C. (2d) 1, [1980] 1 S.C.R. 481, 10 C.R. (3d) 20; *Re Balderstone and The Queen* (1982), 2 C.C.C. (3d) 37, 143 D.L.R. (3d) 671, [1983] 1 W.W.R. 72 (Man. Q.B.), aff'd 8 C.C.C. (3d) 532, 4 D.L.R. (4th) 162, [1983] 6 W.W.R. 438 (C.A.).

An indictment signed by the then Attorney-General some months before the trial at which time the indictment is preferred is valid notwithstanding that by the time of trial a new Attorney-General has been appointed: *R. v. Rooke* (1988), 40 C.C.C. (3d) 484 (B.C.C.A.).

Where a preliminary hearing has been commenced but not completed a preliminary hearing "has not been held" within the meaning of this section and a consent is necessary to prefer an indictment: *Re Stewart et al. and The Queen (No. 2)* (1975), 35 C.C.C. (2d) 281 (Ont. C.A.).

The refusal of the judge presiding at the preliminary inquiry to order the accused to stand trial on another offence, disclosed by the evidence pursuant to s. 548, does not mean that the accused was discharged on that other offence and, therefore, an indictment may be preferred under s. 574 including the charges upon which the accused was ordered to stand trial and other offences disclosed by the evidence. This section need not be complied with: *R. v. Hyde* (1990), 55 C.C.C. (3d) 251 (Man. C.A.).

Where the accused has been discharged on the full offence but ordered to stand trial on an included offence, in order to prefer an indictment for the full offence, the provisions of this section must be complied with. The prosecutor cannot simply rely upon the provisions of s. 574(1)(b): *R. v. Tapaquon*, [1993] 4 S.C.R. 535, 87 C.C.C. (3d) 1, 26 C.R. (4th) 193.

The quashing of an indictment for failure to comply with the provisions of s. 581(3) does not result in the accused being "discharged" so as to require the consent of the Attorney General to the preferring of a subsequent indictment. The term "discharged" in para. (b) refers to an order made at the conclusion of the preliminary inquiry where the justice finds that there is insufficient evidence to order the accused to stand trial. Preferring of a subsequent indictment to cure the supposed defect does not amount to an abuse of process: *R. v. D. (A.)* (1990), 60 C.C.C. (3d) 407, 75 O.R. (2d) 762 (Ont. C.A.).

Where the accused was ordered to stand trial for the offence charged of sexual assault, an offence which, however, did not exist at the time alleged, it was open to the Crown to prefer an indictment charging indecent assault without the consent of the Attorney General, this latter offence having been disclosed by the evidence at the preliminary inquiry within the meaning of s. 574: *R. v. B. (A.)* (1991), 64 C.C.C. (3d) 104 (Que. C.A.).

**Right to hearing before Attorney General** – In exercising his power under this subsection the Attorney General is not required to afford the accused a hearing even where the Attorney General proposes to prefer the indictment part way through the accused's preliminary hearing: *Re Saikaly and The Queen* (1979), 48 C.C.C. (2d) 192 (Ont. C.A.).

**Review of Attorney General's consent generally** – The courts have no jurisdiction to review a decision of the Attorney-General under this subsection to prefer an indictment despite the discharge of the accused at his preliminary inquiry: *Re Balderstone et al. and The Queen* (1983), 8 C.C.C. (3d) 532, [1983] 6 W.W.R. 438 (Man. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*; *R. v. Moore et al.* (1986), 26 C.C.C. (3d) 474, 50 C.R. (3d) 243 (Man. C.A.) or where no preliminary inquiry has been held: *R. v. Stolar* (1983), 4 C.C.C. (3d) 333, 32 C.R. (3d) 342 (Man. C.A.), leave to appeal to S.C.C. refused 21 Man. R. (2d) 240n, 50 N.R. 396n.

A superior court judge had no power to compel potential Crown witnesses to attend to be questioned by defence counsel because the Attorney General had preferred a direct indictment: *R. v. Sterling* (1993), 84 C.C.C. (3d) 65, [1993] 8 W.W.R. 623, 17 C.R.R. (2d) 122 (Sask. C.A.).

**Constitutional considerations** – This section does not infringe ss. 7, 9 and 15 of the Charter of Rights and Freedoms. However, the exercise of the power by the Attorney-General to override a discharge and prefer a direct indictment could be reviewed by a court of competent jurisdiction if in the particular case it resulted in a denial or infringement of a constitutionally protected right: *R. v. Ertel* (1987), 35 C.C.C. (3d) 398, 58 C.R. (3d) 252 (Ont. C.A.), leave to appeal to S.C.C. refused 36 C.C.C. (3d) vi. Also see: *Re Patrick and A.-G. Can.* (1986), 28 C.C.C. (3d) 417 (B.C.S.C.) [note: an appeal to the B.C.C.A. was quashed, 35 C.C.C. (3d) 551, 56 C.R. (3d) 378, and leave to appeal to S.C.C. was refused, 80 N.R. 160]; *R. v. Andrew*, [1986] 6 W.W.R. 323 (B.C.S.C.).

The statutory right to a preliminary hearing is not a constitutional right and therefore where the accused has been given complete disclosure of the Crown's case, the preferring of a direct indictment where a preliminary inquiry has not been held, does not constitute a violation of the right to fundamental justice in s. 7 of the Canadian Charter of Rights and Freedoms: *Re Regina and Arviv* (1985), 19 C.C.C. (3d) 395, 45 C.R. (3d) 354 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*; *R. v. Sterling* (1993), 84 C.C.C. (3d) 65 (Sask. C.A.).

**Order of judge where private complaint [para. (d)]** – In two cases, *Re Johnson and Inglis et al.* (1980), 52 C.C.C. (2d) 385, 17 C.R. (3d) 250 (Ont. H.C.J.) and *Re Garton and Whelan* (1984), 14 C.C.C. (2d) 449, 47 O.R. (2d) 672 (H.C.J.), decided prior to the amendment to this section, Evans C.J.H.C. considered the role of a judge in consenting to private prosecution where no preliminary inquiry had been held or the accused had been discharged. In the *Johnson* case it was held that a distinction must be drawn between cases where a preliminary hearing has and has not been held. In either case, however, in deciding whether to exercise his discretion the judge must consider the nature of the offence, whether it is of a "public" nature such as murder, or of a "private" nature such as criminal libel, and he should also consider the position of the Crown in the matter. Where a preliminary hearing has been held, the judge's consent should be granted only where it is necessary to prevent a miscarriage of justice. Thus, consent will not automatically be granted simply because a *prima facie* case was made out at the preliminary hearing. Where no preliminary hearing has been held a much stricter test is appropriate, consent being granted only where some urgency or other strongly persua-



sive reasons exist so as to require depriving the person of a preliminary hearing to which he would otherwise be entitled under the law. In *Garton*, it was held that the judge should not give his consent merely because of an error of law made by the judge presiding at the preliminary inquiry. Rather, the court will only give its consent where it is necessary to prevent a miscarriage of justice. In making that determination a relevant consideration is the fact that the Attorney-General's Department has on two occasions reviewed the sufficiency of the evidence. It is open to the court in its discretion to hear new evidence on an application pursuant to s. 577.

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#### **SUMMONS OR WARRANT / Part XVI to apply.**

**578. (1) Where notice of the recommencement of proceedings has been given pursuant to subsection 579(2) or an indictment has been filed with the court before which the proceedings are to commence or recommence, the court, if it considers it necessary, may issue**

**(a) a summons addressed to, or**

**(b) a warrant for the arrest of,**

**the accused or defendant, as the case may be, to compel him to attend before the court to answer the charge described in the indictment.**

**(2) The provisions of Part XVI apply with such modifications as the circumstances require where a summons or warrant is issued under subsection (1). 1974-75-76, c. 93, s. 64; R.S.C. 1985, c. 27 (1st Supp.), s. 116.**

#### **CROSS-REFERENCES**

The term "indictment" is defined in s. 2. The terms "summons" and "warrant" are defined for the purposes of Part XVI in s. 493.

The ordinary power to issue a bench warrant is found in s. 597 where the accused does not appear or remain in attendance for his trial.

#### **SYNOPSIS**

This section provides for compelling the appearance of the accused where the Attorney General has recommenced proceedings following a stay of proceedings (see s. 579(2)), or the matter is being dealt with by way of "direct" indictment (see s. 577). The normal rules governing the issuance of process and judicial interim release apply.

#### **ANNOTATIONS**

The judge need not hear evidence before issuing a warrant under this section: *R. v. Denbigh* (1988), 45 C.C.C. (3d) 86 (B.C.S.C.).

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#### **ATTORNEY GENERAL MAY DIRECT STAY / Recommencement of proceedings.**

**579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.**

**(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be**

deemed never to have been commenced. R.S., c. C-34, s. 508; 1972, c. 13, s. 43; R.S.C. 1985, c. 27 (1st Supp.), s. 117.

#### CROSS-REFERENCES

The terms “Attorney General”, “indictment” and “clerk of the court” are defined in s. 2. The procedure for enforcement of recognizance is in Part XXV.

#### SYNOPSIS

This section governs the Attorney General’s ability to stay and recommence proceedings.

The Attorney General or his counsel has the right to direct a stay after proceedings have been commenced (*i.e.*, after an information has been laid or an indictment has been filed) and before a verdict has been rendered.

In the case of an indictable offence the proceedings can be recommenced within one year of the stay. For summary conviction matters the Crown must act before the expiration of the limitation period. Where notice of recommencement is given within these time limits the proceedings will be continued on the original indictment or information.

After the one-year period has elapsed the Crown, if it wishes to proceed on an indictable matter, will have to start afresh.

#### ANNOTATIONS

**Procedure in directing stay** – In *Re Dowson and The Queen* (1983), 7 C.C.C. (3d) 527, 35 C.R. (3d) 289, [1983] 2 S.C.R. 144 (7:0), it was held in relation to the predecessor to this section that an information charging an indictable offence could not be stayed until the justice had determined whether or not to issue process pursuant to s. 518. However, in reaching this conclusion the court appeared to accept that this created an anomaly in that under former s. 732.1 summary conviction proceedings could be stayed as soon as the information was laid. With the amendment to this section and the repeal of s. 732.1, this section now covers both summary and indictable proceedings and in terms similar to former s. 732.1. Accordingly, it would appear that all charges can be stayed as soon as the information is laid.

This view was confirmed in *R. v. Pardo* (1990), 62 C.C.C. (3d) 371 (Que. C.A.), where it was held that the Attorney General may direct a stay of proceedings prior to the decision of the justice whether or not to issue process.

An agent of the Attorney-General may exercise his power under this section under his general authority as such an agent and does not require specific instructions from the Attorney General: *R. v. McKay* (1979), 9 C.R. (3d) 378, [1979] 4 W.W.R. 90 (Sask. C.A.).

**Effect of entering of stay** – Subsequent to proceedings being stayed a new information in identical terms may be laid and proceeded upon: *R. v. Judge of the Provincial Court, Ex p. McLeod*, [1970] 5 C.C.C. 128, 74 W.W.R. 319 *sub nom.* *R. v. McLeod* (B.C.S.C.).

By virtue of this section, the pre-existing right of the Crown to withdraw charges with leave of the Court after the proceedings have been commenced and a plea taken has been abolished by Parliament and this section governs the procedure and the effect of the discontinuance. A stay, however, does not prevent a new information from being laid, and the Crown still has the right to withdraw charges prior to a plea being taken: *R. v. Grocutt* (1977), 35 C.C.C. (2d) 76, [1977] 2 W.W.R. 698 (Alta. S.C.T.D.).

The vacating of the recognizance upon entering of a stay of proceedings does not render the recognizance void *ab initio* and if prior to the stay being entered the accused failed to comply with its terms a court has jurisdiction under s. 770 to endorse such default: *Purves v. Canada (Attorney-General)* (1990), 54 C.C.C. (3d) 355 (B.C.C.A.).

**Right of Attorney General to intervene** – Once the Attorney-General intervenes in a prosecution, then he assumes control of the prosecution and has the right to stay those proceedings despite the wishes of the informant. At least in the absence of flagrant

impropriety on the part of the Crown officers, such action does not constitute a violation of the informant's rights under s. 7 of the Charter of Rights and Freedoms: *Re Hamilton and The Queen* (1986), 30 C.C.C. (3d) 65 (B.C.S.C.). Similarly: *R. v. Osiovy* (1989), 50 C.C.C. (3d) 189, 77 Sask. R. 1 (C.A.).

Except perhaps where there is a flagrant impropriety on the part of the Attorney-General, the courts may not review the exercise of discretion under this section: *Campbell v. A.-G. Ont.* (1987), 31 C.C.C. (3d) 289, 38 D.L.R. (4th) 64, 58 O.R. (2d) 209 (H.C.J.), affd 35 C.C.C. (3d) 480, 42 D.L.R. (4th) 383, 60 O.R. (2d) 617 (C.A.), leave to appeal to S.C.C. refused 43 D.L.R. (4th) vii. Similarly: *Re A.-G. Que. and Chartrand* (1987), 40 C.C.C. (3d) 270, 59 C.R. (3d) 388 (Que. C.A.), where it was held that while by reason of enactment of the Charter the exercise of the discretion under this section is subject to review, the private complainant's rights under s. 15 of the Charter were not infringed because a stay of proceedings was entered to bar prosecution of abortion charges.

The fact that the Attorney-General has broad powers of intervention, including the right to stay proceedings initiated by a private informant, does not violate the equality rights under s. 15 of the Canadian Charter of Rights and Freedoms: *Re Baker and The Queen* (1986), 26 C.C.C. (3d) 123, 21 C.R.R. 365 (B.C.S.C.).

Section 7 of the Charter does not give a private prosecutor the right to continue a criminal prosecution in the face of an intervention by the Attorney General: *Kostuch (Informant) v. Alberta (Attorney General)* (1995), 101 C.C.C. (3d) 321, 43 C.R. (4th) 81, [1996] 1 W.W.R. 292 (Alta. C.A.).

**Withdrawal of charge** – It was held in *R. v. Osborne* (1975), 25 C.C.C. (2d) 405, 33 C.R.N.S. 211 (N.B.S.C. App. Div.), that the trial Judge should not have refused the Crown's request prior to plea to withdraw one charge so as to lay a more serious charge. This

... refusal ... [constituted a] usurpation by the Court of the administrative function of the Crown prosecutor and the Attorney-General to determine who and for what offence any person should be prosecuted. Case law clearly indicates that the Courts should distinguish between private prosecutions and those carried on by the Crown. They show that the Courts should not interfere with the administration of justice by making the matter of withdrawal a means of controlling the Crown's discretion to prosecute and thereby bring the executive and judicial branches of government into conflict. They point out and emphasize that the business of withdrawals is strictly that of the Attorney-General or his agents before the Court. They equate the right of withdrawal to the right to grant a stay of proceedings. The Crown prosecutor is in a better position than the Judge to know how serious any particular case is. Further, the prosecutor is the representative of The Queen and it is inconceivable that the Court should refuse the right of Her Majesty to withdraw an information or stay a prosecution.

Prior to the preferring of an indictment or the entering of a plea and the tendering of evidence an information may be withdrawn by the Crown without the leave of the Court. Where the Crown has tendered evidence after taking of a plea then the trial Judge is seized with jurisdiction and the information cannot be withdrawn without his consent. Accordingly, where, prior to plea, the Crown states that an information is withdrawn the Court has no jurisdiction to proceed with trial or preliminary hearing: *Re Blasko and The Queen* (1975), 29 C.C.C. (2d) 321, 33 C.R.N.S. 227 (Ont. H.C.J.).

The Crown may withdraw an information on which an election of summary conviction has been made, file a new information and proceed by way of indictment, despite a plea of not guilty having been entered. The exercise of prosecutorial discretion does not offend the principles of fundamental justice unless there is bad faith or some improper motive or arbitrary purpose: *R. v. McArthur* (1995), 102 C.C.C. (3d) 84 (Sask. C.A.).

Once evidence has been heard on a preliminary hearing the prosecutor has the right to "withdraw the charges" in the sense that he does not wish to prosecute the proceedings any further but this decision does not eliminate the proceedings and the Court should continue the preliminary hearing until completion, either by discharge or committal of the accused, or until the prosecutor directs a stay under this section. Further, where the prosecutor is counsel for the Attorney-General his verbal assurance that he has the neces-



sary instructions from the Attorney-General to direct a stay be entered is all that is required: *R. v. Mastroianni et al.* (1976), 36 C.C.C. (2d) 97 (Ont. Prov. Ct.).

**Abuse of process / Jurisdiction generally** – Courts have a residual discretion to remedy an abuse of process only in the “clearest of cases” which requires proof of conduct which shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. There must be “overwhelming” evidence that the proceedings are unfair to the point that they are contrary to the interest of justice. Courts must be careful not to attempt to second-guess the Attorney General and to intervene only where there is “conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed”: *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 29 C.R. (4th) 1. Also see the earlier cases of: *R. v. Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193 and *R. v. Keyowski*, [1988] 1 S.C.R. 657, 40 C.C.C. (3d) 481, 62 C.R. (3d) 349.

Crown counsel acted properly and in good faith in staying proceedings when the trial judge ordered that the identity of a confidential informer be disclosed. In the circumstances, the Crown was not required to not offer evidence and then proceed through an appeal against acquittal to challenge the correctness of the ruling. Subsequent to the stay of proceedings, the Crown acted at the first reasonable opportunity to recommence the proceedings. There was no abuse of process in the circumstances: *R. v. Scott* (1990), 61 C.C.C. (3d) 300, 116 N.R. 361, 2 C.R. (4th) 153 (S.C.C.).

**Grounds for judicial stay of proceedings** – In *Re Orysiuk and The Queen* (1977), 37 C.C.C. (2d) 445, 1 C.R. (3d) 111 (5:0) (Alta. S.C. App. Div.), the Court was unanimous in holding that the laying of criminal charges following a public inquiry into the same matter as were the subject of the charges did not give rise to grounds for staying the proceedings.

In *R. v. Crneck, Bradley and Shelley* (1980), 55 C.C.C. (2d) 1, 17 C.R. (3d) 171 (Ont. H.C.J.), Krever J. held that a superior Court had power to stay proceedings as an abuse of process but only in the most exceptional circumstances as where to permit the Crown to renege on its agreement to extend immunity to an accused in return for her co-operation in the prosecution of another person would undermine the administration of justice and bring the entire system of justice into disrepute. As well the accused would be prejudiced in her defence and this too was grounds for staying the proceedings.

Abuse of process is not limited to cases where there is evidence of prosecutorial misconduct and may be invoked where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases: *R. v. Conway* (1989), 49 C.C.C. (3d) 289, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209.

One ground for staying proceedings as an abuse of process is where the criminal proceedings have been instituted to collect a debt or realize on some civil claim. However, this must amount to more than merely evidence that the victim asked the accused for repayment and agreed on cross-examination that had he had been repaid he would not have contacted the police: *Re R. and Laird* (1983), 4 C.C.C. (3d) 92, 146 D.L.R. (3d) 755 (Ont. H.C.J.).

A charge of theft was stayed as an abuse of process where the evidence showed that the “victim” had threatened to go to the authorities if the accused did not repay the allegedly stolen money. In fact, the accused did default and the police were contacted: *R. v. Janvier*, [1985] 5 W.W.R. 59 (Sask. Q.B.).

In *R. v. B* (1986), 29 C.C.C. (3d) 365, 53 C.R. (3d) 216 (Ont. C.A.), the court reviewed the circumstances in which the act of the prosecution in splitting the case by laying a second charge, resting upon some of the same facts as underlay a charge of which the accused had been acquitted, amounted to an abuse of process. Abuse of process has been found where the second trial is such that it will, in effect, force the accused to answer for the same delinquency twice; where the second trial is such that it will, in

effect, relitigate matters that have already been decided on the merits, raising the spectre of inconsistent verdicts; or where the second trial is brought because of malice or spite so as to harass the accused and not for any proper purpose.

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**INTERVENTION BY ATTORNEY GENERAL OF CANADA / Section 579 to apply.**

**579.1. (1)** The Attorney General of Canada or counsel instructed by him or her for that purpose may intervene in proceedings in the following circumstances:

- (a) the proceedings are in respect of a contravention of, a conspiracy or attempt to contravene or counselling the contravention of an Act of Parliament or a regulation made under that Act, other than this Act or a regulation made under this Act;
- (b) the proceedings have not been instituted by an Attorney General;
- (c) judgment has not been rendered; and
- (d) the Attorney General of the province in which the proceedings are taken has not intervened.

(2) Section 579 applies, with such modifications as the circumstances require, to proceedings in which the Attorney General of Canada intervenes pursuant to this section. 1994, c. 44, s. 60.

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**SYNOPSIS**

This section allows the Attorney General of Canada to intervene in proceedings for an offence other than an offence under this Act, even though the proceedings were not commenced at the instance of the Government of Canada within the meaning of "Attorney General" in s. 2, except where, *inter alia*, the proceedings were instituted by a provincial Attorney General or the provincial Attorney General intervened. Having intervened, the federal Attorney General may then stay the proceedings under s. 579.

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**FORM OF INDICTMENT.**

**580.** An indictment is sufficient if it is on paper and is in Form 4. R.S., c. C-34, s. 509; R.S.C. 1985, c. 27 (1st Supp.), s. 117.

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**CROSS-REFERENCES**

The term "indictment" is defined in s. 2. Section 841(3) provides that any pre-printed portions of the form shall be printed in both official languages. The other formal requirements for an indictment are set out in ss. 581 to 593 and the power to amend an indictment is in s. 601.

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**General Provisions as to Counts**

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**SUBSTANCE OF OFFENCE / Form of statement / Details of circumstances / Indictment for treason / Reference to section / General provisions not restricted.**

**581. (1)** Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an offence therein specified.

(2) The statement referred to in subsection (1) may be

- (a) in popular language without technical averments or allegations of matters that are not essential to be proved;
- (b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
- (c) in words that are sufficient to give to the accused notice of the offence with which he is charged.

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

(4) Where an accused is charged with an offence under section 47 or sections 49 to 53, every overt act that is to be relied upon shall be stated in the indictment.

(5) A count may refer to any section, subsection, paragraph or subparagraph of the enactment that creates the offence charged, and for the purpose of determining whether a count is sufficient, consideration shall be given to any such reference.

(6) Nothing in this Part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of this section. R.S., c. C-34, s. 510; R.S.C. 1985, c. 27 (1st Supp.), s. 118.

#### CROSS-REFERENCES

The terms “indictment” and “count” are defined in s. 2. The other formal requirements with respect to sufficiency of counts in an information or indictment are found in ss. 582 to 586. Under s. 587, particulars may be ordered. Joinder and severance are dealt with in ss. 589 to 591. Under s. 592, an accessory after the fact may be indicted whether or not the principal has been indicted or convicted. Section 593 provides that any number of persons may be charged in the same indictment with the offences under s. 354 or s. 356(1)(b). Provision for amending a defective indictment is found in s. 601. The accused is entitled to inspect without charge the indictment pursuant to s. 603. Special provision for delivery of documents including a copy of the indictment in cases of treason is found in s. 604. Pursuant to s. 580, an indictment is sufficient if it is on paper and is in Form 4. Pursuant to s. 841(3), any pre-printed parts of a form are to be in both official languages.

#### SYNOPSIS

This section sets out the rules which govern the drafting of charges. The purpose of these provisions is to ensure that an accused is reasonably informed of the offence alleged and is thus able to properly defend the matter.

Subsection (1), in general, restricts a count to a “single transaction”. This, however, is not synonymous with a single incident or occurrence. A “transaction” may be made up of a series of events or involve a number of victims.

Subsection (3) permits several methods of stating the offence: (a) popular language; (b) the words of the enactment that describe the offence or declares the matters charged to be an offence, and (c) words sufficient to give the accused notice of the offence. Most charges are drafted using the language of the offence-creating provision.

To be valid, a charge must contain sufficient detail to enable the accused to identify the transaction in issue (subsec. (3)). This requires that the count raise the matter from the general to the particular and specify “time, place and subject-matter”.

Where the offence charged is high treason (s. 47), alarming Her Majesty (s. 49), assisting alien enemy (s. 50), intimidating Parliament (s. 51), sabotage (s. 52) or mutiny (s. 53), all of the overt acts relied upon by the Crown must be set out (subsec. (4)).

It is permissible (and certainly advisable) to refer in the body of a charge to the section number of the offence-creating provision (subsec. (5)).

While subsequent provisions, such as s. 583, provide that omissions of certain details do not render the information or indictment insufficient, those provisions, by virtue of subsec. (6), do not limit the application of the mandatory minimum conditions for validity and sufficiency set out in this section.

#### ANNOTATIONS

**Review of judge’s decision re validity** – Where an information falls within a trial Court’s jurisdiction the Judge has exclusive jurisdiction to determine its validity and his decision upholding it is not subject to either a motion to quash or extraordinary remedy



proceedings but only to an appeal against his disposition of the case: *R. v. Jarman* (1972), 10 C.C.C. (2d) 426 (Ont. C.A.); *Re Poulriot and The Queen* (1978), 41 C.C.C. (2d) 93 (Que. C.A.).

**Single transaction rule [subsec. (1)]** – In *R. v. Zamal et al.*, [1964] 1 C.C.C. 12, 42 C.R. 378, [1964] 1 O.R. 224 (C.A.) where five accused were charged jointly with rape and the evidence was that each had successively raped the complainant, although there were separate offences, they were all one transaction and the indictment was not therefore void for duplicity or uncertainty.

An indictment which charged that the accused, over a two and a half year period at specified premises, committed sexual assault by touching the very young victim in specified areas of her body did not offend the single transaction rule set out in subsec. (1): *R. v. German* (1989), 51 C.C.C. (3d) 175, 77 Sask. R. 310 (C.A.).

An agreement to commit a number of different indictable offences is only one conspiracy transaction: *R. v. Addison, ex p. Mooney*, [1970] 1 C.C.C. 127, [1969] 2 O.R. 674 (C.A.).

Where it is alleged that the accused over several months attempted to procure a number of different women to have illicit sexual intercourse, more than one transaction is involved, and each woman should be the subject of a separate count: *R. v. Deutsch* (1983), 5 C.C.C. (3d) 41 (Ont. C.A.) affd on other grounds 27 C.C.C. (3d) 385, 52 C.R. (3d) 305, [1986] 2 S.C.R. 2.

In determining the validity of a charge a single transaction may include a general scheme of operation constituting one continuing offence: *R. v. Kisinger and Voszler* (1972), 6 C.C.C. (2d) 212, 18 C.R.N.S. 120 (Alta. C.A.).

Although no objection was made at trial it is permissible to object on appeal that an indictment violated subsec. (1). Where a fraudulent scheme includes different representations made to separate complainants a count alleging fraud cannot be said to apply in general to a single transaction: *R. v. Rafael* (1972), 7 C.C.C. (2d) 325, [1972] 3 O.R. 238 (C.A.).

A triple, instant death situation may result in a single count indictment, even though three separate counts are quite permissible: *R. v. Porter* (1976), 33 C.C.C. (2d) 215 (Ont. C.A.).

**Duplicity rule [common law]** – In *R. v. Cotroni; Papalia v. The Queen* (1979), 45 C.C.C. (2d) 1, 93 D.L.R. (3d) 161, 7 C.R. (3d) 185 (S.C.C.) (7:0) while the Court unanimously dismissed a Crown appeal against C's acquittal and P's appeal against his conviction on a charge of conspiracy the Court divided on whether where the evidence reveals two separate conspiracies this renders the indictment duplicitous. Dickson, J. (Spence, Beetz and Pratte, JJ., concurring), was of the view that where the count charges one conspiracy but the evidence at trial proves more than one conspiracy this did not render the charge duplicitous and the only issue is which conspiracy was envisaged by the indictment. Pigeon, J. (Ritchie, J., concurring), was of the view that as the indictment covered two separate conspiracies to which P was a party it was duplicitous. However, by virtue of s. 590 (1)(b) this did not render the indictment void and "transaction" in s. 581(1) is not to be equated with "offence". As no prejudice was occasioned to P his appeal was dismissed. Martland, J., agreed with Dickson and Pigeon, JJ. that P's appeal should be dismissed.

An indictment alleging a course of conduct commencing with an initial theft by taking of a cheque and then theft by conversion and theft by failing to account for the cheque and its proceeds does not violate the duplicity rule nor the single transaction rule: *R. v. Fischer* (1987), 31 C.C.C. (3d) 303, 53 Sask. R. 263 (C.A.).

An indictment of three separate conspiracy counts of importing, trafficking and exporting narcotics in effect sets out three different objects of a single subject-matter and accordingly while the accused should be found guilty on no more than one count the

indictment is valid: *R. v. Bloomfield, Cormier and Ettinger* (1973), 10 C.C.C.(2d) 398, 21 C.R.N.S.97 (N.B.C.A.).

**Sufficiency of notice of offence charged [subsecs. (1), (2)]** – Where the fraud indictment charged payments of about four hundred dollars received through false medical treatment claims rendered over a specific six-month period and the trial Judge found that the Crown had failed to prove its general theory of a continued course of conduct constituting a fraudulent scheme of operation, it was still open to him, as he did, to find the accused guilty of the count where he was satisfied beyond a reasonable doubt that fraud had been committed by the accused in connection with nine of the seventy medical treatment claims adduced in evidence by the Crown: *R. v. Barnes* (1975), 26 C.C.C. (2d) 112, 2 C.R. (3d) 310, 63 D.L.R. (3d) 452 (N.S.S.C. App. Div.).

A theft by a person required to account, charged against a taxi-driver who withheld fares from the vehicle's owner, which read "... unlawfully did commit theft of the approximate sum of sixteen dollars and fifty cents the property of Dominic Louis Christian ..." was valid as declaring the matter to be an indictable offence in the words of the general theft section: *R. v. McKenzie* (1971), 4 C.C.C. (2d) 296, 16 C.R.N.S.374 (S.C.C.).

A defective information is not a nullity if it gives fair notice of the offence to the accused. Only if a charge is so badly drawn up as to fail even to give the accused notice of the charge will it fail the minimum test required by para. (c). Otherwise, the charge is capable of amendment under s. 601 and should not be quashed: *R. v. Moore* (1988), 41 C.C.C. (3d) 289, 65 C.R. (3d) 1, [1988] 5 W.W.R. 1, [1988] 1 S.C.R. 1097 (4:3).

**Sufficiency of identification of offence [subsec. (3)]** – An information that not only charges an offence, but does so in the exact wording of the section, is valid, despite its lack of particularity: *R. v. Rowley* (1972), 7 C.C.C. (2d) 230 (2:1) (Ont.C.A.).

It was held in *R. v. Cochrane* (1976), 33 C.C.C. (2d) 549, [1978] 2 W.W.R. 384 (B.C.C.A.) that there is a distinction between an imperfectly stated averment and the total omission of an essential allegation. An averment imperfectly stated cannot be raised after verdict if that verdict could not have been found without proof of that averment stated as it ought to have been. A further appeal to the Supreme Court of Canada was allowed, 38 C.C.C. (2d) 175n, [1978] 2 W.W.R. 384 (9:0) on other grounds without consideration of this particular issue.

In *R. v. Wis Developments Corp. Ltd. et al.* (1984), 12 C.C.C. (3d) 129, 40 C.R. (3d) 97, [1984] 1 S.C.R. 485 (4:0) the court appeared to affirm the continuing vitality of its prior decision in *Brodie et al. v. The King* (1936), 65 C.C.C. 289, [1936] S.C.R. 188, where the predecessor to this section was described as requiring that the indictment identify with reasonable precision the act charged in order that the accused know the particular offence alleged against him and prepare his defence accordingly; that it is not sufficient to charge an offence in the abstract, rather, concrete facts of a nature to identify the particular act which is charged and to give the accused notice of it are necessary ingredients of the indictment; that the indictment must specify time, place and matter, and describe the offence in such a way "as to lift it from the general to the particular". It would seem that the absence of sufficient details so as to comply with this section will vitiate the count. However, the further holding in *Wis Developments* that the information cannot be cured by amendment or the delivery of particulars where objection is taken prior to plea, must be read in light of the fact that this was a summary conviction matter and decided under the former ss. 729(2) and 732 which contained only limited powers of amendment prior to plea. With the repeal of those sections, and ss. 587 and 601 applying in both indictable and summary conviction matters, it may well be that in a proper case an indictment which fails to comply with this section can be cured by amendment or delivery of particulars.

While the circumstances in which acts of care or control of a motor vehicle may be found will vary widely, it cannot be said that the allegation of the care or control offence

under s. 253 could relate to a multitude of activities so as to require that the information contain greater detail than allegations that "on or about" a particular date and "at or near" a named district, the accused had "care or control" of a motor vehicle while his ability to drive a motor vehicle was impaired by alcohol or a drug: *R. v. Fox* (1986), 24 C.C.C. (3d) 366, 50 C.R. (3d) 370 (B.C.C.A.).

The offences of keeping a common betting house and keeping a common gaming house contrary to s. 201 can embrace a number of separate and distinct activities in view of the definition of those houses in s. 197 and so a count simply charging that the accused did unlawfully keep a common betting house or common gaming house at a specific address does not comply with this subsection: *Re R. and Wilson* (1986), 26 C.C.C. (3d) 8 (Man. Q.B.); *R. v. Bingo Enterprises Ltd. et al.* (1984), 15 C.C.C. (3d) 261, 41 C.R. (3d) 291, [1984] 6 W.W.R. 445, 29 Man. R. (2d) 78 (C.A.).

Charging the offence in the words of the statute will be insufficient if the offence as so described is capable of covering a multitude of diverse and unrelated acts. However the offence of keeping a common bawdy house is not of that kind: *R. v. Milberg* (1987), 35 C.C.C. (3d) 45 (Ont. C.A.), leave to appeal to S.C.C. refused June 23, 1987; not following *R. v. Bingo Enterprises Ltd.*, *supra*. Similarly: *R. v. Billon-Rey* (1990), 57 C.C.C. (3d) 223 (Que. C.A.).

**Sufficiency of identification of transaction [subsec. (3)]** – A count charging merely conspiracy to commit fraud which did not identify the transaction complained of was quashed in *Shumiatcher v. A.-G. For Saskatchewan* (1962), 133 C.C.C.69, 38 C.R.411 (Sask. C.A.). The new information, which contained details of the various overt acts in connection with the conspiracy was unsuccessfully attacked as being void for multiplicity: *Re Shumiatcher and A.-G. For Saskatchewan*, [1963] 2 C.C.C.319, 40 C.R.199 (Sask. C.A.).

A count of break and enter and to commit theft therein was upheld on the basis that while a simple charge of theft alone would require reference to the property which was the subject of the offence, the allegation of theft here is lifted from the general to the particular by its association with the particular break and entry in this compounded offence: *R. v. Wixalbrown and Schmidt*, [1964] 1 C.C.C.29, 41 C.R.113 (3:2) (B.C.C.A.).

The test as to whether there has been compliance with the requirements of subsection (3) is whether the information contains sufficient detail to give to the accused reasonable information with respect to the charge and to identify the transaction referred to therein. The kind of information that would be necessary to satisfy this test will vary depending on the nature of the offence charged. Thus, the necessity for an information to specify the time and place of the offence does not require that an information charging offences contrary to s. 253 specify the exact time in terms of hour and minute or the exact location of the offence: *R. v. Ryan*; *R. v. Charbonneau* (1985), 23 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused with respect to *Ryan* February 24, 1986; *R. v. Fox* (1986), 24 C.C.C. (3d) 366, 50 C.R. (3d) 370 (B.C.C.A.), leave to appeal to S.C.C. refused May 22, 1986.

The information in the possession of the accused, other than through the language of the indictment, such as material contained in the Crown brief to which the accused had been given access, is relevant in considering the sufficiency of the indictment: *Re Regina and R.I.C.* (1986), 32 C.C.C. (3d) 399 (Ont. C.A.).

An information charging an accused with sexual assault of a young child was sufficient, although the period of time specified extended for many months. These are the kinds of cases in which, because of the age of the alleged victim, full particularity with respect to, for example, dates, is likely impossible and to require it would make prevention of a serious social problem exceedingly difficult: *Re Regina and R.I.C.*, *supra*; *R. v. German*, *supra*. In both these cases, it should be noted that the court appeared to take into account the sufficiency of the disclosure made by the prosecution.

If an information states the time of the offence (even a lengthy period), the place, the victim and the offence (in the language of the enactment) then, except where there is a



possibility of prejudice to accused, it will not be quashed prior to plea: *R. v. MacLean* (1988), 45 C.C.C. (3d) 185, 68 C.R. (3d) 114, 31 B.C.L.R. (2d) 137 (B.C.C.A.).

As to time of offence, see notes under s. 601.

**Reference to section number [subsec. (5)]** – The omission of certain words from an indictment will not be fatal if it still has set forth the offence requirements, particularly where it is expressed to be contrary to the relevant specific subsection of the Code: *R. v. Lessard* (1970), 6 C.C.C. (2d) 239, [1972] 2 O.R.329 (C.A.).

Where the information fully and adequately sets out an offence, an erroneous section reference, which even if correct is mere surplusage, will not affect its validity: *R. v. Sourwine* (1970), 10 C.R.N.S.380, 72 W.W.R.761 (Alta. D.C.).

Specific reference to the offence section will cure the omission of the words “without reasonable excuse” in an information charging a refusal to provide a breath sample as the section reference complies with the rule of reasonably informing the defendant of the transaction alleged against him: *R. v. Cote* (1977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752 (S.C.C.) (6:2).

**Subsec. (6)** – Parliament enacted this subsection to ensure that neither *subsec. (2)(b)* nor s. 590(1)(a) or (b) could be invoked to answer a valid complaint of multiplicity: *R. v. Toth* (1959), 123 C.C.C.292, 29 C.R.371 (Ont.C.A.).

See also cases noted under s. 789.

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## HIGH TREASON AND FIRST DEGREE MURDER.

**582. No person shall be convicted for the offence of high treason or first degree murder unless in the indictment charging the offence he is specifically charged with that offence.** R.S., c. C-34, s. 511; 1973-74, c. 38, s. 4; 1974-75-76, c. 105, s. 6.

## CROSS-REFERENCES

The term “indictment” is defined in s. 2. High treason is defined in s. 46 and first degree murder is defined in s. 231. Both of these offences are within the exclusive jurisdiction of the superior court of criminal jurisdiction (defined in s. 2) by virtue of ss. 468 and 469 and an accused charged with these offences may only be released by a judge of the superior court of criminal jurisdiction by virtue of s. 522. Section 604 makes special provision for delivery of documents including a copy of the indictment in cases of treason. For other cross-references respecting these offences, see the notes under sections creating the offences. Note in particular, however, s. 589 providing that no count that charges an offence other than murder shall be joined in an indictment to a count that charges murder.

## SYNOPSIS

This section requires that an indictment specifically charge first degree murder or high treason if an accused is to be convicted of these offences. Thus, an indictment, charging the accused with “murder”, would be deemed to be second degree murder.

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## CERTAIN OMISSIONS NOT GROUNDS FOR OBJECTION.

**583. No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that**

- (a) it does not name the person injured or intended or attempted to be injured;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
- (d) it does not set out any writing that is the subject of the charge;

- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f) it does not specify the means by which the alleged offence was committed;
- (g) it does not name or describe with precision any person, place or thing; or
- (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained. R.S., c. C-34, s. 512.

#### CROSS-REFERENCES

The terms "count" and "indictment" are defined in s. 2. Other provisions respecting sufficiency of indictment are found in ss. 581, 582 and 584 to 586. Section 587 provides for the ordering of particulars. Section 588 makes provision with respect to ownership of property and s. 601 permits amendment of a defective indictment. Note s. 581(6) which provides that nothing in this part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of the requirements in s. 581.

#### SYNOPSIS

This section provides that a charge which otherwise complies with the minimum requirements of s. 581 is not insufficient by reason only of the fact that it does not: (a) name the person injured or intended or attempted to be injured; (b) name the owner of an interest in property; (c) name the victim of a fraud; (d) set out the writing which is the subject of the charge; (e) set out the words which are the subject of the charge; (f) specify the means by which an offence was committed; (h) fully name or describe any person, place or thing, or (h) state that, where required, a consent to the prosecution has been obtained.

#### ANNOTATIONS

**Victim of offence generally [paras. (a), (b), (g)]** – An information not naming a person or persons affected by a criminal act is not *per se* insufficient: *R. v. Kozodoy* (1957), 117 C.C.C.315, 23 C.R.124 (Ont. C.A.), but once the victim is named the name is a material part of the charge and must be proved: *R. v. Austin* (1955), 113 C.C.C. 95, 22 C.R.269 (Ont. C.A.).

In *R. v. Vogelle and Reid*, [1970] 3 C.C.C.171, 9 C.R.N.S.101 (Man. C.A.), the Court agreed that if the owner's name is unknown the Crown could charge ownership to person or persons unknown, but divided on the method of proving the theft of the goods.

In *Little and Wolski v. The Queen* (1974), 19 C.C.C. (2d) 385, 52 D.L.R. (3d) 1, [1976] 1 S.C.R. 20 (5:0) an appeal from conviction for theft was dismissed where although the owner of the goods allegedly stolen was named in the indictment as "Westwood Jewelers Limited" the only evidence was that the goods were stolen from "Westwood Jewelers" which was owned and managed by one of the witnesses. The Court divided on the effect of this apparent failure to prove ownership in the entity named in the indictment. de Grandpré, J., for the majority held that

... if the owner of the object allegedly stolen is mentioned in the indictment and if his ownership is not proven and there are no circumstances to indicate to the accused the true nature of the charge, an acquittal should be entered. However, when, as in the present case there cannot be any possibility for the accused to fail to identify the transaction about which they are charged, there is no reason to discharge the accused for the sole reason that the owner mentioned in the indictment has not been mentioned in the evidence.

Dickson, J., for himself and Beetz, J., while agreeing that the conviction was proper held that except in exceptional circumstances as where the theft can be inferred from the suspicious circumstances of the accused's possession, an allegation of ownership is not mere surplusage. However, the identity of the owner is sufficiently established, in instances in which the owner is named in the indictment, when:

- ... (i) the evidence adduced by the Crown reasonably identifies the owner with the person named in the indictment as owner, and (ii) it is clear that failure to prove the identity of the

owner with greater precision has not misled or prejudiced the accused in preparation or presentation of his defence.

In this case, both (i) and (ii) were met and therefore the conviction was proper.

**Person defrauded [para. (c)]** – While the identification of a victim in a charge of fraud is surplusage, the rule that particulars which are surplusage need not be proved is subject to the proviso that the accused not be prejudiced in his defence: *Vezina v. The Queen*; *Cote v. The Queen* (1986), 23 C.C.C. (3d) 481 (S.C.C.) (7:0).

**Means of commission of offence [para. (f)]** – On a charge of committing an act of gross indecency under former s. 157 the failure to specify the detail of what act was alleged to constitute the act of gross indecency was nothing more than a failure to specify the means by which the offence is alleged to have been committed and by virtue of this paragraph the charge is not rendered insufficient: *R. v. Dugdale and Leulier* (1979), 47 C.C.C. (2d) 555, 7 C.R. (3d) 216, [1979] 3 W.W.R. 462 (B.C.C.A.) approving the “modern approach” to the question of sufficiency of indictments in *R. v. Borek*, [1979] 1 W.W.R. 709 (B.C.C.A.) that “now technical omissions that have no real substance should not be considered as cause for rejection of the charges asserted”.

**Place of offence [para. (g)]** – The place of the offence must be both alleged and proven: *Budovitch v. The Queen* (1969), 8 C.R.N.S.280 (N.B.S.C., App. Div.).

**Consent to prosecution [para. (h)]** – The consent must be exact and refer to one specific matter: *Re R. v. Whyte Avenue Hotel Co. Ltd.*; *Re R. v. Wakalich* (1962), 39 C.R.40, 40 W.W.R.193 (Alta. S.C.).

In exercising his power to consent, the Attorney General is under no duty that can be enforced by the courts to act fairly and is not required to afford the accused a hearing before deciding whether or not to consent to the prosecution: *Re Warren and The Queen* (1981), 61 C.C.C. (2d) 65, 22 C.R. (3d) 58 (Ont. H.C.J.).

The consent may be endorsed on the face of the information and, if done in that manner, need not recite particulars of the charge: *Re R. and Willard* (1984), 15 C.C.C. (3d) 350 (Ont. H.C.J.).

An objection to the validity of the form of consent, in this case consent required by s. 477(2), cannot be raised for the first time near the conclusion of the trial just prior to the charge to the jury: *R. v. Sunila* (1987), 35 C.C.C. (3d) 289, 78 N.S.R. (2d) 24 (S.C. App. Div.).

## Special Provisions Respecting Counts

### SUFFICIENCY OF COUNT CHARGING LIBEL / Specifying sense / Proof.

584. (1) No count for publishing a blasphemous, seditious or defamatory libel, or for selling or exhibiting an obscene book, pamphlet, newspaper or other written matter, is insufficient by reason only that it does not set out the words that are alleged to be libellous or the writing that is alleged to be obscene.

(2) A count for publishing a libel may charge that the published matter was written in a sense that by innuendo made the publication thereof criminal, and may specify that sense without any introduction assertion to show how the matter was written in that sense.

(3) It is sufficient, on the trial of a count for publishing a libel, to prove that the matter published was libellous, with or without innuendo. R.S., c. C-34, s. 513.

### CROSS-REFERENCES

The term “count” is defined in s. 2. Section 587 provides for the ordering of particulars. Note



s. 581(6) which provides that nothing in this part relating to matters that do not render a count insufficient shall be deemed to restrict or limit the application of that section which sets out the minimum requirements for sufficiency. Provision for amending an indictment is made in s. 601.

### SYNOPSIS

This section provides that a count for publishing or selling a libel or an obscenity does not need to contain the specific words complained of (subsec. (1)). A count for publishing a libel can claim libel by innuendo without giving the mechanism of the innuendo (subsec. (2)). Proof that published material was libellous is sufficient in a trial for publishing libel (subsec. (3)).

### ANNOTATIONS

Even though the count does not set out the specific words it will be sufficient, particularly if it is clear that the accused knew what the count referred to: *Pratte v. Maher And The Queen*, [1965] 1 C.C.C.77, 43 C.R.214 (Que.C.A.).

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### SUFFICIENCY OF COUNT CHARGING PERJURY, ETC.

#### **585. No count that charges**

(a) perjury,  
(b) the making of a false oath or a false statement,  
(c) fabricating evidence, or  
(d) procuring the commission of an offence mentioned in paragraph (a), (b) or (c),  
is insufficient by reason only that it does not state the nature of the authority of the tribunal before which the oath or statement was taken or made, or the subject of the inquiry, or the words used or the evidence fabricated, or that it does not expressly negative the truth of the words used. R.S., c. C-34, s. 514.

### CROSS-REFERENCES

The term "count" is defined in s. 2. Section 587 makes provision for the ordering of particulars, *inter alia*, in para. (a) of what is relied on in support of a charge of perjury, the making of a false oath or of a false statement, fabricating evidence or counselling the commission of any of those offences. Section 587(1)(e) provides that particulars may be ordered further describing any "writing or words" that are the subject of the charge. Note section 581(6) which provides that nothing in this part relating to matters that do not render a count insufficient shall limit or restrict the application of s. 581 which sets out the minimum sufficiency requirements. A defective indictment may be amended pursuant to s. 601.

### SYNOPSIS

This section states that a count for perjury or related offences need not contain: (a) the nature of the authority of the tribunal; (b) the subject of the inquiry; (c) the words or evidence at issue; or (d) an express negation of the truth of such words.

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### SUFFICIENCY OF COUNT RELATING TO FRAUD.

**586. No count that alleges false pretences, fraud or an attempt or conspiracy by fraudulent means is insufficient by reason only that it does not set out in detail the nature of the false pretence, fraud or fraudulent means. R.S., c. C-34, s. 515.**

### CROSS-REFERENCES

The term "count" is defined in s. 2. Section 587 provides for the ordering of particulars and, in particular, s. 587(1)(b) provides for the ordering of particulars of any false pretence or fraud that is alleged and para. (c) provides for provision of particulars of any alleged attempt or conspiracy by fraudulent means. Section 581(6) provides that nothing in this part relating to matters that do not

render a count insufficient shall be deemed to restrict or limit the application of s. 581 which sets out the minimum sufficiency requirements for a count in an indictment.

## **Particulars**

### **WHAT MAY BE ORDERED / Regard to evidence / Particular.**

**587. (1)** A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars

- (a) of what is relied upon in support of a charge of perjury, the making of a false oath or of a false statement, fabricating evidence or counselling the commission of any of those offences;
- (b) of any false pretence or fraud that is alleged;
- (c) of any alleged attempt or conspiracy by fraudulent means;
- (d) setting out the passages in a book, pamphlet, newspaper or other printing or writing that are relied on in support of a charge of selling or exhibiting an obscene book, pamphlet, newspaper, printing or writing;
- (e) further describing any writing or words that are the subject of a charge;
- (f) further describing the means by which an offence is alleged to have been committed; or
- (g) further describing a person, place or thing referred to in an indictment.

**(2)** For the purpose of determining whether or not a particular is required, the court may give consideration to any evidence that has been taken.

**(3)** Where a particular is delivered pursuant to this section,

- (a) a copy shall be given without charge to the accused or his counsel;
- (b) the particular shall be entered in the record; and
- (c) the trial shall proceed in all respects as if the indictment had been amended to confirm with the particular. R.S., c. C-34, s. 516; R.S.C. 1985, c. 27 (1st Supp.), s. 7(2)(c).

### **CROSS-REFERENCES**

The terms “count” and “indictment” are defined in s. 2. Section 581 defines the minimum requirements for sufficiency of a count in an indictment. Section 601 provides for amending an indictment or count therein or a particular that is furnished under this section. Any objection to the sufficiency of an indictment is to be taken pursuant to a motion to quash prior to plea by virtue of s. 601(1). Other provisions respecting sufficiency of indictment are found in ss. 582 to 586.

### **SYNOPSIS**

This section gives the trial court the authority to order the Crown to furnish “particulars” where it is satisfied that the same are necessary for an accused to receive a fair trial. Particulars, once provided, are treated as part of the indictment (subsec. (2)). They further define the charge by providing more detailed information with respect to what is alleged.

Although not restricted to these matters, particulars may be ordered in regard to: (a) what is alleged in support of a charge of perjury, the making of a false oath, the fabrication of evidence or counselling the commission of an offence; (b) any false pretence or fraud; (c) an attempt or conspiracy by fraudulent means; (d) the passage relied upon in a charge relating to selling or exhibiting an obscene publication; (e) the description of the writing or words relied on in a charge; (f) further describing the means by which an offence was committed, and (g) further describing any person, place or thing referred to in the charge.

In considering whether to order particulars, the court will have regard to any evidence which has been taken (at either the preliminary inquiry or trial).

## ANNOTATIONS

**When particulars ordered** – Particulars are not required to be furnished by the Crown until the time for the entry of a plea by the accused and accordingly will not be ordered on a preliminary inquiry: *R. v. Chew*, [1968] 2 C.C.C. 127, [1968] 1 O.R. 97 (C.A.).

Any Judge of the Court in which an indictment has been filed, not necessarily the trial Judge, has jurisdiction to order particulars: *R. v. Pope et al.* (1978), 45 C.C.C. (2d) 348 (B.C. Co. Ct.); *Re Cole and The Queen* (1980), 70 C.C.C. (2d) 460 (Ont. H.C.J.).

**Purpose of particulars** – Particulars are to give the accused exact and reasonable information to enable him to establish fully his defence and to facilitate the administration of justice by defining the issues to assist the trial Judge in rulings on admissibility of evidence: *R. v. Canadian General Electric Co. Ltd. et al.* (No. 1) (1974), 17 C.C.C. (2d) 433, 16 C.P.R. (2d) 175 (Ont. H.C.J.).

**Effect of Crown's opening address** – The purpose of Crown counsel's opening address to the jury is to assist the jury in following the evidence by informing them of the theory of the Crown and what the various witnesses may say, to inform defence counsel as to the evidence which he may not know is going to be adduced, and to alert the trial Judge of possible legal questions, but it does not constitute particulars of the indictment: *R. v. Bengert et al.* (No. 5) (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 34 N.R. 350n *sub nom.* *R. v. Robertson et al.*

**Failure to prove charge as particularized** – In *Vezina v. The Queen*; *Cote v. The Queen* (1986), 23 C.C.C. (3d) 481, 25 D.L.R. (4th) 82, [1986] 1 S.C.R. 2 (7:0), the court adopted the following description of the so-called "surplusage rule": "If the particular, whether as originally drafted or as subsequently supplied, is not essential to constitute the offence, it will be treated as surplusage, *i.e.*, a non-necessary which need not be proved." However, that rule is subject to the proviso that the accused not be prejudiced in his defence.

It is a fundamental principle of criminal law that the offence, as particularized in the indictment, must be proved. Thus, although the gravamen of the offence of conspiracy to import narcotics is the agreement to import narcotics rather than a particular narcotic, where the Crown has chosen to particularize the narcotic, in this case heroin, then it was required to prove that offence and not some other conspiracy. To allow the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars: that purpose is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial. In this case, it was not appropriate to amend the indictment on appeal to remove reference to the term "heroin". No such amendment was sought at trial and the trial had proceeded originally on the basis that the Crown must prove a conspiracy relating to heroin and on this basis one of the accused took the stand and testified that he was only involved in a conspiracy relating to cocaine. It would be unfair and prejudicial to the accused after that course of events to permit an amendment fundamentally and retroactively changing the nature of what the Crown must prove: *R. v. Saunders* (1990), 56 C.C.C. (3d) 220, [1990] 1 S.C.R. 1020, 77 C.R. (3d) 397, 108 N.R. 234.

Where the "particulars" were really no more than information as to the major overt acts relied upon by the Crown to prove the accused's participation in the conspiracy, then their effect is not to amend the indictment so as to charge more than one conspiracy: *R. v. May* (1984), 13 C.C.C. (3d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused December 20, 1984.

Disclosure of things such as witness statements and photographs does not constitute particulars as contemplated by this section: *R. v. Morin* (1985), 23 C.C.C. (3d) 550 (Ont. H.C.J.).



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## Ownership of Property

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### OWNERSHIP.

588. The real and personal property of which a person has, by law, the management, control or custody shall, for the purposes of an indictment or proceeding against any other person for an offence committed on or in respect of the property, be deemed to be the property of the person who has the management, control or custody of it. R.S., c. C-34, s. 517.

### CROSS-REFERENCES

The terms “property”, “person” and “indictment” are defined in s. 2. The minimum requirements respecting sufficiency of an indictment are set out in s. 581. Section 587 provides for the ordering of particulars. Section 601 sets out the procedure for objecting to the sufficiency of an indictment and for amendment of an indictment. Section 583(b) provides that an indictment which otherwise fulfills the sufficiency requirements of s. 581 is not insufficient by reason only that it does not name the person who owns or has the special property or interest in property mentioned in the count.

### SYNOPSIS

A person having the management, control or custody of property is deemed to own that property for the purposes of an indictment or proceeding against another person for an offence committed on or in respect of the property.

### ANNOTATIONS

The phrase “by law” in this section limits its application to situations where a person is entrusted with property by statute or common law and accordingly this section cannot be invoked to remedy the failure of the Crown to prove the actual ownership alleged in a theft information: *R. v. Scott*, [1970] 3 C.C.C.109, 6 C.R.N.S.17 (Alta. S.C., App. Div.).

However, an employee of a store could be found to be the custodian of the goods in the store and thus properly named in an indictment for robbery as the person with property in the stolen goods: *R. v. Wright* (1990), 60 C.C.C. (3d) 321, 110 A.R. 28 (C.A.).

If the imprecision of the count is only that it names as the owner of the property its bailee then as he has a special property interest the count will stand: *R. v. Allen and Gray* (1972), 7 C.C.C. (2d) 506, 19 C.R.N.S. 239 (Alta.S.C.App.Div.).

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## Joinder or Severance of Counts

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### COUNT FOR MURDER.

589. No count that charges an indictable offence other than murder shall be joined in an indictment to a count that charges murder unless

- (a) the count that charges the offence other than murder arises out of the same transaction as a count that charges murder; or
- (b) the accused signifies consent to the joinder of the counts. R.S., c. C-34, s. 518; 1991, c. 4, s. 2.

### CROSS-REFERENCES

The terms “count” and “indictment” are defined in s. 2. This section limits the general right of the prosecution to join any number of offences subject to power of the court to sever charges as provided in s. 591. Note s. 582 which provides that no person shall be convicted of the offence of first degree murder unless in the indictment charging the offence he specifically is charged with that offence. The offence of murder is defined in ss. 229 to 231.

**SYNOPSIS**

This section provides that no count charging murder shall be joined with any count other than another murder count, unless the other offences arise out of the same transaction or the accused consents.

**ANNOTATIONS**

The phrase "arises out of the same transaction" is not to be given the somewhat restrictive interpretation that a similar phrase "in respect of the same transaction" in s. 548 (1) has been given. Thus, the accused was properly jointly indicted with his co-accused who was charged with murder, where the offences arose out of the identical set of circumstances and were closely related in both time and space, although there was no allegation that either accused was a party to the other's offences: *R. v. Melaragni* (1991), 72 C.C.C. (3d) 339, (Ont. Ct. (Gen. Div.)).

**OFFENCES MAY BE CHARGED IN THE ALTERNATIVE / Application to amend or divide counts / Order.**

**590. (1) A count is not objectionable by reason only that**

- (a) it charges in the alternative several different matters, acts or omissions that are stated in the alternative in an enactment that describes as an indictable offence the matters, acts or omissions charged in the count; or
- (b) it is double or multifarious.

**(2) An accused may at any stage of his trial apply to the court to amend or to divide a count that**

- (a) charges in the alternative different matters, acts or omissions that are stated in the alternative in the enactment that describes the offence or declares that the matters, acts or omissions charged are an indictable offence, or
- (b) is double or multifarious,

on the ground that, as framed, it embarrasses him in his defence.

**(3) The court may, where it is satisfied that the ends of justice require it, order that a count be amended or divided into two or more counts, and thereupon a formal commencement may be inserted before each of the counts into which it is divided. R.S., c. C-34, s. 519.**

**CROSS-REFERENCES**

The term "count" is defined in s. 2. Minimum requirements respecting sufficiency of a count on an information are set out in s. 581. Note in particular s. 581(1) which requires that an indictment shall in general apply to a single transaction. The general power to sever counts in an indictment is found in s. 591. Procedure for objecting to the sufficiency of an indictment and for amendment of an indictment is found in s. 601.

**SYNOPSIS**

Subsection (1) provides that a count is not objectionable because it: (a) charges in the alternative several different acts or omissions where the same are referred to in the offence-creating provision as the various ways in which the offence may be committed, or (b) encompasses two or more separate occurrences of the offence.

However, in such circumstances an accused, to be better able to defend the matter, can apply to the trial judge for an order either amending the count or dividing it into separate counts with respect to each occurrence (subsecs. (2), (3)). The trial judge is to grant such an order where the ends of justice require it.

**ANNOTATIONS**

**Subsec. (3)** – Once the accused, who was charged in a single count of theft, testified that there were two groups of transactions with a different defence for the two sets it would

be preferable to divide the count: *Lilly v. The Queen* (1983), 5 C.C.C. (3d) 1, 34 C.R. (3d) 297, [1983] 1 S.C.R. 794 (7:0).

Only the trial judge has jurisdiction to divide or sever counts. However, the application may be brought prior to trial, once a trial judge has been assigned: *R. v. Litchfield*, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137.

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**JOINDER OF COUNTS / Each count separate / Severance of accused and counts / Order for severance / Subsequent procedure / Idem.**

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**591. (1)** Subject to section 589, any number of counts for any number of offences may be joined in the same indictment, but the counts shall be distinguished in the manner shown in Form 4.

**(2)** Where there is more than one count in an indictment, each count may be treated as a separate indictment.

**(3)** The court may, where it is satisfied that the interests of justice so require, order  
**(a)** that the accused or defendant be tried separately on one or more of the counts; and  
**(b)** where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

**(4)** An order under subsection (3) may be made before or during the trial but, if the order is made during the trial, the jury shall be discharged from giving a verdict on the counts

**(a)** on which the trial does not proceed; or  
**(b)** in respect of the accused or defendant who has been granted as separate trial.

**(5)** The counts in respect of which a jury is discharged pursuant to paragraph (4)(a) may subsequently be proceeded on in all respects as if they were contained in a separate indictment.

**(6)** Where an order is made in respect of an accused or defendant under paragraph (3)(b), the accused or defendant may be tried separately on the counts in relation to which the order was made as if they were contained in a separate indictment. R.S., c. C-34, s. 520; R.S.C. 1985, c. 27 (1st Supp.), s. 119.

**CROSS-REFERENCES**

The terms “count” and “indictment” are defined in s. 2. Provision for dividing a count which is double or multifarious is found in s. 590. Notwithstanding this section, no count that charges an offence other than murder shall be joined in an indictment to a count that charges murder by virtue of s. 589. Section 574(1) provides that counts originally charged in separate informations may be joined in the same indictment. Under s. 593, any number of persons may be charged in the same indictment with an offence under s. 354 or s. 356(1)(b) notwithstanding that the property was held in possession at different times or the person by whom the property was obtained is not indicted with them or is not in custody or amenable to justice.

**SYNOPSIS**

This section deals with indictments in respect of more than one count or accused and the powers of a court to order separate trials.

Other than an indictment alleging murder (see s. 589), any number of counts for any number of offences may be included in an indictment (subsec. (1)). The court can, if the interests of justice require, order that certain counts and/or accused be tried separately (*i.e.*, severance) (subsec. (3)).

Severance can be ordered either before or during a trial. Where the order is made during the course of a jury trial, no verdict will be returned with respect to the severed



counts and/or accused which may be proceeded with at a later time as if on a separate indictment (subsecs. (4), (5) and (6)).

## ANNOTATIONS

**Jurisdiction** – Only the trial judge has jurisdiction to divide or sever counts. However, the application for severance may be brought prior to trial, once a trial judge has been assigned: *R. v. Litchfield*, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 25 C.R. (4th) 137.

**Review of discretion** – The trial Judge's discretion as to whether or not there will be a joint trial of the accused will not be interfered with unless it is shown that he acted unjusticially or that his ruling resulted in an injustice. Furthermore a multiplicity of counts, some of which did not involve the two accused, is not *per se* a ground for separate trials: *R. v. Kestenberg and McPherson* (1959), 126 C.C.C. 387, 32 C.R. 1 (Ont. C.A.).

In *R. v. Henshaw*, [1968] 3 C.C.C. 350, 63 W.W.R. 652 (B.C.C.A.), the majority (2:1) held that a trial Judge's discretion to refuse to sever counts should not be interfered with except in cases of manifest prejudice and injustice. Furthermore, a directed verdict on one count by the trial Judge after the address and before his charge was, on the particular facts, approved. Robertson, J.A., dissented, being of the view that the failure to render the directed verdict at the conclusion of the Crown's case seriously prejudiced the conduct of the accused's defence.

**Generally** – Where the essence of the charge is common enterprise all accused should be jointly tried except for anyone who would be prejudiced in his defence or denied the opportunity of a fair trial. The mere allegation that one accused may give evidence for another is not *per se* sufficient to disturb the trial Judge's discretionary refusal for severance: *R. v. Quiring And Kuipers* (1974), 19 C.C.C. (2d) 337, 27 C.R.N.S. 367 (Sask. C.A.).

Considering the interests of justice as well as the interests of the accused, and provided that there was no improper prejudice to the accused, where there was a common intention to commit a crime a joint trial with all of its characteristics was the proper course: *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401 at p. 422, 33 C.R.N.S. 129 at p. 146 (5:0) (B.C.C.A.).

In *R. v. McCaw* (1971), 5 C.C.C. (2d) 416, [1972] 1 O.R. 742 (C.A.), it was held that where the appellant was the only one of three accused who raised a defence of alibi he should not have been tried jointly with the others nor should he have been represented by the same counsel.

**Antagonistic defences** – Where each co-accused has made a statement blaming the other for the murder, the fact that their defences are apparently antagonistic is not an overriding factor for granting separate trials, which will not be done in this particular case: *R. v. Lane and Ross*, [1970] 1 C.C.C. 196, 6 C.R.N.S. 273 (Ont. H.C.J.).

**To call co-accused as defence witness** – *Prima facie*, accused who are jointly indicted should be jointly tried if it is alleged that they acted in concert, an appeal Court will only interfere with the trial Judge's decision refusing severance when such refusal has resulted in a miscarriage of justice: *R. v. Agawa and Mallett* (1975), 28 C.C.C. (2d) 379, 31 C.R.N.S. 293 (Ont. C.A.). In this case severance was refused although one accused had given a statement, which the Crown was not tendering, exculpating the other. It was held that severance was properly refused although in the result this accused was not a compellable witness for the other, especially since the accused who had given the statement indicated he would deny its truth if it were brought out.

In the subsequent case of *R. v. Torbiak and Gillis* (1978), 40 C.C.C. (2d) 193 (Ont. C.A.) the test for severance in this type of situation was stated to be whether the evidence of the co-accused sought to be elicited on behalf of another is such that, when considered in the light of the other evidence, it might reasonably affect the verdict of the jury by creating a reasonable doubt as to the guilt of the latter. If so, then if a joint trial

would preclude him from having the benefit of that evidence a separate trial may be required. In and of itself it is no ground for refusal of severance that the evidence is merely corroborative of other evidence.

Thus, in *R. v. Bradley et al.* (1980), 57 C.C.C. (2d) 542 (Que. S.C.), one accused whom several of his co-accused wish to call to testify was severed from the trial when it became apparent that the former did not intend to testify and it could not be said that his evidence was so totally incredible that no reasonable jury could have a reasonable doubt as to the guilt of one or more of his co-accused based on his testimony.

In the absence of decisive evidence to the contrary the court must assume that counsel is acting in good faith in seeking severance in order to call a co-accused, who he asserts has evidence which would support the defence. Severance will be necessary where required for the accused to fully defend himself, as where the evidence of the co-accused is likely to raise a reasonable doubt: *R. v. Boulet* (1987), 40 C.C.C. (3d) 38 (Que. C.A.).

**Where inadmissible evidence would be adduced** – However, where the evidence is substantially stronger against one of two co-conspirators the better course is to direct separate trials, particularly where the Crown intends to tender in evidence a damaging statement made by one accused under circumstances which make it inadmissible against the other: *Guimond v. The Queen* (1979), 44 C.C.C. (2d) 481, 8 C.R. (3d) 185, 26 N.R. 91 (S.C.C.).

Even where each accused gives a statement incriminating the others where the evidence suggests a joint venture, the accused are properly tried together: *R. v. Puffer, McFall and Kizyma* (1976), 31 C.C.C. (2d) 81, [1976] 6 W.W.R. 239 (Man. C.A.); affd as to *McFall*, 48 C.C.C. (2d) 225, 100 D.L.R. (3d) 403 (S.C.C.) (6:3).

**To call evidence prejudicial to co-accused** – The trial judge erred in refusing an application for severance by one accused where in the result that accused was not able to make full answer and defence by reason of rulings designed to protect the co-accused. Thus the accused had been prevented from cross-examining his co-accused on prior, possibly involuntary, statements and from leading evidence of the co-accused's disposition for violence: *R. v. Kendall and McKay* (1987), 35 C.C.C. (3d) 105, 57 C.R. (3d) 249 (Ont. C.A.).

Where the effect of the joint trial of the accused was to prevent one accused from being able to cross-examine a co-accused on testimony that she gave in a prior proceeding [by reason of s. 13 of the Charter] thus resulting in real prejudice to the accused, then the trial judge should have granted an application for severance: *R. v. Zurlo* (1990), 57 C.C.C. (3d) 407, 78 C.R. (3d) 167 (Que. C.A.).

**Grounds for severance of counts** – Although it has been frowned upon, the Crown may join with a count of the commission of a substantive offence a count of conspiracy to commit it: *R. v. Kelly*, [1967] 1 C.C.C. 215, 49 C.R. 216 (B.C.C.A.).

In *R. v. Jefferson and Five Others* (1971), 6 C.C.C. (2d) 33, [1972] 2 O.R. 38 (H.C.J.) severance of counts was granted where the indictment charged six accused with 15 counts and the trial Judge was of the opinion that the jury would have great difficulty segregating the evidence legally admissible against each accused on each count. It was also held that while the Crown has a right to join counts charging conspiracy and the substantive offence which was allegedly the object of the conspiracy in the same indictment, it is generally undesirable to do so and in the absence of unusual circumstances the trial Judge should exercise his discretion to order severance of the counts.

On an application by an accused for severance of counts the onus is on the accused to show on the balance of probabilities that the ends of justice require severance. Even when a joint trial will be very long a Judge may properly dismiss the application although the facts fall short of demonstrating that a joint trial is required as a matter of absolute necessity: *R. v. McNamara et al. (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 264-6.

In his appeal from conviction for two charges of attempted murder which were tried

together, the accused argued that the counts should have been severed by the trial Judge. The Court held that as the evidence on each count was admissible as similar fact evidence on the other, the counts were properly tried together: *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507 (Ont. C.A.).

**Joint trial of separate informations** – A court has jurisdiction to jointly try separate informations. Where joinder of offences or of accused is being considered, then the court should seek the consent of the accused and the prosecution. If consent is withheld, then the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice and the offences or accused could initially have been jointly charged. Where the accused wishes to testify in respect to only one of the informations, then consent to a joint trial would be withheld and the judge should not order a joint trial. The procedure to be followed should, to the extent possible, follow the procedure for a trial of an information containing multiple accused or charges. Where the separate informations involve two accused, the Crown may not compel one accused to testify against the other: *R. v. Clunas* (1992), 70 C.C.C. (3d) 115, 11 C.R. (4th) 238, [1992] 1 S.C.R. 595 (5:0).

**Joint trial of summary and indictable offences** – A provincial court judge may jointly try summary and indictable offences even where they are contained on separate informations, provided that the accused has not elected trial by a higher court in respect of the indictable offence. In the event of any conflict as to the applicable procedure, indictable offence procedures would apply. Where, following the trial, both charges have gone for appeal, the summary conviction appeal court should await the decision of the court of appeal in the indictable proceeding: *R. v. Clunas*, *supra*.

**Other notes** – An accused has an absolute right to cross-examine a co-accused who testifies at their joint trial, whether the latter's evidence is favourable or unfavourable to him: *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 563 (Ont. C.A.).

An information may include an offence upon which the Crown intends to proceed summarily and an offence under provincial legislation where the applicable provincial legislation does not prohibit such a procedure: *R. v. Massick* (1985), 21 C.C.C. (3d) 128, 47 C.R. (3d) 148, 35 M.V.R. 234 (B.C.C.A.).

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## ***Joinder of Accused in Certain Cases***

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### **ACCESSORIES AFTER THE FACT.**

**592. Any one who is charged with being an accessory after the fact to any offence may be indicted, whether or not the principal or any other party to the offence has been indicted or convicted or is or is not amenable to justice. R.S., c. C-34, s. 521.**

### **CROSS-REFERENCES**

Accessory after the fact is defined in s. 23. Section 23.1 provides that s. 23 applies in respect of an accused notwithstanding the fact that the person whom the accused received, comforted or assisted could not be convicted of the offence. A party to the offence is defined by ss. 21 and 22. Section 463 sets out the punishment for persons convicted of being an accessory after the fact except for certain offences such as an accessory after the fact to murder (see s. 240).

### **ANNOTATIONS**

On the trial of an accessory after the fact to manslaughter, evidence by the principal that he pleaded guilty to manslaughter and was sentenced to nine years' imprisonment is admissible against the accessory to prove the principal crime. An accessory after the fact may not be tried or tender a valid plea of guilty until the principal is convicted, so that if the latter is acquitted the accessory must of necessity be discharged. Conversely, any evi-



dence admissible against the principal is admissible against an accessory after the fact to prove the principal's crime: *R. v. Vinette* (1974), 19 C.C.C. (2d) 1, [1975] 2 S.C.R. 222.

Evidence of the commission of an offence by the principal must be given before the accessory after the fact may be convicted: *R. ex rel. Power v. Hawkes* (1959), 125 C.C.C. 120, 43 M.P.R. 107 (N.B.Q.B.).

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### **TRIAL OF PERSONS JOINTLY FOR HAVING IN POSSESSION / Conviction of one or more.**

**593. (1) Any number of persons may be charged in the same indictment with an offence under section 354 or paragraph 356(1)(b), notwithstanding that**

**(a) the property was had in possession at different times; or**

**(b) the person by whom the property was obtained**

**(i) is not indicted with them, or**

**(ii) is not in custody or is not amenable to justice.**

**(2) Where, pursuant to subsection (1), two or more persons are charged in the same indictment with an offence referred to in that subsection, any one or more of those persons who separately committed the offence in respect of the property or any part of it may be convicted. R.S., c. C-34, s. 522.**

### **CROSS-REFERENCES**

The term "indictment" is defined in s. 2. The minimum requirements respecting sufficiency of an indictment are set out in s. 581. Provision respecting charging of ownership of property is found in s. 588. Section 591 gives the court power to sever counts and accused in an indictment. The term "property" is defined in s. 2. Possession is defined in s. 4(3).

### **SYNOPSIS**

Subsection (1) provides that all persons alleged to have been in possession of property obtained by crime may be jointly charged even though: (a) they may have had possession at different times, or (b) the person who illegally obtained the property in the first instance is not charged or within the court's jurisdiction.

One or more of several jointly charged accused may be convicted, notwithstanding they are proven to have separately committed the offence (subsec. (2)).

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**594-596. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 120.]**

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## ***Proceedings when Person Indicted is at Large***

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### **BENCH WARRANT / Execution / Interim release.**

**597. (1) Where an indictment has been preferred against a person who is at large, and that person does not appear or remain in attendance for his trial, the court before which the accused should have appeared or remained in attendance may issue a warrant in Form 7 for his arrest.**

**(2) A warrant issued under subsection (1) may be executed anywhere in Canada.**

**(3) Where an accused is arrested under a warrant issued under subsection (1), a judge of the court that issued the warrant may order that the accused be released on his giving an undertaking that he will do any one or more of the following things as specified in the order, namely,**

**(a) report at times to be stated in the order to a peace officer or other person designated in the order;**

**(b) remain within a territorial jurisdiction specified in the order;**

- (c) notify the peace officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
- (d) abstain from communicating with any witness or other person expressly named in the order except in accordance with such conditions specified in the order as the judge deems necessary;
- (e) where the accused is the holder of a passport, deposit his passport as specified in the order; and
- (f) comply with such other reasonable conditions specified in the order as the judge considers desirable. R.S., c. C-34, s. 526; R.S. c. 2 (2nd Supp.), s. 11; 1974-75-76, c. 93, s. 64.1; R.S.C. 1985, c. 27 (1st Supp.), s. 121.

#### CROSS-REFERENCES

Section 841(3) provides that any preprinted portions of a form are to be printed in both official languages. Failure to appear for trial is an offence under s. 145. Under s. 598, a person to whom s. 597(1) applies may lose his right to trial by jury. Section 475 provides that the trial may continue where the accused absconds in the course of the trial.

#### SYNOPSIS

The court may issue a warrant, executable throughout Canada, for the apprehension of an accused who is at large (*i.e.*, not in custody) but who does not appear for trial or remain in attendance at the trial on an indictment (subsecs. (1) and (2)).

An accused, arrested on such a warrant, shall be brought before a judge of the court which issued it for a bail hearing. The judge may either order that the accused remain in custody or be released on an undertaking, with or without conditions.

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#### ELECTION DEEMED TO BE WAIVED / *Idem*.

598. (1) Notwithstanding anything in this Act, where a person to whom subsection 597(1) applies has elected or is deemed to have elected to be tried by a court composed of a judge and jury and, at the time he failed to appear or to remain in attendance for his trial, he had not re-elected to be tried by a court composed of a judge without a jury or provincial court judge without a jury, he shall not be tried by a court composed of a judge and jury unless

- (a) he establishes to the satisfaction of a judge of the court in which he is indicted that there was a legitimate excuse for his failure to appear or remain in attendance for his trial; or
- (b) the Attorney General requires pursuant to section 568 that the accused be tried by a court composed of a judge and jury.

(2) An accused who, pursuant to subsection (1), may not be tried by a court composed of a judge and jury is deemed to have elected under section 536 to be tried by a judge of the court in which he is indicted without a jury and section 561 does not apply in respect of the accused. 1974-75-76, c. 93, s. 65; R.S.C. 1985, c. 27 (1st Supp.), s. 122.

#### CROSS-REFERENCES

The term "Attorney General" is defined in s. 2. Section 475 provides that a trial may continue where the accused has absconded in the course of the trial and the accused is deemed to have waived his right to be present at the trial. Failure to appear or remain in attendance at trial is an offence under s. 145.

#### SYNOPSIS

This section sets out the rules which apply to an accused who does not appear for, or remain in attendance at, a jury trial.

In such circumstances, the right to a jury will have been lost, unless the accused can

satisfy a judge of the trial court that he or she had a “legitimate excuse” for not appearing (subsec. (1)(a)). The Attorney General, however, can still require a jury, pursuant to s. 568 (subsec. (1)(b)).

An accused who has forfeited the right to a jury is deemed to have elected to be tried by a judge alone and has no right to “re-elect” (subsec. (2)).

## ANNOTATIONS

Although this section infringes the right to a jury trial as guaranteed by s. 11(f) of the Charter, it constitutes a reasonable limit on that right within the meaning of s. 1 of the Charter and, accordingly, is valid legislation: *R. v. Lee* (1989), 52 C.C.C. (3d) 289, 73 C.R. (3d) 257, 41 B.C.L.R. (2d) 273 (S.C.C.) (5:2).

This section is mandatory and operates as an exception to the provisions of Part XIX and therefore an accused indicted in Quebec Superior Court who has failed to appear without legitimate excuse must be tried by a Judge of that Court without a jury notwithstanding that in Quebec a Judge of the Superior Court is not included in the definition of “Judge” for the purposes of Part XIX: *Re Voisard and The Queen* (1978), 43 C.C.C. (2d) 570, 2 C.R. (3d) 24 (Que. C.A.).

An honest mistake as to the date when the trial was to commence is a legitimate excuse within the meaning of this section, even if the accused did not exercise due diligence. Nothing less than an intentional avoidance of appearing at trial for the purpose of impeding or frustrating the trial or with the intention of avoiding its consequences, or failure to appear because of a mistake resulting from wilful blindness, should deprive an accused of his right to a jury trial: *R. v. Harris* (1991), 66 C.C.C. (3d) 536 (Ont. C.A.).

## Change of Venue

**REASONS FOR CHANGE OF VENUE / Reasons to be stated / Conditions as to expense / Transmission of record / Idem.**

**599. (1)** A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if

(a) it appears expedient to the ends of justice, or

(b) a competent authority has directed that a jury is not to be summoned at the time appointed in a territorial division where the trial would otherwise by law be held.

**(2) [Repealed. R.S.C. 1985, c. 1 (4th Supp.), s. 16.]**

**(3)** The court or judge may, in an order made upon an application by the prosecutor under subsection (1), prescribe conditions that he thinks proper with respect to the payment of additional expenses caused to the accused as a result of the change of venue.

**(4)** Where an order is made under subsection (1), the officer who has custody of the indictment, if any, and the writings and exhibits relating to the prosecution, shall transmit them forthwith to the clerk of the court before which the trial is ordered to be held, and all proceedings in the case shall be held or, if previously commenced, shall be continued in that court.

**(5)** Where the writings and exhibits referred to in subsection (4) have not been returned to the court in which the trial was to be held at the time an order is made to change the place of trial, the person who obtains the order shall serve a true copy



thereof on the person in whose custody they are and that person shall thereupon transmit them to the clerk of the court before which the trial is to be held. R.S., c. C-34, s. 527; 1974-75-76, c. 93, s. 66; R.S.C. 1985, c. 1 (4th Supp.), s. 16.

#### CROSS-REFERENCES

The terms "indictment", "prosecutor" and "territorial division" are defined in s. 2. Territorial jurisdiction is generally dealt with in ss. 470 and 476 to 481. Also note s. 7 which gives courts territorial jurisdiction in certain circumstances as where offence is committed on aircraft or outside Canada. Where an order is made changing the venue of trial then s. 600 provides for the removal, disposal and reception of an accused pursuant to such order for change of venue. Section 531 provides for change of venue where necessary for the purpose of a trial in the official language of the accused.

#### SYNOPSIS

Subsection (1) provides that an application to change the venue of a trial may be made at any time, by either the prosecutor or the accused, to a judge of the court before which the trial is to take place. Where the judge is satisfied that: (a) the ends of justice so require; or (b) that a jury panel will not be available, he or she can order that the matter be transferred to another territorial division within the same province.

Where the order is made upon the application of the prosecution, the court may require the prosecutor to pay any additional expenses incurred by the accused (subsec. (3)).

The record will be transmitted to the court where the trial is to be held (subsecs. (4) and (5)).

#### ANNOTATIONS

**Jurisdiction** – The superior Court of one province has no power to change the venue of an offence, committed entirely in that province, to another province: *R. v. Threinen* (1976), 30 C.C.C. (2d) 42, [1976] W.W.D. 83 (Sask. Q.B.).

**Procedure** – An accused has no right to bring successive applications before different Judges for a change of venue unless new grounds have arisen since the previous application. On any subsequent application the Judge hears the matter *de novo*: *R. v. Hutchison* (1975), 26 C.C.C. (2d) 423, 11 N.B.R. (2d) 327 (S.C. App. Div.), affd 30 C.C.C. (2d) 97, [1977] 2 S.C.R. 717 *sub nom. Ambrose v. The Queen; Hutchison v. The Queen*.

Where the prejudice which caused a change of venue to be ordered has been eradicated, a return to the original venue should be ordered as *prima facie* the accused should be tried in the jurisdiction where the offence was alleged to have been committed: *R. v. Kellar* (1973), 24 C.R.N.S.71 (Ont. Co.Ct.).

**Principles** – The test is whether it has been made to appear that there is a fair and reasonable probability of partiality or prejudice against the accused: *R. v. Beaudry*, [1966] 3 C.C.C.51 (B.C.S.C.).

The test to be applied on an application for a change of venue is whether it is necessary in order to ensure that the accused has a fair trial with an impartial jury. A fair trial can be conducted only in a reasonably serene environment. The test enunciated in *R. v. Beaudry*, *supra*, requiring the accused to establish that a jury would not render a true verdict free of bias or partiality, is too narrow: *R. v. Charest* (1990), 57 C.C.C. (3d) 312, 76 C.R. (3d) 63, 28 Q.A.C. 258 (C.A.).

For a change of venue the accused must present evidence that a fair and impartial trial cannot be held. Where the only prejudice likely to exist arises out of the very nature of the offence the application will be refused: *R. v. Turvey* (1970), 1 C.C.C. (2d) 90, 12 C.R.N.S.329 (N.S.S.C.).

Where the Chambers Judge declined to take the responsibility for what he believed would be serious consequences if he refused the application, where six months previ-

ously prejudicial newspaper articles which included references to the accused's lengthy criminal record had been published, an order for change of venue was made: *R. v. Kully* (1973), 15 C.C.C. (2d) 488, 2 O.R. (2d) 463 (H.C.J.).

It was held in *R. v. Alward* (1976), 32 C.C.C. (2d) 416, 73 D.L.R. (3d) 290 (N.B.S.C. App. Div.), that a change of venue on a murder case was properly refused despite the considerable publicity which surrounded the crime. It was held that only where there is strong evidence of general prejudicial attitude in the community as a whole should the order be made.

The fundamental consideration in determining an application to grant a change of venue is whether it is necessary to ensure that the accused has a fair trial with an impartial jury. Where most of the pretrial publicity was over a year prior to the trial and the accused was given an unrestricted right to challenge potential jurors for cause, it could not be said that the trial judge improperly exercised his discretion against a change of venue: *R. v. Collins* (1989), 48 C.C.C. (3d) 343 (Ont. C.A.).

In *R. v. Lafferty* (1977), 35 C.C.C. (2d) 183 (N.W.T.S.C.) a change of venue on application by the Crown was granted where all the potential jurors in the area either knew the accused or the victim and evidence was tendered that there was a reasonable probability of prejudice and that most members of a jury would be reluctant to return a verdict for fear of retaliation. It was held that in administering justice the Court should not sanction a course of action which will cause or aggravate divisiveness or hostility in a small settlement.

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## ORDER IS AUTHORITY TO REMOVE PRISONER.

**600.** An order that is made under section 599 is sufficient warrant, justification and authority to all sheriffs, keepers of prisons and peace officers for the removal, disposal and reception of an accused in accordance with the terms of the order, and the sheriff may appoint and authorize any peace officer to convey the accused to a prison in the territorial division in which the trial is ordered to be held. R.S., c. C-34, s. 528.

## CROSS-REFERENCES

The terms "prison", "peace officer" and "territorial division" are defined in s. 2. The order for a change of venue is made pursuant to s. 599.

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## Amendment

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**AMENDING DEFECTIVE INDICTMENT OR COUNT /** Amendment where variance / Amending indictment / Matters to be considered by the court / Variance not material / Adjournment if accused prejudiced / Question of law / Endorsing indictment / Mistakes not material / Limitation / Definition of "court" / Application.

**601.** (1) An objection to an indictment or to a count in an indictment for a defect apparent on the face thereof shall be taken by motion to quash the indictment or count before the accused has pleaded, and thereafter only by leave of the court before which the proceedings take place, and the court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.

(2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and

- (a) a count in the indictment as preferred; or
- (b) a count in the indictment

- (i) as amended, or
  - (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
- (3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
- (a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
  - (b) that the indictment or a count thereof
    - (i) fails to state or states defectively anything that is requisite to constitute the offence,
    - (ii) does not negative an exception that should be negated,
    - (iii) is in any way defective in substance, and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or
  - (c) that the indictment or a count thereof is in any way defective in form.
- (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count thereof under subsection (3), consider
- (a) the matters disclosed by the evidence taken on the preliminary inquiry;
  - (b) the evidence taken on the trial, if any;
  - (c) the circumstances of the case;
  - (d) whether the accused has been misled or prejudiced in his defence by a variance, error or omission mentioned in subsection (2) or (3); and
  - (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.
- (4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to
- (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or
  - (b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.
- (5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.
- (6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.
- (7) An order to amend an indictment or a count therein shall be endorsed on the indictment as part of the record and the proceedings shall continue as if the indictment or count had been originally preferred as amended.
- (8) A mistake in the heading of an indictment shall be corrected as soon as it is discovered but, whether corrected or not, is not material.
- (9) The authority of a court to amend indictments does not authorize the court to add to the overt acts stated in an indictment for high treason or treason or for an offence against any provision in sections 49, 50, 51 and 53.
- (10) In this section, "court" means a court, judge, justice or provincial court judge acting in summary conviction proceedings or in proceedings on indictment.



**(11) This section applies to all proceedings, including preliminary inquiries, with such modifications as the circumstances require. R.S., c. C-34, s. 529; 1974-75-76, c. 105, s. 29; R.S.C. 1985, c. 27 (1st Supp.), s. 123.**

#### CROSS-REFERENCES

The terms “count”, “indictment”, “justice” and “provincial court judge” are defined in s. 2. Section 581 sets out the minimum sufficiency requirements with respect to a count in an indictment or information. Other provisions respecting sufficiency of counts in an indictment are found in ss. 582 to 586. Provision for ordering particulars is made in s. 587 and any such particular may be amended pursuant to this section. Provision for amending a count which is double or multifarious is found in s. 590. Section 591 permits a judge to sever jointly charged accused and to order severance of counts. Under s. 683(1)(g), an appellate court may amend an indictment.

#### SYNOPSIS

This section governs applications to quash or amend an indictment.

Where a defect is apparent on the face of an indictment, subsec. (1) directs that a motion to quash shall be made prior to plea. Thereafter, leave of the court is required.

Where evidence has been called, the court can amend the indictment, or any particular, to conform with the evidence (subsec. (2)).

At any stage of the proceedings, the court can amend a charge which, although otherwise properly drawn, refers to the wrong statute (subsec. (3)(a)) or is in any way defective in form (subsec. (3)(c)).

In cases where the need for the proposed amendment has been disclosed by the evidence called at either the preliminary inquiry or the trial, the indictment may be amended where it: (a) fails to state or defectively states an essential averment (subsec. (3)(b)(i)); (b) fails to negative an exception (subsec. (3)(b)(ii)); (c) is in any way defective in substance (subsec. (3)(b)(iii)).

Subsection (4) directs the trial judge to consider the following in deciding whether an amendment ought to be made: (a) the evidence from the preliminary inquiry; (b) any evidence adduced at trial; (c) the circumstances of the case; (d) whether the accused has been misled or prejudiced by the defect in the charge; and (e) whether the amendment would cause an injustice.

The reference in the opening words of subsec. (4) to “subsection (3)” appears to have been inserted in the R.S.C. 1985 revision and would seem to be an error. The predecessor to this provision contained no such reference and limitation of the application of this subsection to subsec. (3) is inconsistent with subsec. (4)(d).

By reason of subsec. (4.1), a variation between the evidence and the time of the offence is not material if the indictment was preferred within the limitation period. Similarly, a variation between the evidence and the location of the offence is not material if the matter arose within the territorial jurisdiction of the court.

The court may, pursuant to subsec. (5), adjourn the trial (and order costs if appropriate) where necessary, to remove any prejudice caused by an error in the wording of the charge.

A decision with respect to amending an indictment is a question of law (subsec. (6)). This is important for the purposes of appeals.

This section does not authorize amendments with respect to the overt acts which must be set out in treason charges or in charges of alarming Her Majesty (s. 49), assisting an alien or omitting to prevent treason (s. 50), intimidating Parliament (s. 51), sabotage (s. 52) or mutiny (s. 53).

The powers of amendment set out in this section also apply to summary conviction proceedings (subsec. (10)) and to preliminary inquiries (subsec. (11)).

#### ANNOTATIONS

**Amendment on court’s own motion** – It was held in *R. v. Powell*, [1965] 4 C.C.C. 349

(B.C.C.A.), that a trial judge may *ex mero motu*, upon a motion for dismissal at the conclusion of the Crown's case, amend the information to conform with the evidence.

**Procedure** – In *R. v. Bouchard*, [1970] 5 C.C.C. 95, 2 N.B.R. (2d) 138 (N.B.S.C. App.Div.), it was held that an objection to a defect apparent on the face of the indictment cannot be entertained initially upon appeal unless the accused has been misled or prejudiced by that defect.

Where the accused refuses to plead and stands mute, then, although a plea of not guilty is entered, the accused has never actually pleaded and therefore does not require leave to raise an objection to the indictment in the course of the trial: *Re R. and Wilson* (1986), 26 C.C.C. (3d) 8 (Man. Q.B.).

An information charging a summary conviction offence may be amended by the trial judge and resworn to properly state the grounds for belief by the informant, *i.e.*, reasonable grounds rather than personal knowledge, notwithstanding the six-month limitation period has expired by that time: *R. v. Canadian Industries Ltd.* (1982), 69 C.C.C. (2d) 533, 41 N.B.R. (2d) 631 (C.A.).

An accused may move at his preliminary inquiry to quash an information for failure to comply with s. 581(3): *Re Dallas and Cassidy and The Queen* (1986), 25 C.C.C. (3d) 287 (Ont. C.A.).

An application to quash an information on the basis that it fails to comply with s. 581(3) may be brought prior to the accused's election as to mode of trial: *Re Volpi and Lanzino and The Queen* (1987), 34 C.C.C. (3d) 1 (Ont. C.A.); *R. v. Itt Industries of Canada* (1987), 39 C.C.C. (3d) 268, 18 B.C.L.R. (2d) 98 (B.C.C.A.).

Where an information falls within a trial Court's jurisdiction the Judge has exclusive jurisdiction to determine its validity and his decision upholding it is not subject to either a motion to quash or extraordinary remedy proceedings but only to an appeal against his disposition of the case: *R. v. Jarman* (1972), 10 C.C.C. (2d) 426 (Ont. C.A.).

An information not being an absolute nullity, in deciding whether or not to quash it, the provincial court judge presiding at the accused's preliminary inquiry was acting within his jurisdiction and *certiorari* was not available to review that decision. However, there may be very rare and highly exceptional circumstances where *certiorari* was available, as where the judge refused to quash an information which was an absolute nullity in that it failed even to give the accused notice of the charge. The existence of some charge of an offence known to the law, albeit very imperfectly described, is the basis of the judge's jurisdiction: *R. v. Webster* (1993), 78 C.C.C. (3d) 302, [1993] 1 S.C.R. 3, 17 C.R. (4th) 393 (7:0).

**Nature of amendments which may be made** – On the second trial (this time for wounding), following an acquittal of attempted murder, the trial Judge refused the special plea of *autrefois acquit*. In affirming this decision it was held in *R. v. Rinnie*, [1970] 3 C.C.C. 218, 9 C.R.N.S. 81 (Alta. C.A.), that an included offence, which can only be found by definition of the crime, or by statutory prescription, or by the inclusion of apt words of description cognate to the offence, may be pleaded to by this special plea where there has been an acquittal of the principal offence. Furthermore, as the Crown is not to be permitted to amend a count at trial to include a lesser and included offence, because such amendment is not envisaged by this section, the accused cannot argue that a proper amendment might have been made at the former trial to entitle him subsequently to plea *autrefois acquit*.

**Circumstances where amendment should be made generally** – An amendment during a trial which fundamentally changes the Crown's case is an injustice to the accused: *R. v. Charlton and Ostere* (1976), 30 C.C.C. (2d) 372 (B.C.C.A.).

An information which is duplicitous or multifarious is not null or void but merely contains a defect apparent on its face within this section, and may be amended: *R. v. Sauli Ste. Marie (City)* (1976), 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (Ont. C.A.), *affd* on other grounds, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (9:0).

**Amendment to conform with evidence [subsec. (2)]** – A trial continues until the charge is disposed of so that until that point a Judge may amend the charge to conform with the evidence: *R. v. Clark* (1974), 19 C.C.C. (2d) 445, [1974] 6 W.W.R. 114 (Alta. C.A.).

It would seem that the test to be applied as to whether the indictment is to be amended to conform to the evidence is whether or not the amendment can be made without causing irreparable prejudice to the accused: *R. v. Morozuk* (1986), 24 C.C.C. (3d) 257, 50 C.R. (3d) 179, [1986] 1 S.C.R. 31 (7:0); *R. v. Campbell And Kotler* (1986), 29 C.C.C. (3d) 97, [1986] 2 S.C.R. 376, 32 D.L.R. (4th) 363 (S.C.C.).

**Amendments to cure defects in form and substance [subsec. (3)]** – An amendment clarifying a count by including particulars was not one of substance, but in any event subsec. (3) gave the trial Judge an unqualified right to amend: *R. v. Denis*, [1970] 1 C.C.C. 86, [1969] 2 O.R. 205 (Ont. C.A.).

It would seem that the test to be applied as to whether the indictment is to be amended rather than quashed is a test of irreparable prejudice. Absent absolute nullity, if the defect to be cured by the amendment has misled or prejudiced the accused then the judge must determine whether the misleading or prejudice can be removed by an adjournment. If it can, then the judge must make the amendment and adjourn and thereafter proceed. Only if the amendment cannot be made without injustice being done, is it open to the judge to quash the charge: *R. v. Moore* (1988), 41 C.C.C. (3d) 289, 65 C.R. (3d) 1, [1988] 5 W.W.R. 1, [1988] 1 S.C.R. 1097 (4:3).

An information which lacks an essential averment is not thereby rendered a nullity, but rather may be amended: *R. v. Stewart* (1979), 7 C.R. (3d) 165, [1979] 3 W.W.R. 177 (B.C.C.A.) (5:0).

**Factors to be considered under [subsec. (4)]** – These requirements are mandatory and the failure of the trial Judge to observe them vitiates an amendment made to the charge by him: *R. v. Geary* (1960), 126 C.C.C. 325, 33 C.R. 103 (Alta. S.C.App. Div.).

The effect of this subsection is not that a preliminary inquiry must have been held before an amendment can be made. If the preliminary inquiry has been waived by the accused the result is that there is nothing for the trial Judge to consider under para. (a) in following the directions under the subsection: *R. v. Smith* (1961), 131 C.C.C. 14, 35 C.R. 323 (Ont. C.A.), *revd* on other grounds, 131 C.C.C. 403, 36 C.R. 384 (S.C.C.).

**Time and place of offence [subsec. (4.1)]** – While time must be specified in an information in order to provide an accused with reasonable information about the charges brought against him and to ensure the possibility of a full defence and a fair trial, exact time need not be specified. The individual circumstances of the particular case may, however, be such that greater precision as to time is required, as where there is a lack of other factual information available with which to identify the transaction. If the time specified in the information is inconsistent with the evidence, there is conflicting evidence as to the time of the offence or the date cannot be established with precision, the information need not be quashed and conviction may result, provided that time is not an essential element of the offence or crucial to the defence: *R. v. B. (G.)* (1990), 56 C.C.C. (3d) 161, [1990] 2 S.C.R. 30, 77 C.R. (3d) 327 (5:0).

While a variance between the date of the offence as set out in the indictment and as shown in the evidence is not material, it was held to constitute misdirection to instruct the jury to disregard any variance. While the dates on the indictment alleging sexual assault may have had several sources, the jury was entitled to assume that the adult complainant must have been consulted before the charges were laid. The direction to the jury may have led the jury to disregard evidence which was material in assessing the credibility of the complainant: *R. v. C. (M.H.)* (1991), 63 C.C.C. (3d) 385 (S.C.C.) (5:0).

In *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, 89 C.C.C. (3d) 289, 29 C.R. (4th) 209 it was held that, particularly with respect to sexual offences against young children, absolute precision with respect to the timing of the alleged offence will often be unrealistic and



unnecessary. The fact that an accused may have an alibi for part of the period described in the indictment does not necessarily or automatically freeze the dates specified in that indictment. The alibi evidence must respond to the case as presented by the Crown. However, at the time the Crown closed its case there was no occasion for an amendment to the indictment, the testimony of the complainant and her mother as to the date of the offence corresponding to the dates set out in the indictment. The Crown should not have been allowed to reopen its case after the accused had declared his intention to call evidence of an alibi in order to justify the subsequent amendment to the indictment. The fundamental principle in determining whether the Crown should be permitted to reopen its case is whether the accused will suffer prejudice in his defence. Whether or not the Crown should be permitted to reopen its case will depend on the stage at which the application is made and the nature of the evidence to be called. Before the Crown has closed its case, the trial judge has considerable latitude to permit the Crown to recall a witness to correct earlier testimony. Any prejudice to the accused can generally be cured by an adjournment, cross-examination of the recalled witness and other crown witnesses and a review by the trial judge of the record in order to determine whether certain portions should be struck. Once the Crown actually closes its case, the trial judge's discretion will narrow with reopening being permitted to correct some oversight or inadvertent omission by the Crown in the presentation of its case, provided that justice requires it and there will be no prejudice to the defence. Where the Crown has closed its case and as, in this case, the defence has started to answer the case against him, the trial judge's discretion is very restricted and it will only be in the narrowest of circumstances that the Crown will be permitted to reopen its case.

**Review of decision of trial judge [subsec. (6)]** – Failure to make an amendment to the information which had merely misdescribed the allegedly stolen property, which amendment would not have prejudiced the accused, is an error of law which the Crown may appeal to the Court of Appeal: *R. v. Cousineau* (1982), 1 C.C.C. (3d) 293 (Ont. C.A.).

While the decision to refuse an amendment is a question of law and reviewable by the Court of Appeal, the decision of the trial judge, when based on a finding of irreparable prejudice should not be interfered with lightly and the trial judge's privileged position as regards the effect on the fairness of a trial should be borne in mind: *R. v. Vezina*; *R. v. Cote* (1986), 23 C.C.C. (3d) 481 (S.C.C.) (7:0).

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**602. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 124.]**

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## ***Inspection and Copies of Documents***

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### **RIGHT OF ACCUSED.**

**603. An accused is entitled, after he has been ordered to stand trial or at his trial,**

- (a) to inspect without charge the indictment, his own statement, the evidence and the exhibits, if any; and**
- (b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the province, a copy**
  - (i) of the evidence,**
  - (ii) of his own statement, if any, and**
  - (iii) of the indictment;**

**but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused. R.S., c. C-34, s. 531; 1974-75-76, c. 93, s. 67; R.S.C. 1985, c. 27 (1st Supp.), s. 101(2)(d).**

## CROSS-REFERENCES

The terms “indictment” and “Attorney General” are defined in s. 2. Following the order to stand trial, s. 551 provides that the record is to be transmitted to the trial court.

## SYNOPSIS

This section sets out the material which an accused is entitled to examine, or obtain copies of. Accused persons may inspect the indictment, their own statements and any evidence or exhibits tendered at the preliminary inquiry.

Upon payment of a prescribed fee, the accused can obtain copies of the evidence, his or her own statements and the indictment. A trial should not be adjourned until the accused receives copies, if the failure to obtain copies is due to lack of diligence on the part of the accused.

## ANNOTATIONS

**Disclosure generally** – At least in the case of indictable offences, the Crown is required to produce to the defence all relevant information whether or not the Crown intends to introduce it into evidence and whether it is inculpatory or exculpatory. The Crown does have a discretion to withhold information and as to the timing of the disclosure where necessary to protect the identity of an informer or a continuing investigation. A discretion must also be exercised with respect to the relevance of information. The exercise of this discretion is reviewable by the trial judge who will be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. Even then, the trial judge might conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. The obligation to disclose will be triggered by a request by or on behalf of the accused. In the case of an unrepresented accused, the trial judge should not take a plea unless satisfied that the accused has been informed of his right to disclosure: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 9 C.R. (4th) 277 (7:0).

**Production of witness’ statement** – Subject to the discretion discussed above under the heading “Disclosure generally”, the Crown must disclose any statements in its possession of witnesses the Crown proposes to call and all statements obtained from persons who have provided relevant information to the authorities notwithstanding that they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced, and, if there are no notes, then in addition to the name, address and occupation of the witness, all information in the possession of the prosecution relating to any relevant evidence that the person could give should be disclosed: *R. v. Stinchcombe*, *supra*.

**Production of accused’s statement** – The phrase “his own statement” in para. (a) includes the accused’s statement to the police and not merely the statement given pursuant to s. 541 at the preliminary hearing. Further, even apart from this section, the trial judge has a discretion which, absent some cogent reason, he should exercise to order the Crown to produce the accused’s statement for the defence even if the Crown has no intention of introducing the statement as part of its case: *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259 (Ont. C.A.). *Folld*: *R. v. Gonneville* (1982), 69 C.C.C. (2d) 269 (Que. S.C.). *Contra*: *R. v. Lantos*, *supra*.

For other notes on disclosure, see notes following s. 650.

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## DELIVERY OF DOCUMENTS IN CASE OF TREASON, ETC. / Details / Witnesses to delivery / Exception.

**604. (1) An accused who is indicted for high treason or treason or for being an accessory after the fact to high treason or treason is entitled to receive, after the indictment has been found and at least ten days before his arraignment,**

**(a) a copy of the indictment,**

**(b) a list of the witnesses to be produced on the trial to prove the indictment, and**

**(c) a copy of the panel of jurors who are to try him, returned by the sheriff.**

**(2) The list of the witnesses and the copy of the panel of the jurors referred to in subsection (1) shall mention the names, occupations and places of abode of the witnesses and jurors respectively.**

**(3) The writings referred to in subsection (1) shall be given to the accused at the same time and in the presence of at least two witnesses.**

**(4) This section does not apply to the offence of high treason by killing Her Majesty, to the offence of high treason where the overt act alleged is an attempt to injure the person of Her Majesty in any manner or to the offence of being an accessory after the fact in such case of high treason. R.S., c. C-34, s. 532; 1974-75-76, c. 105, s. 29.**

#### CROSS-REFERENCES

Other special provisions respecting the trial and charging of the offences of treason and high treason may be found in the cross-references following ss. 46 and 47. Note, however, in particular, s. 601(9) which limits the power of a court to amend an indictment charging the offence of high treason or treason.

#### SYNOPSIS

This section specifies that an accused charged with certain treason-related offences is entitled to receive before trial, in the presence of two witnesses, a copy of the indictment, a list of the Crown's witnesses and a list of the members of the jury panel. The lists are to include names, addresses and occupations.

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#### RELEASE OF EXHIBITS FOR TESTING / Disobeying orders.

**605. (1) A judge of a superior court of criminal jurisdiction or a court of criminal jurisdiction may, on summary application on behalf of the accused or the prosecutor, after three days notice to the accused or prosecutor, as the case may be, order the release of any exhibit for the purpose of a scientific or other test or examination, subject to such terms as appear to be necessary or desirable to ensure the safeguarding of the exhibit and its preservation for use at the trial.**

**(2) Every one who fails to comply with the terms of an order made under subsection (1) is guilty of contempt of court and may be dealt with summarily by the judge or provincial court judge who made the order or before whom the trial of the accused takes place. R.S., c. C-34, s. 533.**

#### CROSS-REFERENCES

In addition to the power in this section, note s. 258(4) which provides for a court order releasing samples of blood taken from the accused pursuant to ss. 254 and 256. Under s. 603, an accused is entitled to inspect exhibits which have been transmitted to the trial court pursuant to s. 551. The rights of appeal in cases of contempt of court are set out in s. 10.

#### SYNOPSIS

This section authorizes a trial judge to release an item which has been marked as an exhibit for scientific testing or other examination. Either the Crown or the accused can apply, upon giving three days notice to the other party. A court making such an order can impose terms to safeguard the item and to ensure its preservation for use at trial.

Failure to comply with the order is punishable as a contempt of court.



## ANNOTATIONS

This section would permit the release for testing of a tape recording which was ordered produced by the trial Judge although not made an exhibit: *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259 (Ont. C.A.).

On the trial of a narcotics offence the fact that the entire amount of the alleged narcotic was used up in scientific analysis so that the accused was rendered unable to exercise his right to apply under this section does not deprive the accused of his right to make full answer and defence: *R. v. O'Quinn* (1976), 36 C.C.C. (2d) 364, [1976] W.W.D. 130 (B.C.C.A.); *Canada (Attorney General) v. Ross* (1971), 15 C.R.N.S. 71 (Que. C.A.).

An accused charged with a narcotics offence may apply under this section for an order releasing the narcotics for the purpose of scientific testing. But an order should be granted only where the intended analysis can be characterized as quantitatively and qualitatively different from the one initially carried out by the Government analyst: *R. v. Bryers and Mueller* (1975), 28 C.C.C. (2d) 466 (Ont. Co.Ct.).

This section will permit release of narcotics for scientific testing which have been made exhibits, even to persons not otherwise authorized by the Narcotic Control Act or Regulations to possess narcotics: *R. v. Vales* (1979), 46 C.C.C. (2d) 269 (Ont. H.C.J.).

Where there is an "air of reality" to the production and examination sought and if the production and examination sought have any meaningful capacity to advance any available defence then the order should be made: *R. v. Rhab* (1985), 21 C.C.C. (3d) 97 (Ont. H.C.J.).

A justice presiding at a preliminary inquiry has no power to order the release of exhibits for scientific testing under this section: *R. v. Walsh* (1981), 59 C.C.C. (2d) 554 (Ont. Ct. (Prov. Div.)). *Contra: R. v. McGee* (1973), 15 Crim. L.Q. 468 (B.C. Prov. Ct.).

For notes on the power of the court to control release of exhibits following the trial see notes under s. 683, **Powers of court of appeal generally** [subsec. (3)].

## Pleas

**PLEAS PERMITTED / Refusal to plead / Allowing time / Included or other offence.**

**606. (1)** An accused who is called on to plead may plead guilty or not guilty, or the special pleas authorized by this Part and no others.

**(2)** Where an accused refuses to plead or does not answer directly, the court shall order the clerk of the court to enter a plea of not guilty.

**(3)** An accused is not entitled as of right to have his trial postponed but the court may, if it considers that the accused should be allowed further time to plead, move to quash, or prepare for his defence or for any other reason, adjourn the trial to a later time in the session or sittings of the court, or to the next of any subsequent session or sittings of the court, on such terms as the court considers proper.

**(4)** Notwithstanding any other provision of this Act, where an accused or defendant pleads not guilty of the offence charged but guilty of any other offence arising out of the same transaction, whether or not it is an included offence, the court may, with the consent of the prosecutor, accept that plea of guilty and, if such plea is accepted, the court shall find the accused or defendant not guilty of the offence charged and find him guilty of the offence in respect of which the plea of guilty was accepted and enter those findings in the record of the court. *R.S., c. C-34, s. 534; 1974-75-76, c. 105, s. 7; R.S.C. 1985, c. 27 (1st Supp.), s. 125.*

## CROSS-REFERENCES

The rules respecting included offences are set out in ss. 660 to 662. The special pleas are provided

for in ss. 607 to 610. The special plea of justification in cases of libel is set out in ss. 611 and 612. Any ground of defence for which a special plea is not provided for in this part may be relied upon under the plea of not guilty pursuant to s. 613. Thus, for example, the defence of insanity as defined in s. 16 is tried pursuant to a plea of not guilty entered pursuant to s. 606(1).

## SYNOPSIS

The only pleas recognized by Canadian law are guilty, not guilty and the "special pleas" referred to in s. 607, *viz.*, *autrefois acquit*, *autrefois convict*, and pardon (subsec. (1)).

A plea of not guilty will be entered if the accused refuses to plead to a charge (subsec. (2)).

The judge can adjourn a trial if he or she feels it is appropriate to allow the accused more time to consider what plea to enter or for any other reason related to the preparation and conduct of the defence (subsec. (3)).

With the consent of the Crown, the court may accept a plea of guilty to another offence arising out of the same transaction, whether or not it is an included offence. In such a case the accused will be found not guilty of the offence charged, but guilty of the offence in respect of which the plea was accepted (subsec. (4)).

## ANNOTATIONS

**Guilty plea / Procedure** – In *Adgey v. The Queen* (1973), 13 C.C.C. (2d) 177, 23 C.R.N.S. 298 (S.C.C.) (3:2) the majority held that a trial Judge has a discretion with respect to accepting a plea of guilty, first, when the charge is read and a plea of guilty is entered and, second, following the hearing of evidence if the Judge chooses to hear evidence. The trial Judge is not bound as a matter of law in all cases to conduct an inquiry after a guilty plea has been entered. If he chooses to hear evidence it may indicate the accused never intended to admit to an essential fact of the offence charged or may have misapprehended the effect of the plea or may never have intended to plead guilty at all. In such cases the Judge may, in his discretion, permit the accused to withdraw the plea or direct the entry of a plea of not guilty. The discretion of the trial Judge if exercised judicially will not be lightly interfered with. The Court's right to permit withdrawal of a guilty plea is not limited to matters arising from "admitted facts" but can be based upon any statements made in the course of the inquiry following a guilty plea.

A plea of guilty may be entered by counsel on behalf of the accused in the presence of the accused: *R. v. Sommerfeldt* (1984), 14 C.C.C. (3d) 445 (B.C.C.A.).

In *Brosseau v. The Queen*, [1969] 3 C.C.C. 129, 5 C.R.N.S. 331 (S.C.C.), it was held (4:1) that, where an accused who is represented by counsel pleads guilty, the trial judge is not bound as a matter of law to ascertain whether the accused fully appreciates the nature of the charge and the effect of his plea.

**Qualified or conditional plea** – When a qualified or conditional plea is given the Court should not accept it as a plea of guilty unless the Court is satisfied, after due inquiry, that the qualification or condition does not derogate from the accused's intention to enter an unequivocal plea of guilty: *R. v. McNabb* (1971), 4 C.C.C. (2d) 316 (Sask. C.A.). In this case on appeal the accused was permitted to withdraw his guilty plea when at trial he pleaded "guilty with an explanation" and the trial Judge did not make the inquiry which would justify his acceptance of the plea.

A plea of guilty must be an admission by the accused of all the legal ingredients necessary to constitute the crime charged thus dispensing with the necessity of proof of those ingredients. The accused may not enter a conditional plea of guilty, for example, in a homicide case, conditional on the Crown establishing the cause of death: *R. v. Lucas* (1983), 9 C.C.C. (3d) 71 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

**Grounds for withdrawing plea** – On appeal the accused was permitted to withdraw his guilty plea and a new trial was ordered where a statement by the trial Judge may have

been construed by the accused as meaning he was liable as a party to the offence though he was only present. Further, on the facts as disclosed by the Crown there was no evidence that would make the accused a party to the offence and the trial Judge having heard the facts was under a duty to stop the proceedings and permit a change of plea: *R. v. Voorwinde* (1975), 29 C.C.C. (2d) 413 (B.C.C.A.).

In *R. v. Hansen* (1977), 37 C.C.C. (2d) 371 (Man. C.A.) (3:2) the accused on appeal was permitted to withdraw his plea of guilty to second degree murder and a new trial was ordered where evidence adduced on the appeal showed that the accused was in a disturbed state of mind at the time and was under the false impression that if he did not plead guilty the Crown would proceed on a charge of first degree murder.

A plea of guilty must always be a free and voluntary act by the accused himself, untainted by any threats or promises to induce the accused to admit that he committed the offence when he does not wish or intend to do so. While counsel has a duty to advise and this advice may sometimes have to be firmly given, counsel has no right to pressure the accused into pleading guilty: *R. v. Lamoureux* (1984), 13 C.C.C. (3d) 101, 40 C.R. (3d) 369 (Que. C.A.).

The accused was allowed to withdraw his guilty plea on appeal where it was shown that he pleaded guilty to avoid spending a week in jail awaiting trial after he was remanded in custody after failing to appear for the original trial date: *R. v. Cesari* (1986), 50 C.R. (3d) 93 (Que. C.A.).

It is not a ground for allowing an accused on appeal to withdraw his guilty plea that the sentence imposed by the trial judge was substantially greater than the submission by Crown and defence counsel, there being no evidence that the accused did not understand the charges nor any evidence that the plea was equivocal: *R. v. Rubenstein* (1987), 41 C.C.C. (3d) 91 (Ont. C.A.).

It was not a valid ground for withdrawal of a guilty plea that, subsequent to the plea, the co-accused was acquitted at a trial where the facts adduced at the plea indicated that the appellant was convicted as a principal. The acquittal of the co-accused determined nothing in respect of the appellant's conviction: *R. v. Hick* (1991), 67 C.C.C. (3d) 573, [1991] 3 S.C.R. 383, 7 C.R. (4th) 297.

**Appeal from refusal to traverse trial** – There is no right of appeal from a refusal to traverse a trial: *R. v. Lahosky* (1972), 7 C.C.C. (2d) 407 (Man.C.A.).

**Plea of guilty to included or other offence [subsec. (4)]** – Where an accused pleads guilty to a lesser count the Court may proceed with the trial of the more serious count, and if he is acquitted on that count, can sentence him on the plea of guilty: *R. v. St. Jean* (1970), 15 C.R.N.S. 194 (Que.C.A.). *Contra: R. v. Pentiluk and MacDonald* (1974), 21 C.C.C. (2d) 87, 28 C.R.N.S. 324 (Ont.C.A.) where it was held that once the guilty plea to the included offence is not accepted the only plea that is deemed to have been made is that of not guilty of the primary offence.

During a joint trial for murder the trial Judge may accept a plea of guilty to manslaughter from one or more of the accused, directing a verdict in respect of those accused at that stage and then continuing with the trial of the other accused: *R. v. MacGregor* (1981), 64 C.C.C. (2d) 353 (Ont. C.A.), leave to appeal to S.C.C. refused March 4, 1982.

An accused may plead guilty to and be convicted of second degree murder on an indictment for first degree murder without intervention of a jury: *Bennett v. The Queen* (1982), 70 C.C.C. (2d) 575, 142 D.L.R. (3d) 575, [1982] 2 S.C.R. 582 (7:0), and without re-electing trial by judge alone pursuant to s. 473: *R. v. Luis* (1989), 50 C.C.C. (3d) 398 (Ont. H.C.J.).

The proper practice, after an accused has been given in charge to the jury and wishes to plead guilty with prosecutorial consent pursuant to subsec. (4), is for the trial judge, in the absence of the jury, to consider the appropriateness of the plea and rule whether it is acceptable. If the plea is acceptable, then the jury may be discharged and the "court" now consisting of the judge alone may record the verdict of not guilty to the offence



charged and guilty to the lesser offence admitted: *R. v. Rowbotham*, [1994] 2 S.C.R. 463, 90 C.C.C. (3d) 449, 30 C.R. (4th) 141.

It was not an abuse of process for the Crown to attach as a condition to its agreement to a plea of guilty by the accused to the included offence of manslaughter that the accused agree to a joint submission as to sentence. This subsection recognizes the Crown's discretion to refuse a plea of guilty to an offence other than the offence charged, and the exercise of this discretion will amount to an abuse of process only in exceptional cases: *R. v. Conway* (1989), 49 C.C.C. (3d) 289, [1989] 1 S.C.R. 1659, 70 C.R. (3d) 209.

Section 10(b) of the Charter mandates that the Crown or police, when offering a plea bargain to a detainee, tender that offer either to counsel or to the detainee while in the presence of counsel, unless the detainee has expressly waived the right to counsel: *R. v. Burlingham*, [1995] 2 S.C.R. 206, 97 C.C.C. (3d) 385, 38 C.R. (4th) 265.

The trial judge should, in most cases, give substantial weight to the decision of the prosecutor to accept a plea to the lesser offence, but the judge has a discretion to refuse to accept the guilty plea as where the facts relied upon support the full offence. This is not to say that the judge would be wrong in accepting a plea to the lesser offence although the facts supported the full offence where a case is made out that the result reflects a reasonable exercise of prosecutorial discretion having regard to the public interest in the effective administration of justice: *R. v. Naraindeen* (1990), 80 C.R. (3d) 66, 75 O.R. (2d) 120, 40 O.A.C. 291 (C.A.).

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**SPECIAL PLEAS / In case of libel / Disposal / Pleading over / Statement sufficient / Exception: foreign trials *in absentia*.**

**607. (1) An accused may plead the special pleas of**

- (a) *autrefois acquit*,
- (b) *autrefois convict*, and
- (c) pardon.

(2) An accused who is charged with defamatory libel may plead in accordance with sections 611 and 612.

(3) The pleas of *autrefois acquit*, *autrefois convict* and pardon shall be disposed of by the judge without a jury before the accused is called on to plead further.

(4) When the pleas referred to in subsection (3) are disposed of against the accused, he may plead guilty or not guilty.

(5) Where an accused pleads *autrefois acquit* or *autrefois convict*, it is sufficient if he

- (a) states that he has been lawfully acquitted, convicted or discharged under subsection 736(1), as the case may be, of the offence charged in the count to which the plea relates; and
- (b) indicates the time and place of the acquittal, conviction or discharge under subsection 736(1).

**NOTE:** Subsection (5) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the references to s. 736(1) with s. 730(1).

(6) A person who is alleged to have committed an act or omission outside Canada that is an offence in Canada by virtue of any of subsections 7(2) to (3.4) or subsection 7(3.7) or (3.71), and in respect of which that person has been tried and convicted outside Canada, may not plead *autrefois convict* with respect to a count that charges that offence if

- (a) at the trial outside Canada the person was not present and was not represented by counsel acting under the person's instructions, and
- (b) the person was not punished in accordance with the sentence imposed on conviction in respect of the act or omission,

notwithstanding that the person is deemed by virtue of subsection 7(6) to have been

tried and convicted in Canada in respect of the act or omission. R.S., c. C-34, s. 535; 1974-75-76, c. 105, s. 8; R.S.C. 1985, c. 27 (1st Supp.), s. 126, c. 30 (3rd Supp.), s. 2.

## CROSS-REFERENCES

Sections 608 to 610 assist in determining when the plea of *autrefois* is made out. Also see ss. 660 to 662 which define circumstances in which an offence is included in another. For notes respecting the “defence” of *res judicata* and issue estoppel see notes under s. 613. For abuse of process, see notes under s. 579. Also see notes under s. 11(h) of the Charter which defines a limited constitutional protection against double jeopardy.

## SYNOPSIS

This section sets out the “special pleas” which are recognized in Canadian law, *viz.*, *autrefois acquit*, *autrefois convict* and pardon (subsec. (1)). Justification may be pleaded to a charge of defamatory libel (subsec. (2)).

The trial judge will decide whether such a plea should be accepted. If it is not, the accused will be called upon to plead guilty or not guilty (subsecs. (3) and (4)).

In pleading *autrefois*, an accused must state whether the earlier disposition was an acquittal, conviction or discharge and, further, where and when it occurred (subsec. (5)).

With respect to offences committed on an aircraft, an accused cannot plead *autrefois convict* with respect to an act or omission outside of Canada if: (a) the earlier trial was outside of Canada and the accused was not present and was not represented by counsel; and (b) the accused did not actually serve the sentence which was imposed (subsec. (6)).

## ANNOTATIONS

[For notes on *res judicata* and issue estoppel, see s. 613.]

**Availability where earlier charge withdrawn or quashed** – In *R. v. Karpinski* (1957), 117 C.C.C. 241, [1957] S.C.R. 343, 25 C.R. 365 (4:1) the accused was charged with a Crown option offence. The information had been laid over six months after the offence allegedly occurred, however the Crown elected to proceed summarily. When the accused pleaded not guilty and raised the defence that the prosecution was statute barred the Magistrate permitted the Crown to withdraw the charge. In subsequent proceedings on an identical information upon which the Crown proceeded by way of indictment the special plea of *autrefois acquit* was refused. Kerwin, C.J.C., and Taschereau, J., held that the Crown had the right to change its election and to withdraw the information and the fact of the withdrawal did not amount to an acquittal when there was no adjudication by the Magistrate. Fauteux, and Abbott, JJ., held that as the information showed on its face that there could be no trial by way of summary conviction the judge had no jurisdiction either to take an election or receive a plea and both were void. Therefore the issue of *autrefois acquit* never arose. Cartwright, J., dissenting, held that s. 786 constituted a defence and that the withdrawal was equivalent to a dismissal which gave rise to a successful plea of *autrefois acquit*.

It was held, applying *R. v. Karpinski, supra*, that the plea of *autrefois acquit* was not available where the information upon which the Crown elected to proceed by way of summary conviction was quashed prior to plea for being laid outside the six-month limitation period. Further, the relaying of the charge and the Crown electing to proceed by indictment did not, in the circumstances, constitute an abuse of process: *R. v. Belair* (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.).

It was held in *Petersen v. The Queen* (1982), 69 C.C.C. (2d) 385, 30 C.R. (3d) 165, [1982] 2 S.C.R. 493 (7:0) that the summary conviction Court was free of jurisdictional error where the Judge dismissed the charge, after the accused had entered a plea, apparently because it was not shown that several previous adjournments which exceeded eight days had been with the accused’s consent as required by s. 803. In deciding he lacked jurisdiction to continue the trial the Judge simply made an error in law but as long as

that disposition stood it was a bar to subsequent proceedings on any new information even where the Crown proceeds by way of indictment on the relaid charge. The plea of *autrefois acquit* must be given effect on the trial of this new charge.

The erroneous decision of a trial judge, following the accused's plea of not guilty, quashing charges which, though defective, could have been cured by an amendment under s. 601, is tantamount to an acquittal and gives rise to a valid plea of *autrefois acquit* should the Crown relay the same charges: *R. v. Moore* (1988), 41 C.C.C. (3d) 289, [1988] 5 W.W.R. 1, [1988] 1 S.C.R. 1097, 65 C.R. (3d) 1 (4:3).

However, where the Crown is permitted by the trial Judge to withdraw the charges following a plea of not guilty, the plea of *autrefois acquit* is not available in answer to a subsequent identical charge, at least where the withdrawal flowed from purely technical considerations before any evidence was adduced: *R. v. Selhi* (1985), 18 C.C.C. (3d) 131, 32 M.V.R. 299 (Sask. C.A.), affd (1990), 53 C.C.C. (3d) 576 (S.C.C.).

Nor is the plea available where the charge is quashed prior to plea for failure to comply with s. 581(3): *R. v. Pretty* (1989), 47 C.C.C. (3d) 70 (B.C.C.A.); *R. v. D. (A.)* (1990), 60 C.C.C. (3d) 407, 75 O.R. (2d) 762 (C.A.).

The quashing of the order to stand trial and the setting aside of the indictment is not an acquittal which will support a plea of *autrefois acquit*: *R. v. Gould*, [1984] 5 W.W.R. 430 (Sask. C.A.).

**Availability where earlier charge stayed** – The plea is not available where the proceedings were stayed by the Crown part way through the first trial: *R. v. Tateham* (1982), 70 C.C.C. (2d) 565 (B.C.C.A.).

A foreign acquittal may be the basis for a plea of *autrefois acquit* provided that the accused was in jeopardy at the time of the earlier proceeding, which proceeding terminated in an acquittal or an order tantamount to an acquittal. Thus the dismissal of an indictment by a United States magistrate who had no jurisdiction to try the accused which was the equivalent of a stay of proceedings could not give rise to a plea of *autrefois* when the accused was subsequently charged with the same offence in Canada: *R. v. Frisbee* (1989), 48 C.C.C. (3d) 388 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi.

**Availability where no evidence offered on previous trial** – On a trial before a provincial court judge, once the accused has been arraigned and pleaded to the charge he has been “given in charge” and placed in jeopardy and if the Crown, because of a refusal to grant an adjournment by the Court, elects then not to call any evidence, the disposition of the charge by dismissal will give rise to a successful plea of *autrefois acquit* to a subsequent identical charge. There is no requirement of a trial “on the merits” of the first charge. Generally the only requirements are that the previous dismissal must have been made by a Court of competent jurisdiction whose proceedings were free from jurisdictional error and which rendered judgment on the charge: *R. v. Riddle*, *supra*.

**Requirement of identity of charges [Also see notes under s. 609]** – Assuming that the plea of *autrefois acquit* was available to an accused on the basis of his acquittal of the same offence in the United States, the plea was not made out in this case. The accused must show that: (1), the matter is the same, in whole or in part and (2), that the new count is the same as at the first trial or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at that time to make the necessary amendments. If the differences between the charges at the first and second trials are such that it must be concluded that the charges are different in nature, the plea is not appropriate. However, the mere availability of a defence in the foreign jurisdiction which is not available in Canada would not prevent the principle of *autrefois acquit* from applying. In this case, however, the Canadian charges were limited to events which occurred in Canada and the conduct referred to in the charges was different: *R. v. Van Rassel* (1990), 53 C.C.C. (3d) 353, [1990] 1 S.C.R. 225 (7:0).

To maintain the plea of *autrefois acquit* the accused must prove that he was acquitted



previously for the same offence before a court having proper jurisdiction: *R. v. Suleyman Sanver* (1973), 12 C.C.C. (2d) 105, 28 C.R.N.S.10 (N.B.S.C.App.Div.).

In *R. v. Ko and Yip* (1977), 36 C.C.C. (2d) 32, 38 C.R.N.S. 243 (B.C.C.A.), it was held that the trial Judge erred in rejecting a plea of *autrefois convict* where the second trial took place on an identical indictment charging the offence of trafficking narcotics. Substantially the same evidence was led at both trials although the Crown stated in his opening at the first trial that it only involved the delivery of a sample of the larger quantity of narcotics which was to be the subject of the second trial. It was held that while these two transactions could constitute two separate offences justifying two convictions this could only be done if the Crown alleged in the indictment or in particulars properly given, the acts alleged so that the two acts could be isolated. The mere accusation by the Crown that the first trial was limited to the sample would not suffice.

In determining the validity of a plea of *autrefois acquit* the true test is whether the offence charged is substantially identical to the offence of which the accused was previously acquitted. This may be compared with the common law defence of *res judicata* where the onus is upon the accused to show that in the former proceedings there was a determination of a question of fact in favour of the accused which is vital to the present offence: *R. v. Feeley, McDermott and Wright*, [1963] 1 C.C.C.254, 38 C.R.321 (Ont. C.A.). Affirmed as to the first issue (5:0) and as to the second issue (3:2), [1963] 3 C.C.C.201, 40 C.R.261 (S.C.C.).

**Summary conviction proceedings** – The procedure in s. 808 does not supplant the common law right to raise the special plea of *autrefois acquit* in summary conviction proceedings: *R. v. Riddle* (1979), 48 C.C.C. (2d) 365, [1980] 1 W.W.R. 592 (S.C.C.) (7:0).

**New trial** – On a new trial ordered by the Court of Appeal the accused may be permitted to enter one of the special pleas: *R. v. Moore* (1980), 52 C.C.C. (2d) 203, [1980] 4 W.W.R. 511 (B.C.C.A.).

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## EVIDENCE OF IDENTITY OF CHARGES.

**608.** Where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried, the evidence and adjudication and the notes of the judge and official stenographer on the former trial and the record transmitted to the court pursuant to section 551 on the charge that is pending before that court are admissible in evidence to prove or to disprove the identity of the charges. R.S., c. C-34, s. 536.

## CROSS-REFERENCES

Other provisions respecting the plea of *autrefois* are set out in ss. 607, 609 and 610. Thus, see the notes following s. 607.

## SYNOPSIS

This section makes the record of the proceedings at the earlier trial, including the judge's notes, admissible in the determination of a plea of *autrefois*.

## ANNOTATIONS

In *R. v. Gee* (1973), 14 C.C.C. (2d) 538 (Ont. C.A.) a Crown appeal was allowed where the trial Judge allowed the plea of *autrefois convict* after simply comparing the information on the first trial with the indictment presented on the second trial. It was held that the trial Judge erred in allowing the plea without receiving evidence pursuant to this section on the question whether the second charge and the charge on which the accused was convicted were found in the same transaction.

**WHAT DETERMINES IDENTITY / Allowance of special plea in part.**

**609.** (1) Where an issue on a plea of *autrefois acquit* or *autrefois convict* to a count is tried and it appears

- (a) that the matter on which the accused was given in charge on the former trial is the same in whole or in part as that on which it is proposed to give him in charge, and
- (b) that on the former trial, if all proper amendments had been made that might then have been made, he might have been convicted of all the offences of which he may be convicted on the count to which the plea of *autrefois acquit* or *autrefois convict* is pleaded,

the judge shall give judgment discharging the accused in respect of that count.

(2) The following provisions apply where an issue on a plea of *autrefois acquit* or *autrefois convict* is tried:

- (a) where it appears that the accused might on the former trial have been convicted of an offence of which he may be convicted on the count in issue, the judge shall direct that the accused shall not be found guilty of any offence of which he might have been convicted on the former trial, and
- (b) where it appears that the accused may be convicted on the count in issue of an offence of which he could not have been convicted on the former trial, the accused shall plead guilty or not guilty with respect to that offence. R.S., c. C-34, s. 537.

**CROSS-REFERENCES**

Other provisions respecting the plea of *autrefois* are found in ss. 607, 608 and 610. Section 601 defines the circumstances in which an indictment may be amended. Sections 660 to 662 define cases in which one offence is included in another. Also see notes following s. 11(h) which defines a limited constitutional right against double jeopardy. For notes on *res judicata* and issue estoppel, see the notes following s. 613. Also see s. 12 which provides that where an act or omission is an offence under more than one act of Parliament unless a contrary intention appears, the person, although subject to proceedings under any of those acts, is not liable to be punished more than once for the same offence.

**SYNOPSIS**

This section establishes what is required to successfully advance a plea of *autrefois*.

An accused will be discharged if it is shown that: (a) the earlier trial was on a charge which was, in whole or in part, the same as the later one; and (b) he or she was in jeopardy of being convicted at the earlier trial of the offence now before the court.

**ANNOTATIONS**

On the second trial (this time for wounding), following an acquittal of attempted murder, the trial judge refused the special plea of *autrefois acquit*. In affirming this decision it was held in *R. v. Rinnie*, [1970] 3 C.C.C.218, 9 C.R.N.S.81 (Alta.S.C.App.Div.), that an included offence, which can only be found by definition of the crime, or by statutory prescription, or by the inclusion of apt words of description cognate to the offence, may be pleaded to by this special plea where there has been an acquittal of the principal offence. Because of the manner in which the indictment was worded on the first trial, however, wounding was not an included offence. Furthermore, an amendment to that indictment could only have been made under s. 601 and that section did not apply to the first trial as the indictment was not defective nor was there a variance between the indictment and the evidence adduced. An amendment to include a charge of wounding would have constituted the adding of a fresh count in the indictment rather than the curing of a defect.

In *R. v. Plank* (1986), 28 C.C.C. (3d) 386, 40 M.V.R. 298 (Ont. C.A.), it was held

that the accused could rely on the plea of *autrefois acquit* to a charge of care or control of a motor vehicle while his blood alcohol level exceeded .08 as a result of his earlier acquittal of the driving offence. The judge at the first trial had properly refused to amend the information to charge the separate care or control offence. While the judge erred in failing to go on to consider whether the accused should be convicted of that offence pursuant to s. 662 as an included offence, since the accused was acquitted, that acquittal stood as a final disposition of both offences.

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**CIRCUMSTANCES OF AGGRAVATION / Effect of previous charge of murder or manslaughter / Previous charges of first degree murder / Effect of previous charge of infanticide or manslaughter.**

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**610. (1)** Where an indictment charges substantially the same offence as that charged in an indictment on which an accused was previously convicted or acquitted, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, the previous conviction or acquittal bars the subsequent indictment.

**(2)** A conviction or an acquittal on an indictment for murder bars a subsequent indictment for the same homicide charging it as manslaughter or infanticide, and a conviction or acquittal on an indictment for manslaughter or infanticide bars a subsequent indictment for the same homicide charging it as murder.

**(3)** A conviction or an acquittal on an indictment for first degree murder bars a subsequent indictment for the same homicide charging it as second degree murder, and a conviction or acquittal on an indictment for second degree murder bars a subsequent indictment for the same homicide charging it as first degree murder.

**(4)** A conviction or an acquittal on an indictment for infanticide bars a subsequent indictment for the same homicide charging it as manslaughter, and a conviction or acquittal on an indictment for manslaughter bars a subsequent indictment for the same homicide charging it as infanticide. R.S., c. C-34, s. 538; 1973-74, c. 38, s. 5; 1974-75-76, c. 105, s. 9.

**CROSS-REFERENCES**

Sections 607 to 609 also set out the circumstances in which the plea of *autrefois* is available and thus see notes under those sections for other cross-references.

**SYNOPSIS**

A plea of *autrefois* is available where the subsequent charge merely adds a statement of intention or circumstances of aggravation to the earlier charge (subsec. (1)).

A conviction or acquittal on a homicide related charge (*i.e.*, murder, manslaughter or infanticide) bars further proceedings on a subsequent homicide related charge (subsecs. (2), (3) and (4)).

**ANNOTATIONS**

In *R. v. Hemmingway, Ewert and Benford* (1971), 5 C.C.C. (2d) 127 (B.C. Co. Ct.) the plea of *autrefois convict* for one accused was allowed to a charge of possession of narcotics for the purpose of trafficking, the accused having been previously convicted of simple possession. The accused was found on a boat in which there were quantities of narcotics, as well he had narcotics on his person. On the plea of guilty to the simple possession charge, no evidence was led as to the quantities found on the boat. It was held that to distinguish between the materials found on the accused's person and the materials found in the boat would be an unreal distinction. There was one possession of the prohibited substances at a specific time and place.



**LIBEL, PLEA OF JUSTIFICATION / Where more than one sense alleged / Plea in writing / Reply.**

**611. (1)** An accused who is charged with publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matter should have been published in the manner in which and at the time when it was published.

**(2)** A plea that is made under subsection (1) may justify the defamatory matter in any sense in which it is specified in the count, or in the sense that the defamatory matter bears without being specified, or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each count as if two libels had been charged in separate counts.

**(3)** A plea that is made under subsection (1) shall be in writing, and shall set out the particular facts by reason of which it is alleged to have been for the public good that the matter should have been published.

**(4)** The prosecutor may in his reply deny generally the truth of a plea that is made under this section. R.S., c. C-34, s. 539.

#### **CROSS-REFERENCES**

The offence of defamatory libel and procedure respecting the trial of that offence is set out in ss. 297 to 317. As to circumstances in which the plea of justification is necessary, see s. 612. Also note ss. 728 and 729 respecting the awarding of costs in libel cases.

#### **SYNOPSIS**

This section sets out the procedure with respect to a plea of justification on a charge of defamatory libel.

A plea of justification shall be in writing. The accused may plead that the matter published was true and that its publication was for the public benefit. The prosecutor is entitled to deny the truth of such a plea.

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**PLEA OF JUSTIFICATION NECESSARY / Not guilty, in addition / Effect of plea on punishment.**

**612. (1)** The truth of the matters charged in an alleged libel shall not be inquired into in the absence of a plea of justification under section 611 unless the accused is charged with publishing the libel knowing it to be false, in which case evidence of the truth may be given to negative the allegation that the accused knew that the libel was false.

**(2)** The accused may, in addition to a plea that is made under section 611, plead not guilty and the pleas shall be inquired into together.

**(3)** Where a plea of justification is pleaded and the accused is convicted, the court may, in pronouncing sentence, consider whether the guilt of the accused is aggravated or mitigated by the plea. R.S., c. C-34, s. 540.

#### **CROSS-REFERENCES**

Provision for the plea that the defamatory matter published was true and that it was for the public benefit is set out in s. 611. The offence of defamatory libel and procedure for trial of the offence is generally set out in ss. 297 to 317. Also note ss. 728 and 729 respecting awarding of costs in libel cases.

#### **SYNOPSIS**

Unless an accused is charged with publishing a libel knowing it to be false, the truth of the alleged libel shall not be an issue, except when there has been a plea of justification.

On a charge of knowingly publishing false information, evidence as to the truth of the statements may be given to negative the allegation that the accused knew that the libel was false (subsec. (1)).

In addition to justification, a plea of not guilty may be entered (subsec. (2)).

The fact that the accused pleaded justification may be considered on the question of sentence (subsec. (3)).

## PLEA OF NOT GUILTY.

**613. Any ground of defence for which a special plea is not provided by this Act may be relied on under the plea of not guilty. R.S., c. C-34, s. 541.**

## CROSS-REFERENCES

The pleas which are permitted are defined in ss. 606 to 612. Most defences including the insanity defence are not specially pleaded but are simply raised under the plea of not guilty.

## ANNOTATIONS

***Res judicata* [Kienapple rule]** – In *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 26 C.R.N.S. 1 (5:4) (S.C.C.), Laskin, J., for the majority stated that:

... the term *res judicata* best expresses the theory of precluding multiple convictions for the same delict, although the matter is the basis of two separate offences. ... Where there has been a previous conviction of an accused, whether in a former trial or on one count of a multicount indictment, issue estoppel is obviously an inappropriate term to urge against a further conviction of another offence. So, too, would be *autrefois convict* in its strict connotation; hence the utility of *res judicata*.

The proper procedure where a case calls for the application of the rule precluding multiple convictions is for the trial judge to enter a conviction for the more serious charge and enter a conditional stay with respect to the alternative charge. This stay is conditional on the final disposition of the charge of which the accused has been convicted. If the accused's appeal from conviction arising from the same delict is eventually dismissed or the accused does not appeal within the specified time then the conditional stay becomes a permanent stay and is tantamount to a verdict of acquittal. If, however, the accused's appeal from conviction is successful, the conditional stay dissolves and the appellate court, while allowing the appeal, can make an order remitting to the trial judge the count which was conditionally stayed by reason of the application of the rule against multiple convictions, notwithstanding that no appeal was taken by the Crown from the conditionally stayed count: *R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417, 70 C.R. (3d) 315, [1989] 5 W.W.R. 97 (S.C.C.) (5:0).

In *R. v. Loyer and Blouin* (1978), 40 C.C.C. (2d) 291, 85 D.L.R. (3d) 101, [1978] 2 S.C.R. 631 (9:0) the Court considered the proper application of the principle laid down in *Kienapple v. The Queen*, *supra*, and held, *inter alia*, that if the accused pleads guilty to the less serious charge the plea is held in abeyance pending the trial on the more serious charge.

In *R. v. Prince* (1986), 30 C.C.C. (3d) 35, 54 C.R. (3d) 97, [1986] 2 S.C.R. 480 (7:0), the court considered at length the application of the rule in *Kienapple v. The Queen*, *supra*. That judgment may be summarized as follows: The rule against multiple convictions applies only where there is a sufficient factual nexus between the charges and a legal nexus between the offences themselves. The requirement of a factual nexus will be satisfied usually if the same act of the accused grounds each of the charges. Subject to a clearly expressed Parliamentary intention to the contrary, the sufficient nexus between the offences will be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the rule against multiple convictions. As a corollary, where the offences are of unequal gravity the rule may bar a conviction for a lesser offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence.

There are at least three ways in which sufficient correspondence between elements can be found. First, an element may be a particularization of another element. Second, there may be more than one method, embodied in more than one offence, to prove a single delict. Third, Parliament, in effect, may deem a particular element to be satisfied by proof of a different nature, not necessarily because logic compels that conclusion, but because of social policy or inherent difficulties of proof. However, in applying these criteria, it is important not to frustrate the intent of Parliament or to lose sight of the overarching question whether the same cause, matter or delict underlies both charges. Thus, there exist offences aimed at a particular evil which, in certain circumstances, contain as an element the commission of some other offence directed toward an entirely different wrong and in which case the *Kienapple* case would have no application.

The requirement of sufficient proximity between the offences will be satisfied only if there is no additional and distinguishing element contained in the offence for which a conviction is sought to be precluded by this principle. Thus conviction of an accused for both break and enter and commit robbery and attempted murder was not barred by the rule in *Kienapple*: *Wigman v. The Queen* (1987), 33 C.C.C. (3d) 97, 56 C.R. (3d) 289, [1987] 1 S.C.R. 246 (6:0).

The doctrine precluding multiple convictions for the same cause or matter does not preclude an accused's conviction for conspiracy to traffic in narcotics and trafficking in narcotics although the latter transaction was one of several overt acts relied upon by the Crown to prove the conspiracy: *Sheppe v. The Queen* (1980), 51 C.C.C. (2d) 481, [1980] 2 S.C.R. 22, 15 C.R. (3d) 381, [1980] 5 W.W.R. 528 (7:0).

**Issue estoppel** – In *Gushue v. The Queen* (1980), 50 C.C.C. (2d) 417, [1980] 1 S.C.R. 798, 16 C.R. (3d) 39 (7:0) the accused had previously been acquitted of murder which had occurred in the course of a robbery. The accused testified that he did not shoot the deceased. He later confessed to the killing and was charged with robbery and perjury; and later, under s. 136, for giving contradictory evidence as the result of an admission under oath at the preliminary hearing. The Court held that issue estoppel is available in criminal proceedings in Canada (unlike in Britain: *D.P.P. v. Humphreys*, [1976] 2 All E.R. 497 (H.L.)) but the doctrine did not apply in this case. As to the s. 124 charge and the perjury charge it was held that unless the subsequent prosecution is an attempt by the Crown to retry the accused on the original charge then the preferable policy is to exclude issue estoppel. That was not the case here since, *inter alia*, the Crown could rely on the accused's own statements made subsequent to the acquittal. As to the robbery charge the Court held that only if a finding in the accused's favour on the relevant issue at the first trial was the only rational explanation of the jury's verdict can issue estoppel avail. In this case the Court from examining the charge to the jury considered that a finding that the accused did not participate in the robbery was not necessary for the acquittal on the murder charge.

In the subsequent case *Grdic v. The Queen* (1985), 19 C.C.C. (3d) 289, 46 C.R. (3d) 1, [1985] 4 W.W.R. 437 (S.C.C.) (5:4) the Court upheld the defence of issue estoppel to a perjury charge arising out of the accused's testimony at his own trial on a motor vehicle offence of which he was acquitted. An acquittal even if only by reason of the trier of fact having a reasonable doubt is equivalent to a finding of innocence, and any issue the resolution of which had to be in favour of the accused as a prerequisite to the acquittal is irrevocably deemed to have been found conclusively in his favour. While fraud, including perjury, is an exception to the application of issue estoppel, the Crown is not entitled to merely relitigate the issues at the first trial and therefore a subsequent perjury charge must be founded on additional evidence. This additional evidence must, however, be evidence which was not available to the Crown at the first trial using reasonable diligence. In this case, the accused had relied on the defence of alibi at the first trial and was acquitted. On the perjury charge the Crown called the same evidence and several other police officers to establish that the accused was driving the vehicle at the time of the



motor vehicle offence. This evidence was available at the first trial by exercise of reasonable diligence and could have been called at the first trial in rebuttal.

In *R. v. Wright*, [1965] 3 C.C.C. 160, 50 D.L.R. (2d) 498 (Ont. C.A.) the accused had previously been acquitted of conspiracy to commit bribery and convicted of conspiracy to effect an unlawful purpose. It was held that the combined effect of these verdicts was to create an estoppel against the Crown with respect to charges for the substantive offences of bribery. In this case it was admitted by the Crown that there was only one conspiracy. As the jury found this was not a conspiracy to commit bribery but was a conspiracy to effect an unlawful purpose all the elements of the charges in the substantive counts were *res judicata*.

In *R. v. Quinn* (1905), 10 C.C.C. 412, 11 O.R. 242 (C.A.) the defence of *res judicata* was allowed to a charge of perjury following the accused's acquittal on a charge of personation. In that case the accused allegedly impersonated another at a polling station which gave rise to the personation charge and also at the same time swore an oath of identity, giving rise to the perjury charge. The majority held that while *autrefois acquit* was not available the common law defence of *res judicata* was a bar to conviction on the second charge. In this case the main issue was identity but the acquittal in the first case established that it was not the accused who had committed the personation and this had become *res judicata* as between the Crown and the accused. The issue of identity having been determined adversely to the Crown by the decision in the first case, while that decision stood it was not open to the Crown to have it tried a second time.

An acquittal on a charge of perjury did not give rise to issue estoppel to a charge of attempting to obstruct justice contrary to s. 139 although the giving of false evidence was common to both charges. The jury could well have acquitted on the perjury charge, although they found that the accused's testimony was false, because of the absence of corroboration which is required as a matter of law (s. 133) for a conviction for perjury, but not attempting to obstruct justice: *R. v. Moore* (1980), 52 C.C.C. (2d) 203, [1980] 4 W.W.R. 511 (B.C.C.A.).

In *R. v. Carlson*, [1970] 5 C.C.C. 147, [1970] 3 O.R. 213 (H.C.J.) the defence of *res judicata* was allowed on a charge of murder where the accused had previously been acquitted of another charge of murder. Both killings had taken place at the same time and place. There were only two witnesses to the killings, the accused and the principal Crown witness. The core of both trials was whether the jury believed the Crown witness as to the same facts. Where the jury had returned a verdict of not guilty on the first trial it was not open to the jury at the second trial to arrive at a different verdict on exactly the same issue, except for the identity of the victim.

A verdict in earlier proceedings gives rise to a plea of issue estoppel in subsequent proceedings if a necessary element of the offence tried first is also a necessary element of the offence that is the subject-matter of the subsequent proceedings and if it appears from the record or is explained by proper evidence that such necessary element was resolved in the first proceedings on a point of law or fact such as identification that was fundamental to its resolution: *R. v. Casson* (1976), 30 C.C.C. (2d) 506, [1976] 4 W.W.R. 561 (Alta. S.C. App. Div.). In this case a conviction for "over 80" was upheld despite an acquittal for impaired driving. The only issue determined in the accused's favour on the first trial was that of impairment. The situation would have been different had the trial Judge on the first trial found that the accused had consumed no alcohol.

**Interlocutory rulings** – The doctrine of *res judicata* does not operate so as to preclude the Crown from relitigating the admissibility of a confession held inadmissible in a previous trial of the accused on another charge, or ruled inadmissible at a preliminary inquiry: *Duhamel v. The Queen* (1984), 15 C.C.C. (3d) 491, [1985] 2 W.W.R. 251, 43 C.R. (3d) 1, [1984] 2 S.C.R. 555 (5:0).

**Availability at preliminary inquiry** – The defence of *res judicata* and the special pleas of *autrefois* are not available at the preliminary hearing stage: *Schmidt v. The Queen* (1984),

10 C.C.C. (3d) 564, 44 O.R. (2d) 777 (C.A.), affd on other grounds 33 C.C.C. (3d) 193, 58 C.R. (3d) 1, [1987] 1 S.C.R. 500.

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**614. [Repealed (with heading). 1991, c. 43, s. 3.]**

**Transitional provision**

1991, c. 43, s. 10 provides as follows:

10. (1) Any order for the detention of an accused or accused person made under section 614, 615 or 617 of the Criminal Code or section 200 or 201 of the National Defence Act, as those sections read immediately before the coming into force of section 3 or 18 of this Act, shall continue in force until the coming into force of section 672.64 of the Criminal Code, subject to any order made by a court or Review Board under section 672.54 of the Criminal Code.

(2) The Review Board of a province shall, within twelve months after the coming into force of this section, review the case of every person detained in custody in the province by virtue of an order of detention referred to in subsection (1).

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**615. [Repealed. 1991, c. 43, s. 3.]**

**Transitional provision**

1991, c. 43, s. 10 provides as follows:

10. (1) Any order for the detention of an accused or accused person made under section 614, 615 or 617 of the Criminal Code or section 200 or 201 of the National Defence Act, as those sections read immediately before the coming into force of section 3 or 18 of this Act, shall continue in force until the coming into force of section 672.64 of the Criminal Code, subject to any order made by a court or Review Board under section 672.54 of the Criminal Code.

(2) The Review Board of a province shall, within twelve months after the coming into force of this section, review the case of every person detained in custody in the province by virtue of an order of detention referred to in subsection (1).

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**616. [Repealed. 1991, c. 43, s. 3.]**

**617. [Repealed. 1991, c. 43, s. 3.]**

**Transitional provision**

1991, c. 43, s. 10 provides as follows:

10. (1) Any order for the detention of an accused or accused person made under section 614, 615 or 617 of the Criminal Code or section 200 or 201 of the National Defence Act, as those sections read immediately before the coming into force of section 3 or 18 of this Act, shall continue in force until the coming into force of section 672.64 of the Criminal Code, subject to any order made by a court or Review Board under section 672.54 of the Criminal Code.

(2) The Review Board of a province shall, within twelve months after the coming into force of this section, review the case of every person detained in custody in the province by virtue of an order of detention referred to in subsection (1).

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**618. [Repealed. 1991, c. 43, s. 3.]**

619. [Repealed. 1991, c. 43, s. 3.]

## Corporations

### APPEARANCE BY ATTORNEY.

**620. Every corporation against which an indictment is found shall appear and plead by counsel or agent. R.S., c. C-34, s. 548.**

### CROSS-REFERENCES

The term “counsel” is defined in s. 2. Pursuant to s. 621, where an indictment has been found against a corporation, the clerk of the court is to cause notice of the indictment to be served on the corporation. Service on a corporation is effected pursuant to s. 703.2. Punishment of a corporation is by way of a fine pursuant to s. 719. Enforcement of fines on corporations is provided for in s. 720. The corporation also appears by counsel or agent at a preliminary inquiry pursuant to s. 538 and for trial by provincial court judge pursuant to s. 556 and indictable matters similarly with respect to summary conviction proceedings, see s. 800(3). Where the corporation fails to appear then the procedure is as set out in s. 622. Where the corporation appears and pleads to the indictment or a plea of not guilty is entered then the court shall proceed with the trial of an indictment pursuant to s. 623.

### NOTICE TO CORPORATION / Contents of notice.

**621. (1) The clerk of the court shall, where an indictment is found against a corporation, cause a notice of the indictment to be served upon the corporation.**

**(2) A notice of an indictment referred to in subsection (1) shall set out the nature and purport of the indictment and advise that, unless the corporation appears and pleads within seven days after service of the notice, a plea of not guilty will be entered for the accused by the court, and that the trial of the indictment will be proceeded with as though the corporation had appeared and pleaded. R.S., c. C-34, s. 549.**

### CROSS-REFERENCES

A corporation appears by counsel or agent pursuant to s. 620. Procedure where the corporation does not appear pursuant to the notice referred to in this section is set out in s. 622. Where the corporation appears and pleads or a plea of not guilty is entered pursuant to s. 622 then the trial proceeds as directed by s. 623. Upon conviction, the corporation is fined in accordance with s. 719. Service upon a corporation is effected pursuant to s. 703.2.

### PROCEDURE ON DEFAULT OF APPEARANCE.

**622. Where a corporation does not appear in the court in which an indictment is found and plead within the time specified in the notice referred to in section 621, the presiding judge may, on proof by affidavit of service of the notice, order the clerk of the court to enter a plea of not guilty on behalf of the corporation, and the plea has the same force and effect as if the corporation had appeared by its counsel or agent and pleaded that plea. R.S., c. C-34, s. 550.**

### CROSS-REFERENCES

A corporation appears and pleads by counsel or agent pursuant to s. 620. Service on a corporation is effected in accordance with s. 703.2. By virtue of s. 623, where a plea of not guilty is entered pursuant to this section, the court shall proceed with the trial. Upon conviction, a corporation is fined in accordance with the provisions of s. 719, which fine may be enforced pursuant to s. 720.



**SYNOPSIS**

This section provides that where a corporation being prosecuted on indictment fails to appear and plead within seven days of the service of the notice referred to in s. 621, on proof of service, a plea of not guilty will be entered on the corporation's behalf and the trial will proceed as if the corporation had appeared and pleaded.

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**TRIAL OF CORPORATION.**

**623.** Where a corporation appears and pleads to an indictment or a plea of not guilty is entered by order of the court pursuant to section 622, the court shall proceed with the trial of the indictment and, where the corporation is convicted, section 719 applies. R.S., c. C-34, s. 551.

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 719 with s. 735.

**CROSS-REFERENCES**

A corporation appears by counsel or agent by virtue of s. 620. After an indictment has been found against a corporation, the clerk of the court must cause a notice of indictment to be served on the corporation. Section 719 provides that a corporation is punished by way of a fine which may be in force pursuant to s. 720. Note s. 665(4) which provides that where the trial proceeds pursuant to this section but the corporation has not appeared or pleaded then the court may, whether or not the corporation was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the corporation and, if any such conviction is proved, may impose a greater punishment by reason thereof. Service on a corporation is effected in accordance with s. 703.2.

**SYNOPSIS**

This section notes that s. 719 applies to the trial of a corporation, regardless of whether the corporation appears and pleads or a plea is entered under s. 622. Section 719 provides for a fine in lieu of imprisonment for a corporation, with no maximum, except where otherwise provided, where the conviction is for an indictable offence.

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## ***Record of Proceedings***

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**HOW RECORDED / Record of proceedings.**

**624. (1)** It is sufficient, in making up the record of a conviction or acquittal on an indictment, to copy the indictment and the plea that was pleaded, without a formal caption or heading.

**(2)** The court shall keep a record of every arraignment and of proceedings subsequent to arraignment. R.S., c. C-34, s. 552.

**CROSS-REFERENCES**

The term "indictment" is defined in s. 2. Note s. 667 which sets out the procedure for proving a previous conviction through a certificate of that conviction. Pursuant to s. 625, where it is necessary to draw up a formal record of proceedings in which the indictment has been amended, the record shall be drawn up in the form in which the indictment remained after the amendment without reference to the fact that the indictment was amended. The power to amend is found in s. 601.

**SYNOPSIS**

The formal record of a conviction or acquittal may be made by copying the indictment and plea and the same need not have a formal heading (subsec. (1)). A record is required to be kept of the arraignment and all subsequent proceedings (subsec. (2)).

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**FORM OF RECORD IN CASE OF AMENDMENT.**

**625.** Where it is necessary to draw up a formal record in proceedings in which the indictment has been amended, the record shall be drawn up in the form in which the indictment remained after the amendment, without reference to the fact that the indictment was amended. R.S., c. C-34, s. 553.

**CROSS-REFERENCES**

The term “indictment” is defined in s. 2. Provision for amendment of an indictment is made in ss. 590, 591 and, in particular, s. 601.

**SYNOPSIS**

This section provides that, if the indictment is amended, the formal record shall reflect only the amended version, and not the fact that there was an amendment.

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***Pre-hearing Conference***

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**PRE-HEARING CONFERENCE / Mandatory pre-trial hearing for jury trials.**

**625.1.** (1) Subject to subsection (2), on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held may, with the consent of the prosecutor and the accused, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, judge, provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing.

(2) In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious trial. R.S.C. 1985, c. 27 (1st Supp.), s. 127.

**CROSS-REFERENCES**

The terms “provincial court judge”, “justice”, “prosecutor” are defined in s. 2. The rule making power referred to in this section is found in s. 482(3)(c).

**SYNOPSIS**

To facilitate the expeditious hearing of trials, a judge, with the consent of the parties, may order a pre-trial conference. Either the Crown, the defence or the judge may initiate the motion for such a meeting. Conferences are mandatory for all jury trials.

Courts have the authority to promulgate rules in this regard.

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***Juries***

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**QUALIFICATION OF JURORS / No disqualification based on sex.**

**626.** (1) A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that province.

(2) Notwithstanding any law of a province referred to in subsection (1), no person may be disqualified, exempted or excused from serving as a juror in criminal pro-

ceedings on the grounds of his or her sex. R.S., c. C-34, s. 554; 1972, c. 13, s. 46; R.S.C. 1985, c. 27 (1st Supp.), s. 128.

#### CROSS-REFERENCES

The procedure for selecting a jury is found in ss. 629 to 644. Note s. 530 which provides for an order that the accused be tried by a jury which speaks the official language of the accused or speaks both official languages.

Note s. 670 which provides that judgment shall not be stayed or reversed after verdict on an indictment by reason of any irregularity in the summoning or empanelling of the jury or for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer. Under s. 671, no omission to observe the directions contained in any Act with respect to the qualification, the preparation of the jurors book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

#### SYNOPSIS

This section states that jurors in criminal proceedings are qualified if they are qualified and summoned as jurors under the laws of the relevant province. No person may be disqualified, exempted or excused as a juror on the grounds of gender.

#### ANNOTATIONS

None of ss. 15, 25 nor 27 of the Charter of Rights and Freedoms, which refer respectively to equality and aboriginal rights and Canada's multicultural heritage, entitle an accused to a jury composed entirely or proportionately of persons belonging to the same race as the accused, in this case, native Indians: *R. v. Kent, Sinclair and Gode* (1986), 27 C.C.C. (3d) 405 (Man. C.A.).

While the exclusion of non-citizen permanent residents from the jury panel pursuant to provincial legislation may violate ss. 11(f) and 15 of the Charter, this violation was a reasonable limit under s. 1 of the Charter. The judicial function exercised by jurors is a public one and is part of the function of government in the country. The limit on the right to a representative jury arising out of the requirement of Canadian citizenship is therefore a reasonable one which can be demonstrably justified in a free and democratic society. Further, the provisions of provincial legislation making certain persons ineligible by reason of their occupation or the occupation of their spouse, an occupation related to the administration of justice, are not violations of the Charter. Even if exclusion from juries of persons engaged in law enforcement and lawyers and law students and the spouses of persons engaged in those occupations constitutes a limit on the right to a representative jury as guaranteed by the Charter, it is a reasonable limit. The exclusion of certain legally qualified medical practitioners and veterinarian surgeons in active practice and coroners is not a violation of the accused's rights. The requirement that juries be representative does not mean that the panels and the roles from which the panels are chosen must mirror exactly the makeup of the community. Physicians, veterinarians and coroners are declared ineligible because the uninterrupted performance of their work is considered to be in the public interest. The exclusion of these persons does not materially reduce the representatives of jury panels: *R. v. Church of Scientology of Toronto* (1992), 74 C.C.C. (3d) 327, 9 C.B.R. (2d) 232 (Ont. Ct. (Gen. Div.)).

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### *Mixed Juries*

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627. [*Repealed*. R.S.C. 1985, c. 2 (1st Supp.), s. 1.]

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628. [*Repealed*. R.S.C. 1985, c. 27 (1st Supp.), s. 129.]



**CHALLENGING THE JURY PANEL / In writing / Form.**

**629. (1) The accused or the prosecutor may challenge the jury panel only on the ground of partiality, fraud or wilful misconduct on the part of the sheriff or other officer by whom the panel was returned.**

**(2) A challenge under subsection (1) shall be in writing and shall state that the person who returned the panel was partial or fraudulent or that he wilfully misconducted himself, as the case may be.**

**(3) A challenge under this section may be in Form 40. R.S., c. C-34, s. 558; R.S.C. 1985, c. 27 (1st Supp.), s. 130.**

**CROSS-REFERENCES**

This section sets out what is commonly referred to as the challenge to the array. The challenge is to be tried by the trial judge pursuant to s. 630. Procedure for challenging individual jurors is set out in ss. 631 to 641. Note s. 670 which provides that judgment shall not be stayed or reversed after verdict on an indictment by reason of any irregularity in the summoning or empanelling of the jury or for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer. Under s. 671, no omission to observe directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors book, the selecting of jury lists or the drafting of panels from the jury lists is a ground for impeaching or quashing a verdict rendered in criminal proceedings.

**SYNOPSIS**

Either the Crown or the accused can challenge the entire jury panel, otherwise known as the array, on the grounds that improper procedures were employed by the sheriff in preparing the jury list. Challenges must be in writing and allege either partiality, fraud or wilful misconduct (*e.g.*, the deliberate exclusion of persons of a particular race or ethnic background).

**ANNOTATIONS**

In *R. v. Diabo* (1974), 27 C.C.C. (2d) 411, 30 C.R.N.S. 75 (Que. C.A.) it was held that a challenge to the array by an accused treaty Indian, based on the absence of persons from his reservation on the jury panel, was properly dismissed. The accused argued that the Jury Act (Que.) was inoperative by reason of the Canadian Bill of Rights prohibition of discrimination on the basis of race. Under the Jury Act only persons on the valuation role are eligible for jury duty and there are no valuation roles on the reservations. It was held that assuming the Jury Act was subject to the supervision of the Bill of Rights by virtue of its incorporation by reference in s. 626(1), the Act was not inoperative as the exclusion of Indians arose on the basis of geography not race.

In a similar case, *R. v. Laforte* (1975), 25 C.C.C. (2d) 75, 62 D.L.R. (3d) 86 (Man. C.A.), a challenge based on the small number of women and band Indians was held to have been properly dismissed there being no evidence of misconduct by the Sheriff in returning the panel.

When evidence came to light in the course of a trial of two native Indians that there was a policy of the sheriff to exclude Indians from all jury panels then the matter should have been investigated. Such deliberate exclusion would amount to partiality on the part of the sheriff within the meaning of this section. The trial judge not having investigated the matter, the appeal by the accused was allowed and a new trial ordered. The privative provisions of ss. 670 and 671 could not apply to preclude a new trial where there has been a failure to observe a fundamental principle of jury selection: *R. v. Butler* (1984), 63 C.C.C. (3d) 243, 3 C.R. (4th) 174 (B.C.C.A.).

In the absence of evidence to the contrary the doctrine of *omnia praesumuntur* applies to a statutory official such as the Sheriff in the performance of his statutory duties. The mere fact that there were no black persons on the panel summoned for a trial of two

black accused on a charge of rape was not proof of partiality on the part of the Sheriff and the challenge was therefore dismissed: *R. v. Bradley and Martin (No. 1)* (1973), 23 C.R.N.S. 33 (Ont. H.C.J.). It was also held that the absence of black jurors in this case did not offend the Canadian Bill of Rights: *R. v. Bradley and Martin (No. 2)* (1973), 23 C.R.N.S. 39 (Ont. H.C.J.).

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#### TRYING GROUND OF CHALLENGE.

**630.** Where a challenge is made under section 629, the judge shall determine whether the alleged ground of challenge is true or not, and where he is satisfied that the alleged ground of challenge is true, he shall direct a new panel to be returned. R.S., c. C-34, s. 559.

#### CROSS-REFERENCES

This section deals with trial of what is commonly referred to as a challenge to the array. The grounds upon which the jury panel may be challenged are set out in s. 629. Note, however, the saving provisions in ss. 670 to 672.

#### SYNOPSIS

This section provides that where a challenge to the jury panel is made under s. 629, the issue will be determined by the trial judge who shall, if he upholds the challenge, direct a new empanement.

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### *Empanelling Jury*

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**NAMES OF JURORS ON CARDS / To be placed in box / To be drawn by clerk of court / Juror to be sworn / Drawing additional names if necessary.**

**631. (1)** The name of each juror on a panel of jurors that has been returned, his number on the panel and his address shall be written on a separate card, and all the cards shall, as far as possible, be of equal size.

**(2)** The sheriff or other officer who returns the panel shall deliver the cards referred to in subsection (1) to the clerk of the court who shall cause them to be placed together in a box to be provided for the purpose and to be thoroughly shaken together.

**(3) Where**

**(a)** the array of jurors is not challenged, or

**(b)** the array of jurors is challenged but the judge does not direct a new panel to be returned,

the clerk of the court shall, in open court, draw out the cards referred to in subsection (1), one after another, and shall call out the name and number on each card as it is drawn, until the number of persons who have answered to their names is, in the opinion of the judge, sufficient to provide a full jury after allowing for orders to excuse, challenges and directions to stand by.

**(4)** The clerk of the court shall swear each member of the jury in the order in which the names of the jurors were drawn.

**(5)** Where the number of persons who answer to their names under subsection (3) is not sufficient to provide a full jury, the clerk of the court shall proceed in accordance with subsections (3) and (4) until twelve jurors are sworn. R.S. c. C-34, s. 560; R.S.C. 1985, c. 27 (1st Supp.), s. 131; 1992, c. 41, s. 1.

## CROSS-REFERENCES

The term “clerk of the court” is defined in s. 2. The challenge to array referred to in this section is dealt with under ss. 629 and 630. Sections 632 to 642 set out the procedure for jury selection. The number of peremptory challenges which an accused may exercise, that is a challenge where the accused is not required to provide a reason, is set out in s. 633. The prosecutor may peremptorily challenge four jurors pursuant to s. 634(1) but may stand aside up to 48 jurors unless the presiding judge for special cause permits further stand asides. Challenge for cause is dealt with in accordance with ss. 638 to 641. Section 642 provides a procedure for summoning further jurors where the panel has been exhausted. Note ss. 670 to 672 which set out saving provisions respecting defects in the jury selection procedure; also consider the application of s. 686(1)(b)(iv). Note also s. 643 which provides that no omission to follow the directions of this section affects the validity of a proceeding.

## SYNOPSIS

This section sets out the general procedure followed in a Jury.

Each juror’s name, number and address will be on a card in a box. The clerk of the court will then proceed as follows: (1) cards will be selected at random; (2) the name and number of each juror selected will be called out; (3) when the judge is satisfied that sufficient members of the panel have been called forward, the clerk will go through the names in the order that the cards were selected; (4) as each juror steps forward the parties will declare any challenges or, in the case of the Crown, whether it wishes to “stand aside” a person; (5) if both parties are content then the juror will be sworn and take a seat in the jury box; (6) if the initial number of persons is not sufficient to provide a full jury, the process will be repeated as many times as is necessary.

## ANNOTATIONS

**Subsec. (3)** – The Judge should not depart from the procedure set out in this subsection by, for example, directing the clerk to only draw four cards at a time: *R. v. Alward* (1976), 32 C.C.C. (2d) 416, 73 D.L.R. (3d) 290 (N.B.S.C. App. Div.).

The practice whereby the judge addresses a few preliminary questions to the jury panel is not a substitute for a challenge for cause and the procedure laid down in s. 640(2) which requires the determination as to partiality to be made by two triers, not the trial judge: *R. v. Guerin and Pimpare* (1984), 13 C.C.C. (3d) 231 (Que. C.A.).

## EXCUSING JURORS.

**632.** The judge may, at any time before the commencement of a trial, order that any juror be excused from jury service, whether or not the juror has been called pursuant to subsection 631(3) or any challenge has been made in relation to the juror, for reasons of

- (a) personal interest in the matter to be tried;
- (b) relationship with the judge, prosecutor, accused, counsel for the accused or a prospective witness; or
- (c) personal hardship or any other reasonable cause that, in the opinion of the judge, warrants that the juror be excused. R.S., c. C-34, s. 561; 1992, c. 41, s. 2.

## CROSS-REFERENCES

Section 631 sets out the procedure for selecting the potential jury members. The number and order of challenges is prescribed by ss. 634 and 635 respectively. In addition to the power in the judge in this section to excuse jurors, s. 633 gives the judge the power [which formerly resided in the Crown] to stand jurors aside. Once the accused has been given in charge to the jury then the procedure for discharge of jurors is governed by s. 644. As to the procedure for replacement of jurors prior to commencement of the trial, see the notes under s. 644.



## SYNOPSIS

This section codifies a practice which had developed at common law of permitting the judge to excuse potential jurors by reason of manifest bias or personal hardship. The practice at common law, which will no doubt be continued, was for the judge, prior to the commencement of jury selection, to direct a question or questions to the panel as a whole as to whether they had any connection to the parties.

## ANNOTATIONS

The pre-screening procedure in which the trial judge directs questions to the jury panel to deal with cases of obvious partiality, as where the juror is related to the accused or a witness, is part of the trial and must be done in the presence of the accused: *R. v. Barrow* (1987), 38 C.C.C. (3d) 193, [1987] 2 S.C.R. 694, 45 D.L.R. (4th) 487 (5:2).

As this initial procedure goes only to such clear-cut cases of partiality, the consent of counsel is and can be presumed. Once out of obvious situations of non-indifference, the consent can no longer be presumed and the procedure must conform to that set out in the Criminal Code, including the procedure for challenge for cause. The trial judge has no right to take over the challenge process by deciding controversial questions of partiality. If there exist legitimate grounds for a challenge for cause, outside of the obvious cases, it must proceed in accordance with the Code: *R. v. Sherratt* (1991), 63 C.C.C. (3d) 193, [1991] 1 S.C.R. 509, 3 C.R. (4th) 129 (5:0), approving *R. v. Guérin and Pimparé* (1984), 13 C.C.C. (3d) 231 (Que. C.A.).

This provision does not allow the judge to delegate the power to excuse jurors. Furthermore, potential jurors should not be excused in private as the accused and the public must be able to know the reasons for any decision to excuse. Consequently, the trial judge erred when he asked the sheriff to pre-screen additional jurors in the absence of the accused when the jury panel had been exhausted: *R. v. Mid Valley Tractor Sales Ltd.* (1995), 101 C.C.C. (3d) 253 (N.B.C.A.).

## STAND BY.

**633.** The judge may direct a juror whose name has been called pursuant to subsection 631(3) to stand by for reasons of personal hardship or any other reasonable cause. R.S., c. C-34, s. 562; 1974-75-76, c. 105, s. 10; 1992, c. 41, s. 2.

## CROSS-REFERENCES

This provision is in addition to the power in the judge under s. 632 to excuse jurors. If after the panel is exhausted but a full jury has not been sworn, then jurors who have been ordered to stand by under this section are called back in accordance with the procedure set out in s. 641.

**PEREMPTORY CHALLENGES / Maximum number / Where there are multiple counts / Where there are joint trials.**

**634.** (1) A juror may be challenged peremptorily whether or not the juror has been challenged for cause pursuant to section 638.

(2) Subject to subsections (3) and (4), the prosecutor and the accused are each entitled to

- (a) twenty peremptory challenges, where the accused is charged with high treason or first degree murder;
- (b) twelve peremptory challenges, where the accused is charged with an offence, other than an offence mentioned in paragraph (a), for which the accused may be sentenced to imprisonment for a term exceeding five years; or
- (c) four peremptory challenges, where the accused is charged with an offence that is not referred to in paragraph (a) or (b).

(3) Where two or more counts in an indictment are to be tried together, the prosecu-

tor and the accused are each entitled only to the number of peremptory challenges provided in respect of the count for which the greatest number of peremptory challenges is available.

- (4) Where two or more accused are to be tried together,
- (a) each accused is entitled to the number of peremptory challenges to which the accused would be entitled if tried alone; and
  - (b) the prosecutor is entitled to the total number of peremptory challenges available to all the accused. R.S., c. C-34, s. 563; 1992, c. 41, s. 2.

#### CROSS-REFERENCES

The order of challenges is set out in s. 635. The procedure for challenge for cause is governed by ss. 638 to 640. For jurors who have been ordered to stand by under s. 633, see s. 641. The procedure for selecting talesmen is set out in s. 642. Jurors may be excused by the trial judge in accordance with s. 632. Section 631 sets out the procedure for drawing the names of potential jurors.

#### SYNOPSIS

This section prescribes the number of peremptory challenges (*i.e.* challenges for which no reason need be given) for both the accused and the prosecutor. The number of challenges for the accused depends on the offence. Where the accused is charged with a number of offences, then the accused is only entitled to the number of challenges for the one offence which carries the largest number of challenges. The number of challenges for the prosecutor depends on the offence with which the accused is charged and the number of accused. Thus, for example, if two accused were charged with forgery and fraud under \$1000 [maximum penalties 14 years and 2 years respectively] each accused would be entitled to 12 challenges and the prosecutor would be entitled to 24 challenges.

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635. [*Repealed*. R.S.C. 1985, c. 2 (1st Supp.), s. 2.] (old provision)

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#### ORDER OF CHALLENGES / Where there are joint trials.

635. (1) The accused shall be called on before the prosecutor is called on to declare whether the accused challenges the first juror, for cause or peremptorily, and thereafter the prosecutor and the accused shall be called on alternately, in respect of each of the remaining jurors, to first make such a declaration.

(2) Subsection (1) applies where two or more accused are to be tried together, but all of the accused shall exercise the challenges of the defence in turn, in the order in which their names appear in the indictment or in any other order agreed on by them,

- (a) in respect of the first juror, before the prosecutor; and
- (b) in respect of each of the remaining jurors, either before or after the prosecutor, in accordance with subsection (1). 1992, c. 41, s. 2.

#### CROSS-REFERENCES

The number of peremptory challenges is governed by s. 634. Procedure for challenge for cause is set out in ss. 638 to 640. Section 641 governs procedure for calling back jurors who have been stood by under s. 633.

#### SYNOPSIS

This section in effect prescribes that the accused and the prosecutor shall alternate in the exercise of challenges. Where there are two or more accused, then all of the accused will challenge at the same time. For example, the order of challenges will proceed as follows: Juror #1–Accused “A”, Accused “B”, Prosecutor; Juror #2–Prosecutor, Accused “A”, Accused “B”, etc. As to who of the accused must go first, this section provides that the

accused will go in the order of the names as set out in the indictment or some other order as may be decided amongst the accused.

#### ANNOTATIONS

Where it is the accused who seeks to challenge jurors for cause, then he may be called upon to declare the challenge for cause first with respect to each juror. The Crown and defence would, however, alternate peremptory challenges: *R. v. Aguilera* (1993), 87 C.C.C. (3d) 474 (Ont. Ct. (Gen. Div.)).

636. [Repealed. 1992, c. 41, s. 2.]

637. [Repealed. 1992, c. 41, s. 2.]

#### CHALLENGE FOR CAUSE / No other ground / Coming into force / Idem.

638. (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

- (a) the name of a juror does not appear on the panel, but no misnomer or misdescription is a ground of challenge where it appears to the court that the description given on the panel sufficiently designates the person referred to;
- (b) a juror is not indifferent between the Queen and the accused;
- (c) a juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months;
- (d) a juror is an alien;
- (e) a juror is physically unable to perform properly the duties of a juror; or

**Editor's Note:** Former subsection 567(1) [now subsection 638(1)] amended by 1977-78, c. 36, s. 5 by striking out "or" at the end of para. (d), adding "or" at the end of para. (e) and by adding the following new para. (f), which was to come into force in any province on a day fixed by proclamation; from June 20, 1985 by virtue of 1985 c. 19, s. 188 [now R.S.C. 1985, c. 27 (1st Supp.), s. 188], para. ((f) is to come into force in any province in respect of summary conviction offences or indictable offences on a day fixed by proclamation declaring those sections in force in that province with respect to those offences.

- (f) a juror does not speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or both official languages of Canada, where the accused is required by reason of an order under section 530 to be tried before a judge and jury who speak the official language of Canada that is the language of the accused or the official language of Canada in which the accused can best give testimony or who speak both official languages of Canada, as the case may be.

**Editor's Note:** This paragraph proclaimed in force in New Brunswick, Yukon Territory and Northwest Territories, May 1, 1979; in Ontario, December 31, 1979; in Manitoba, July 1, 1982; in force in all other provinces with respect to summary conviction offences or indictable offences effective January 1, 1990.

(2) No challenge for cause shall be allowed on a ground not mentioned in subsection (1).

(3) Paragraph (1)(f) shall come into force in any of the Provinces of Quebec, Nova Scotia, British Columbia, Prince Edward Island, Saskatchewan, Alberta and Newfoundland, in respect of

- (a) offences punishable on summary conviction, or
- (b) indictable offences.

only on a day to be fixed in a proclamation declaring that paragraph to be in force in that Province with respect to those offences.



**(4) Notwithstanding any other provision in this section, paragraph 638(1)(f) shall come into force on January 1, 1990**

- (a) in respect of offences punishable on summary conviction, in any province in which that paragraph is not in force in respect of offences punishable on summary conviction immediately prior to that date; and**
- (b) in respect of indictable offences, in any province in which that paragraph is not in force in respect of indictable offences immediately prior to that date. R.S., c. C-34, s. 567; 1977-78, c. 36, ss. 5, 6; R.S.C. 1985, c. 27 (1st Supp.), s. 132; c. 31 (4th Supp.), s. 96.**

#### CROSS-REFERENCES

The terms “prosecutor” and “Attorney General” are defined in s. 2. Section 639 provides that the judge may require that the challenge be put in writing and that such challenge may be in Form 41. Under s. 639(3), a challenge may be denied by the other party to the proceedings on the grounds that it is not true. Where the ground of the challenge is that the name of the juror does not appear on the panel, the issue is to be tried by the judge pursuant to s. 640. Any other ground of challenge for cause is tried in accordance with s. 640(2) by the two jurors who were last sworn or, if no jurors have been sworn, two persons present whom the court may appoint for the purpose. Procedure for trial of the issue is then as set out in s. 640(3) and (4). Procedure for challenge to the array is set out in ss. 629 and 630, for peremptory challenges by the accused in s. 633 and for peremptory challenge and stand aside by the prosecutor in s. 634. Note the saving provisions respecting jury selection in ss. 670 to 672.

#### SYNOPSIS

This section specifies the bases upon which individual jurors may be challenged for cause. The grounds for such a challenge are that: (a) the juror’s name does not appear on the list; (b) the juror is not unbiased; (c) the juror has previously been sentenced to death or to more than 12 months in prison; (d) the juror is an alien; (e) the juror is physically unable to properly carry out his or her duties; and (f) in certain provinces, the juror is not proficient in the official language of the accused (see s. 530).

#### ANNOTATIONS

In *R. v. Hubbert* (1975), 29 C.C.C. (2d) 279, 31 C.R.N.S. 27 (5:0) (Ont. C.A.) the Court considered at length the scope of the challenge for cause and the procedure to be followed. It was held that the presumption is that a juror not disqualified by statute will perform his duties in accordance with his oath. Accordingly, the purpose of a challenge of a prospective juror for cause is to eliminate from the jury those persons who come within the categories listed therein, not to find out what type of person the prospective juror is or to aid counsel in deciding whether to exercise his peremptory challenge. The trial Judge has a wide discretion in controlling the challenge process, to prevent its abuse, to ensure it is fair to the prospective juror as well as the accused and to provide that the trial is not unnecessarily prolonged by suspect challenges for cause. Possible grounds for a challenge for cause on the ground that a juror is not “indifferent between the Queen and the accused” would include prior association with the accused, direct connection with the prosecution and pre-trial publicity surrounding the case. As to the latter ground, in an extreme case the publication of the facts of a case can give rise to the degree of partiality that should lead to the right to challenge for cause, but the mere fact that the prospective juror has prior information about the case or even that he holds a tentative opinion about it does not render him partial.

Where counsel seeks to challenge for cause the challenge need not be in writing though in certain circumstances, as where the challenge may cause embarrassment to the prospective juror, it may be desirable and the trial Judge may require it.

Although the challenge itself may be simply in the words of subsec. (1) and Form 41 and need not be particularized, counsel must have a reason for the challenge, and the

trial Judge must be made aware of it so that he may properly control the trial of the truth of the challenge. If counsel refuses to state the reason then the trial Judge may refuse to permit the trial of the issue. Where the challenge is taken under subsec. (1)(b) and the basis for the alleged non-indifference appears "far-fetched" the Judge may in his discretion require further elucidation or the tendering of evidence before permitting the trial of the issue. The other party may deny the challenge, in which case the issue is tried, admit the challenge, in which case the juror is excused, or make submissions that the ground for the challenge is not in law a valid ground of challenge for cause. For example, a challenge on the basis that the prospective juror and a prospective witness are of the same racial origin would not in law be a proper challenge.

On the trial of the issue the party challenging for cause may call the prospective juror as a witness without having to establish first through other evidence a *prima facie* case as to the truth of the challenge. The questioning of the juror is not strictly characterized as either direct or cross-examination, but it must be relevant, succinct and fair. The other party may then question the witness, or call his own witness and the challenging party may with leave call other reply evidence. The Judge in his discretion may allow counsel to address the jurors and may himself "charge" them in terms he considers sufficient. If the challenge is not found to be true either party may exercise the further right of peremptory challenge and the Crown may stand the juror aside.

An appeal by the accused to the Supreme Court of Canada was dismissed, 33 C.C.C. (2d) 207n, [1977] 2 S.C.R. 267, in brief oral reasons. However, the Court stated the procedures outlined by the Court of Appeal provides a useful guide for the trial Judges.

As the trial judge must be able to retain a reasonable degree of control over the challenge for cause procedure, there is some burden placed upon the challenger to ensure that sufficient information is provided to the trial judge so that the trial of the issue is contained within permissible bounds. There must, therefore, be an "air of reality" to the ground for the challenge. There must exist a realistic potential for the existence of partiality, on a ground sufficiently articulated in the application, before the challenger should be allowed to proceed. The right to challenge for cause is, however, an important one designed to ensure a fair trial and is not limited to extraordinary or exceptional cases. In cases of pre-trial publicity, the question is whether the particular publicity and notoriety of the accused could potentially have the effect of destroying the prospective juror's indifference: *R. v. Sherratt* (1991), 63 C.C.C. (3d) 193, [1991] 1 S.C.R. 509, 3 C.R. (4th) 129 (5:0).

In *R. v. Zundel* (1987), 31 C.C.C. (3d) 97, 58 O.R. (2d) 129 (C.A.), leave to appeal to S.C.C. refused 61 O.R. (2d) 588, the court considered the issue of challenge for cause in a case where there had been extensive pre-trial publicity, much of it adverse to the accused. The court held that the trial judge erred in failing to permit challenge for cause and ought to have advised defence counsel that while the questions which he proposed to ask were improper, some could be rephrased so as to be the basis for a proper challenge for cause. Further, there is no prerequisite to challenge for cause on the grounds of pre-trial publicity that there had been a particular notorious episode and the fact that the accused's own conduct attracted notoriety is not sufficient to disallow the challenged. The issue is whether the particular publicity and notoriety of the accused could potentially have the effect of destroying the prospective jurors' indifference between the Crown and the accused. Whether or not there is then any evidentiary connection between the publicity and the particular juror's lack of indifference is for the triers, not the judge. There is a denial of a fundamental right to a fair trial where the accused is not allowed to challenge any number of jurors for cause when the grounds of challenge are properly specified in accordance with this section.

Once the trial judge has ruled that the challenge may proceed, he still has a discretion whether and to what extent he will allow questioning of prospective jurors on the *voir dire*: *R. v. Pirozzi* (1987), 34 C.C.C. (3d) 376 (Ont. C.A.).

In view of the documented extent and intensity of racist beliefs in Canada and particularly in Metropolitan Toronto, the accused should have been permitted to ask prospective jurors whether their ability to judge the evidence in the case without partiality would be affected by the fact that the accused was black and the deceased was white. There was a realistic potential for existence of partiality. The inter-racial nature of the violence involved and the fact that the crime occurred in the course of a black accused's involvement in a criminal drug transaction combined to provide circumstances in which it was essential to the conduct of a fair trial that counsel be permitted to put the question: *R. v. Parks* (1993), 84 C.C.C. (3d) 353, 24 C.R. (4th) 81, 15 O.R. (3d) 324 (C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 28 C.R. (4th) 403n. Similarly: *R. v. Willis* (1994), 90 C.C.C. (3d) 350 (Ont. C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 28 C.R. (4th) 403n.

On the other hand, it was held in *R. v. Williams* (1994), 90 C.C.C. (3d) 194, 30 C.R. (4th) 277 (B.C.S.C.) that an accused was not entitled to challenge for cause merely because he was a native and notwithstanding evidence of widespread bias and prejudice in Canadian society toward native people. That evidence did not displace the presumption that jurors can be relied upon to do their duty and decide the case without regard to their personal bias and prejudices.

The trial judge properly rejected an application to question each juror as to whether their ability to judge the accused without bias, prejudice or partiality would be affected by the fact that the accused was selling cocaine on the day of the killing. Before counsel can ask questions of a juror as part of the challenge process, counsel must articulate to the trial judge sufficient particularity of the ground to show the existence of a realistic potential for the existence of partiality against the accused: *R. v. Cameron* (1995), 96 C.C.C. (3d) 346, 22 O.R. (3d) 65, 80 O.A.C. 58 (C.A.).

#### CHALLENGE IN WRITING / Form / Denial.

**639.** (1) Where a challenge is made on a ground mentioned in section 638, the court may, in its discretion, require the party that challenges to put the challenge in writing.

(2) A challenge may be in Form 41.

(3) A challenge may be denied by the other party to the proceedings on the ground that it is not true. R.S., c. C-34, s. 568.

#### CROSS-REFERENCES

The challenge for cause is tried in accordance with s. 640.

#### SYNOPSIS

This section provides that challenges for cause may be required by the court to be in writing and may be in Form 41. The other party is free to argue that the grounds given for the challenge are untrue.

#### OBJECTION THAT NAME NOT ON PANEL / Other grounds / If challenge not sustained, or if sustained / Disagreement of triers.

**640.** (1) Where the ground of a challenge is that the name of a juror does not appear on the panel, the issue shall be tried by the judge on the *voir dire* by the inspection of the panel, and such other evidence that the judge thinks fit to receive.

(2) Where the ground of a challenge is one not mentioned in subsection (1), the two jurors who were last sworn, or if no jurors have then been sworn, two persons present whom the court may appoint for the purpose, shall be sworn to determine whether the ground of challenge is true.



(3) Where the finding, pursuant to subsection (1) or (2) is that the ground of challenge is not true, the juror shall be sworn, but if the finding is that the ground of challenge is true, the juror shall not be sworn.

(4) Where, after what the court considers to be a reasonable time, the two persons who are sworn to determine whether the ground of challenge is true are unable to agree, the court may discharge them from giving a verdict and may direct two other persons to be sworn to determine whether the ground of challenge is true. R.S., c. C-34, s. 569.

#### CROSS-REFERENCES

The grounds for challenge for cause are set out in s. 638. Pursuant to s. 639, the judge may require that the challenge be in writing and may be in Form 41. Under s. 639(3), a challenge may be denied by the other party in the proceedings on the ground that it is not true. Procedure for challenge to array is set out in ss. 629 and 630. Peremptory challenges for the accused are set out in s. 633. Peremptory challenge and stand asides for the prosecutor are set out in s. 634. Note ss. 670 to 672 setting out certain saving provisions with respect to jury selection.

#### SYNOPSIS

This section sets out the procedures for dealing with challenges for cause (see s. 638).

A challenge based on the fact that the juror's name is not on the list is heard and determined by the trial judge (subsec. (1)).

Other challenges for cause are determined in a mini-trial. The issue will be tried by the last two jurors who have been sworn. If no jurors have been selected the judge will appoint two persons for this purpose (subsec. (2)).

If the two appointed persons are unable to agree on a decision within a reasonable time the judge may discharge them and appoint two new persons to act (subsec. (4)).

It should be noted that if a challenge for cause does not succeed a prospective juror may still be peremptorily challenged.

#### ANNOTATIONS

The proper procedure under subsec. (2) is that the two persons appointed by the court try the challenge for cause with respect to the first two jurors. It is only after two jurors have been sworn that they replace the appointed triers. Further, by virtue of subsec. (4), where the triers are unable to agree they are to be discharged and two other triers selected. It is not proper for the judge to simply excuse the juror when the triers are unable to agree: *R. v. Brigham* (1988), 44 C.C.C. (3d) 379 (Que. C.A.).

There is no requirement that the first two triers should initially be questioned to determine their impartiality: *R. v. English* (1993), 84 C.C.C. (3d) 511, 111 Nfld. & P.E.I.R. 323 (Nfld. C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 120 Nfld. & P.E.I.R. 180n.

Once his challenge for cause is lost the challenger may still then exercise one of his remaining peremptory challenges against a prospective juror: *Cloutier v. The Queen* (1979), 48 C.C.C. (2d) 1, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10.

#### CALLING JURORS WHO HAVE STOOD BY / Other jurors becoming available.

641. (1) Where a full jury has not been sworn and no names remain to be called, the names of those who have been directed to stand by shall be called again in the order in which their names were drawn and they shall be sworn, unless excused by the judge or challenged by the accused or the prosecutor.

(2) Where, before a juror is sworn pursuant to subsection (1), other jurors in the panel become available, the prosecutor may require the names of those jurors to be put into and drawn from the box in accordance with section 631, and those jurors shall be challenged, directed to stand by, excused or sworn, as the case may be,

before the names of the jurors who were originally directed to stand by are called again. R.S., c. C-34, s. 570; 1992, c. 41, s. 3.

#### CROSS-REFERENCES

Jurors may be ordered to stand by for reasons of personal hardship or other reasonable cause by the judge under s. 633. Once the panel has been exhausted but a full jury has not been selected, then these jurors are subject to selection. They may, however, be excused by the judge under s. 632 and are subject to peremptory challenge in accordance with ss. 634 and 635 or challenge for cause in accordance with ss. 638 to 640. If after the stand by jurors have been exhausted and a full jury has not been selected, then talesmen may be obtained in accordance with s. 642.

#### SYNOPSIS

Under subsection (1), jurors who have been stood by under s. 633 are dealt with in the same manner as the other members of the panel except that the juror cannot be stood aside again. However, if prior to a previously stood by juror being sworn other members of the panel become available, then the prosecutor may ask that their names be drawn before the jurors who have been stood aside.

#### ANNOTATIONS

After a number of stand asides resulting in the exhaustion of the whole panel and with one jury vacancy remaining, instead of following the predecessor to this section, the court incorrectly proceeded under s. 642(1) with the result that it was held that the appellant was not tried by a lawfully constituted jury; the curative provision, s. 643, could not be applied to such a defect because the procedure constituted an omission to follow the procedure in s. 642 which authorizes the addition of *talesmen* only where a full jury cannot be provided in spite of compliance with the provisions of this Part, including s. 641: *R. v. James*, [1969] 1 C.C.C. 278, 64 W.W.R. 659 (B.C.C.A.).

#### SUMMONING OTHER JURORS WHEN PANEL EXHAUSTED / Orally / Adding names to panel.

642. (1) Where a full jury cannot be provided notwithstanding that the relevant provisions of this Part have been complied with, the court may, at the request of the prosecutor, order the sheriff or other proper officer forthwith to summon as many persons, whether qualified jurors or not, as the court directs for the purpose of providing a full jury.

(2) Jurors may be summoned under subsection (1) by word of mouth, if necessary.

(3) The names of the persons who are summoned under this section shall be added to the general panel for the purposes of the trial, and the same proceedings shall be taken with respect to calling and challenging those persons, excusing them and directing them to stand by as are provided in this Part with respect to the persons named in the original panel. R.S., c. C-34, s. 571; 1992, c. 41, s. 4.

#### CROSS-REFERENCES

The term “prosecutor” is defined in s. 2. This section sets out a procedure for the summoning of talesmen where the jury panel has been exhausted.

#### SYNOPSIS

If the original panel has been exhausted and a full jury has not been selected the trial judge may, at the request of the Crown, direct the sheriff to summons other persons (known as “talesmen”) for jury service. In carrying out this order the sheriff may notify prospective jurors by word of mouth (e.g., by simply going out onto the streets adjacent to the court-house). Persons summoned in this fashion are added to the list and thereafter are dealt with in the normal way.

**ANNOTATIONS**

Subsection (1) requires that where the judge orders a *tales* he shall specify the number of persons the sheriff is to summon. Where that number has been exhausted and a full jury not yet selected, then before ordering that a further number of jurors be summoned the *talesman* added to the panel and directed by the Crown to stand by must be called again and sworn unless challenged: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 25 O.A.C. 321 (C.A.).

**WHO SHALL BE JURY / Same jury may try another issue by consent / Sections directory.**

**643.** (1) The twelve jurors whose names are drawn and who are sworn in accordance with this Part shall be the jury to try the issues of the indictment, and the names of the jurors so drawn and sworn shall be kept apart until the jury gives its verdict or until it is discharged, whereupon the names shall be returned to the box as often as occasion arises, as long as an issue remains to be tried before a jury.

(2) The court may try an issue with the same jury in whole or in part that previously tried or was drawn to try another issue, without the jurors being sworn again, but if the prosecutor or the accused objects to any of the jurors or the court excuses any of the jurors, the court shall order those persons to withdraw and shall direct that the required number of names to make up a full jury be drawn and, subject to the provisions of this Part relating to challenges, orders to excuse and directions to stand by, the persons whose names are drawn shall be sworn.

(3) Failure to comply with the directions of this section or section 631, 635 or 641 does not affect the validity of a proceeding. R.S., c. C-34, s. 572; 1992, c. 41, s. 5.

**CROSS-REFERENCES**

The terms "prosecutor" and "indictment" are defined in s. 2. Sections 670 to 672 set out other saving provisions with respect to jury selection and other defects in the jury process. Also consider the application of s. 686(1)(b)(iv). A juror may be discharged pursuant to s. 644. Ordinarily jurors are not required to be sequestered until time for them to retire to consider their verdict pursuant to s. 647.

**SYNOPSIS**

A jury panel or list is often prepared for use in a number of trials. Local practice governs whether a juror will be available for service on more than one trial.

Subsection (1) provides that once a trial has concluded the members of the jury shall again be available to try other cases.

Subsection (2) permits the court, with the consent of the parties, to try another matter with all or some of the jurors who have already been sworn. In practice this provision is not utilized.

Subsection (3) provides that certain irregularities in the selection process will not affect the validity of the proceedings.

**ANNOTATIONS**

**Subsec. (3)** – This provision and the predecessor of s. 686(1)(b)(iii) were applied where, through inadvertence, the balance of the jury was selected from persons originally stood aside despite the fact there remained a member of the panel who had not yet been called: *R. v. McLachlan* (1923), 41 C.C.C. 249, 56 N.S.R. 413 (S.C.). Leave to appeal to P.C. 42 C.C.C. 249, [1924] 1 D.L.R. 1109.

Also see: *R. v. James*, [1969] 1 C.C.C. 278, 64 W.W.R. 659 (B.C.C.A.) noted under s. 641.

This subsection applies only to irregularities and has no application where the error is such that the accused has been deprived of a statutory right, or where the error deprived



the accused of the right to a trial by a jury lawfully constituted. Thus it could not apply to a case where the trial judge, instead of following the procedure prescribed in s. 642 for summoning of *talesmen*, purported to continuously expand the jury panel by adding members with the result that those potential jurors who were directed by the Crown to stand by were never called again to be sworn, unless challenged: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 25 O.A.C. 321 (Ont. C.A.).

#### DISCHARGE OF JUROR / Trial may continue.

**644. (1)** Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly. R.S., c. C-34, s. 573; 1972, c. 13, s. 47; 1980-81-82-83, c. 47, s. 53.

#### CROSS-REFERENCES

The procedure for jury selection is set out in ss. 626 to 643. Ordinarily jurors are permitted to separate pursuant to s. 647.

#### SYNOPSIS

Subsection (1) permits a trial judge to discharge a juror who by reason of illness or other reasonable cause (*e.g.*, lack of impartiality) is unable to continue to act.

A trial must commence with 12 jurors. However, a verdict can be rendered by as few as 10 (subsec. (2)). Less than this will result in a mistrial.

#### ANNOTATIONS

**Grounds for discharge of juror** – Where it appears that a juror might not be manifestly impartial there may be a cause for his discharge: *R. v. Tsoumas* (1973), 11 C.C.C. (2d) 344 (Ont. C.A.).

“Other reasonable cause” means any cause that the trial Judge deems reasonable to ensure a competent and impartial jury: *R. v. Holcomb* (1973), 12 C.C.C. (2d) 417 (N.B.S.C.App.Div.), affd 15 C.C.C. (2d) 239 (7:0) (S.C.C.).

It is not ground for discharge of a juror that he was previously convicted of a Crown option offence and fined. Although by virtue of provincial legislation, applicable to the proceedings under s. 626, such a person was not qualified to serve on the jury, the presence of such a person would not affect the validity of the verdict and such a record is not even grounds for a challenge for cause under s. 638(1)(c): *R. v. Lessard* (No. 2) (1986), 33 C.C.C. (3d) 561 (Que. S.C.).

In an unusual case, it was held that the trial judge erred in discharging a juror in the middle of their deliberations because the juror, according to the foreman, professed to have psychic powers and special gifts and would not deal with the arguments or discussions over the evidence. The juror denied the statements and her denial could not be rejected without some inquiry in which the accused had a vital interest and in which he had a right to participate by cross-examination and making representations. A suggestion that a juror had a special gift in assessing evidence was far from establishing cause for depriving the accused of his *prima facie* right to a verdict of 12 of his peers: *R. v. Sophonow* (No. 2) (1986), 25 C.C.C. (3d) 415 50 C.R. (3d) 193, [1986] 2 W.W.R. 481 (Man. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

There would be serious consequences for the jury system if an accused were entitled to a mistrial as of right whenever there was an attempt to bribe a member of the jury. The test to be applied in determining whether or not the trial judge should continue the trial

is whether there was a real danger that the accused's position had been prejudiced in the circumstances. The trial judge is in the best position to assess the impact on the jury of the bribery attempt. The judge will take into account the general atmosphere in which the trial took place, the specific circumstances of the case, what the judge had observed during the stages of the trial and the reactions of the members of the jury at the time of his comments on the incident. The judge is also in the best position to find a solution to neutralize the effect of the incident: *R. v. Lessard* (1992), 74 C.C.C. (3d) 552, [1992] R.J.Q. 1205 (C.A.).

**Procedure** – Where circumstances arise during the course of a trial requiring resort to this section the course to be followed lies in the discretion of the trial Judge after consideration of counsel's statements and any evidence there may be, and an appellate Court will not lightly interfere with the exercise of this discretion. The course of action, for example, whether or not to give an explanation for the discharge to the remaining jurors, must have regard for the fundamental necessity to avoid any significant risk of his decision resulting in a trial which is unfair or prejudicial to the accused or to the Crown: *R. v. MacKay* (1980), 53 C.C.C. (2d) 366, [1980] 6 W.W.R. 108 (B.C.C.A.).

Excusing a juror for reasons of illness or hardship cannot reasonably be said to have a bearing on the substantive conduct of the trial or on guilt or innocence of the accused which is fundamental and thus constitutes part of the trial so as to trigger the accused's right to be present as provided for in s. 650. Thus, neither a report by the sheriff to the trial judge nor the call to the judge by the juror's physician constituted part of the trial which required the presence of the accused. Nevertheless, due to the importance of the step in discharging the juror, it would be preferable for a trial judge to advise counsel, in court and in the presence of the accused, of the nature of the health or hardship problem and to invite counsel to make submissions: *R. v. Chambers* (1990), 59 C.C.C. (3d) 321, 80 C.R. (3d) 235, [1990] 2 S.C.R. 1293 (6:1).

Normally an inquiry into whether or not a juror should continue should take place in open court. The normal rules of the adversarial system, however, do not apply and counsel have no right to put questions directly to the juror. Counsel may suggest questions which the judge may put to the juror and then make submissions on the issue: *R. v. Hanna* (1993), 80 C.C.C. (3d) 289, 45 W.A.C. 42 (B.C.C.A.), leave to appeal to S.C.C. refused 91 C.C.C. (3d) vi.

The Judge has no power under this section to discharge a juror and commence the trial with less than 12 jurors where the accused has not yet been given in charge of the jury: *Basarabas v. The Queen*; *Spek v. The Queen* (1982), 2 C.C.C. (3d) 257, 31 C.R. (3d) 193, [1982] 2 S.C.R. 730 (7:0).

Where the accused have pleaded not guilty, the jury empanelled, and the accused placed in charge of the jury, then the proceedings have reached the stage of being "in the course of a trial" and a juror may be discharged under this section and the trial continued with 11 jurors: *R. v. Andrews, Farrant and Kerr* (1984), 13 C.C.C. (3d) 207, 41 C.R. (3d) 82 (B.C.C.A.); *R. v. Richardson* (1987), 39 C.C.C. (3d) 262 (N.S.C.A.); *R. v. Varcoe* (unreported, February 2, 1996, Ont. C.A.) [096/043/014-24 pp.].

The Court has the power, aside from this section, to discharge a juror prior to the selection of a complete jury and replace that juror where it is in the general interest of the administration of justice: *R. v. Parker et al.* (1981), 62 C.C.C. (2d) 161, 23 C.R. (3d) 282 (Ont. H.C.J.).

Until the trial has begun, this section does not apply and jurors can be replaced simply and easily in order to maintain a full jury. In this case, 12 members of the jury had been selected and the case adjourned to the following day. At that time, one of the jurors did not appear. The accused had not yet been put in the charge of the jury. Accordingly, it was open to the trial judge to order a number of the members of the full panel, who had not previously been either challenged or stood aside, to reattend so that a replacement juror could be chosen: *R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.).

**Constitutional considerations** – The right to a jury trial as guaranteed by s. 11(f) of the Charter is not the right as envisaged at common law or at the time of Confederation, namely a jury composed of 12 men. Thus, this section, which permits the trial judge to discharge up to two jurors, does not violate s. 11(f): *R. v. Genest* (1990), 61 C.C.C. (3d) 251, [1990] R.J.Q. 2387 (C.A.).

## Trial

**TRIAL CONTINUOUS / Adjournment / Formal adjournment unnecessary / Questions reserved for decision / Questions reserved for decision in a trial with a jury.**

**645. (1)** The trial of an accused shall proceed continuously subject to adjournment by the court.

**(2)** The judge may adjourn the trial from time to time in the same sittings.

**(3)** No formal adjournment of trial or entry thereof is required.

**(4)** The judge, in any case tried without a jury, may reserve his final decision on any question raised at the trial, and his decision, when given, shall be deemed to have been given at the trial.

**(5)** In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called pursuant to subsection 631(3) and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn. R.S., c. C-34, s. 574; R.S.C. 1985, c. 27 (1st Supp.), s. 133.

## CROSS-REFERENCES

Under s. 474, the trial may be adjourned where panel of jurors was not summoned for the sittings of the court. Under s. 475, the trial may proceed in the absence of the accused where the accused has absconded in the course of the trial. Discharge of jurors is governed by s. 644. Jurors are ordinarily permitted to separate by virtue of s. 647 until they have retired to consider their verdict. It is an offence under s. 648 to publish information regarding any portion of the trial at which the jury is not present where the jury has not been sequestered. Under s. 650, the accused is to be present during the whole of his trial subject to certain narrow exceptions in s. 650(2). The order of jury addresses is set out in s. 651. In s. 652, the court may order that a view be taken outside the courtroom. Where the jury is unable to agree on its verdict then, pursuant to s. 653, the jury may be discharged. Pursuant to s. 654, the taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on a Sunday or on a holiday.

## SYNOPSIS

This section provides that, subject to adjournments being granted from time to time, a trial shall proceed continuously.

In non-jury trials subsec. (4) permits a judge to reserve final judgment on a point. When reasons are delivered they are deemed to have been given at trial. In other words, the judge can decide a matter during the course of the trial with “reasons to follow”.

Subsection (5) allows the trial judge to deal with questions that would ordinarily be dealt with in the absence of the jury, before the jury is empanelled (e.g., a *voir dire* with respect to the admissibility of evidence). This facilitates the calling of evidence in a more orderly and continuous manner as the jury will not have to be excused to enable such matters to be decided.

## ANNOTATIONS

**When trial commences** – The course of a trial commences when the members of the



jury are sworn and the accused is given in charge of the jury: *R. v. Emkeit and twelve others* (1971), 3 C.C.C. (2d) 309, 14 C.R.N.S. 290 (Alta.S.C.App.Div.).

**Adjournment** [*Also see notes under ss. 571 and 650*] – Absent unconstitutional conduct, there will be no loss of jurisdiction when a trial court, acting on an indictment, fails to proceed at the time set for trial: *Re Franklin and The Queen* (1985), 18 C.C.C. (3d) 97, 45 C.R. (3d) 90, [1985] 1 S.C.R. 293 (7:0).

**Chambers discussions** – In *R. v. Johnson* (1977), 35 C.C.C. (2d) 439, 2 B.C.L.R. 193 (C.A.) the Court stated that the practice of counsel discussing certain aspects of the case in the Judge's Chambers during a jury trial should be discouraged. There may be exceptions but, if so, the substance of the discussion in Chambers should be reviewed in open Court and recorded and the assent of counsel should also appear on the record.

In *R. v. Roy* (1976), 32 C.C.C. (2d) 97 (Ont. C.A.) a conviction by a Judge alone was set aside where part way through the case the trial Judge invited counsel into his Chambers and suggested a range of sentence should the accused plead guilty to a lesser offence, an offer which the accused declined. A Judge sitting without a jury cannot initiate such discussions after having heard the evidence and still preserve the appearance of impartiality.

**Grounds for declaring mistrial** [*Also see notes under s. 653*] – In *R. v. Browning* (1976), 34 C.C.C. (2d) 200 (Ont. C.A.) it was held that the trial Judge did not err in failing to declare a mistrial where the Crown in cross-examination of a defence witness referred to an unproved threat by the accused on the deceased. The trial Judge had immediately told the jury that there was no evidence of such a threat.

The ruling of the trial Judge on such matters as to whether or not to declare a mistrial where police are seen talking to a Crown witness at a break, before the completion of his evidence, are within the trial Judge's discretion and are not subject to review by way of a prerogative writ: *Re Stewart and Dalton and The Queen* (1977), 36 C.C.C. (2d) 5 (Ont. C.A.).

**Duty of trial judge to give reasons** – While reasons are desirable, in the absence of a statutory or common law rule, they are not required and their absence does not raise a question of law, but an appellate Court may review the whole record to determine whether the trial Judge erred in a matter that could reasonably have affected his verdict: *MacDonald v. The Queen* (1976), 29 C.C.C. (2d) 257, 68 D.L.R. (3d) 649 (9:0) (S.C.C.). Also see: *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193, 29 C.R. (4th) 113 *sub nom. R. v. B. (R.H.)*.

In *R. v. Stewart* (1976), 31 C.C.C. (2d) 497, [1977] 2 S.C.R. 748, 71 D.L.R. (3d) 449 (6:3) a Crown appeal from an acquittal by a Judge alone on a charge of murder was allowed where the Judge in his reasons, *inter alia*, failed to consider the large body of incriminating evidence and misdirected himself as to the manner in which the evidence was to be treated.

Where the record including the reasons for judgment discloses a lack of appreciation of relevant evidence and moreover, the complete disregard of such evidence then the appellate Court may intervene: *Harper v. The Queen* (1982), 65 C.C.C. (2d) 193, 40 N.R. 255 (S.C.C.) (6:1).

Following delivery of oral reasons the trial judge may not amend those reasons except to edit for punctuation and grammatical errors: *R. v. Bowles and Danylak* (1985), 21 C.C.C. (3d) 540 (Alta. C.A.).

**Pre-trial motions** [subsec. (5)] – Subject to s. 669.2, the judge hearing motions under this subsection is seized with the trial: *R. v. Curtis* (1991), 66 C.C.C. (3d) 156 (Ont. Ct. (Gen. Div.)).

**Other notes** – Even where there is no jury the evidence on a *voir dire*, unless so specifi-

cally consented to by the parties, is not a part of the trial evidence: *R. v. Gauthier* (1975), 27 C.C.C. (2d) 14, 33 C.R.N.S. 46 (6:2) (S.C.C.).

At least in the absence of objection by counsel the trial judge may permit jurors to take notes during the testimony. He also has a discretion to permit jurors to put questions to witnesses following conclusion of the witness' testimony: *R. v. Andrade* (1985), 18 C.C.C. (3d) 41 (Ont. C.A.).

## TAKING EVIDENCE.

**646.** On the trial of an accused for an indictable offence, the evidence of the witnesses for the prosecutor and the accused and the addresses of the prosecutor and the accused or counsel for the accused by way of summing up shall be taken in accordance with the provisions of Part XVIII relating to the taking of evidence at preliminary inquiries. R.S., c. C-34, s. 575.

## CROSS-REFERENCES

The section of Part XVIII referred to in this section is s. 540. In addition to the Canada Evidence Act, R.S.C. 1985, c. C-5, provisions of the Criminal Code itself deal with the admissibility of evidence. For example, s. 655 provides that counsel for an accused may admit any fact alleged against him for the purpose of dispensing with proof thereof. Section 657.1 provides a simple method for proof of ownership and value of property with respect to certain property offences. Proof of age where material may be proved under s. 658. Section 667 provides a means of proving previous convictions. Sections 709 to 714 provide for the taking of evidence on commission. Section 715 permits evidence taken on a previous proceeding, such as the preliminary inquiry, to be admitted. Under s. 715.1, in some circumstances a videotape in which the complainant describes the acts complained of may be admitted on the trial of certain sexual offences. For other notes respecting trial of sexual offences, see the notes after the offence charged or the notes under s. 150.1.

## SYNOPSIS

This section states that the evidence of the witnesses for the prosecution and the defence and the addresses of the prosecution and the defence must be recorded in a trial by indictment in the same way in which they are recorded on a preliminary inquiry.

## ANNOTATIONS

The provisions of this section are mandatory and the failure to record addresses by counsel will result in a new trial: *R. v. Robillard*, [1969] 4 C.C.C. 120, [1968] Que. Q.B. 255n (Que. C.A.).

**SEPARATION OF JURORS / Keeping in charge / Non-compliance with subsection (2) / Empanelling new jury in certain cases / Refreshment and accommodation.**

**647.** (1) The judge may, at any time before the jury retires to consider its verdict, permit the members of the jury to separate.

(2) Where permission to separate under subsection (1) cannot be given or is not given, the jury shall be kept under the charge of an officer of the court as the judge directs, and that officer shall prevent the jurors from communicating with anyone other than himself or another member of the jury without leave of the judge.

(3) Failure to comply with subsection (2) does not affect the validity of the proceedings.

(4) Where the fact that there has been a failure to comply with this section or section 648 is discovered before the verdict of the jury is returned, the judge may, if he considers that the failure to comply might lead to a miscarriage of justice, discharge the jury and

- (a) direct that the accused be tried with a new jury during the same session or sittings of the court; or
- (b) postpone the trial on such terms as justice may require.

(5) The judge shall direct the sheriff to provide the jurors who are sworn with suitable and sufficient refreshment, food and lodging while they are together until they have given their verdict. R.S., c. C-34, s. 576; 1972, c. 13, s. 48.

#### CROSS-REFERENCES

It is an offence under s. 648 to publish any information regarding any portion of the trial at which the jury is not present where the jury has not been sequestered, before the jury retires to consider its verdict. It is also an offence subject to limited exceptions for any member of the jury to disclose information relating to the proceedings of the jury when it was absent from the courtroom pursuant to s. 649. Under s. 652, the judge may order that a view be taken of any place, thing or person in accordance with s. 652. Where the jury is unable to agree on its verdict then the jury may be discharged under s. 653. A juror may be discharged in accordance with the provisions of s. 644.

#### SYNOPSIS

This section deals with the sequestering of the jury. Once they begin their deliberations the jurors will be in the charge of a court officer and will not be permitted to communicate with outside persons. Before this time the trial judge has a discretion to allow them to separate (subsecs. (1), (2)).

Where a failure to comply with the provisions of this section or that dealing with publication bans (see s. 648) is discovered before a verdict is returned, the trial judge can discharge the jury or postpone the trial and make such order as may be required (subsec. (4)). Subsection (5) provides for the food and lodging of the jurors.

#### ANNOTATIONS

**Grounds for sequestration of jury** – The decision of the trial Judge refusing to sequester the jury is discretionary and does not involve a question of law alone which the accused may appeal to the Supreme Court of Canada: *Demeter and The Queen* (1977), 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251 (9:0) (S.C.C.).

The fact that inflammatory newspaper articles are circulated in the district where the accused is to be tried does not afford grounds for setting aside the conviction if there is nothing in the record or the evidence to show that the members of the jury had any knowledge of the contents of such articles or that they did not give a free unbiased verdict: *Koufis v. The King* (1941), 76 C.C.C. 161, [1941] S.C.R. 481, [1941] 3 D.L.R. 657.

**Proceedings concerning jury** – Where there has been a potentially prejudicial communication to a juror the trial Judge should conduct an inquiry himself by personally examining the juror to determine whether the communication has affected the impartiality of the juror. This function cannot be delegated to some other official such as the sheriff. As well, counsel should be informed of the incident so that they can participate in the inquiry: *R. v. Hertrich, Stewart and Skinner* (1982), 67 C.C.C. (2d) 510, 137 D.L.R. (3d) 400 (Ont. C.A.), leave to appeal to S.C.C. refused 45 N.R. 629n. [Also see note of this case under s. 650, *infra*.]

In view of the importance of the step of excusing a juror, even on account of illness, it would be preferable for the trial judge to advise counsel, in court and in the presence of the accused, of the nature of the health or hardship problem and to invite counsel to make submissions if they wish to: *R. v. Chambers*, [1990] 6 W.W.R. 554 (S.C.C.).

Subsection (5) cannot reasonably be interpreted as permitting an unsworn constable to take a sequestered juror to a hotel bar for several drinks: *R. v. Cameron* (1991), 64 C.C.C. (3d) 96, 2 O.R. (3d) 633, 44 O.A.C. 278 (C.A.).

The duty of the sworn constables is to provide contact between a sequestered jury and the outside world and to make certain that no unauthorized persons have contact with



the jury. It was unacceptable to allow unsworn constables and a police officer who was a relative of the deceased in a murder case, to dine with the jury which had been sequestered for their deliberations. It was also improper to allow an unsworn constable to take a sequestered jury to a hotel bar for several drinks. These incidents were so blatantly irregular that a new trial must be ordered, even in the absence of proof by the accused of actual prejudice: *R. v. Cameron, supra*.

**Giving jury excerpts from Criminal Code and other written instructions** – In *R. v. Schimanowsky* (1973), 15 C.C.C. (2d) 82, 25 C.R.N.S. 332 (Sask. C.A.) the Court disapproved the practice of giving the jury copies of the sections of the Criminal Code for their study and consideration during their deliberations. Folld *R. v. Crothers* (1978), 43 C.C.C. (2d) 27 (Sask. C.A.).

In *R. v. Tennant and Naccarato* (1975), 23 C.C.C. (2d) 80, 31 C.R.N.S. 1 (Ont. C.A.) it was held that where the jury requests portions of the Criminal Code it is within the Judge's discretion whether to accede to the request, a discretion which must be exercised with great care. If the Judge accedes to the request he should carefully instruct the jury of the limited use they may make of the copies, *i.e.*, to help them remember the elements of the offence, and they are not to engage in their own interpretation of the sections but must take the law from the trial Judge.

The right of the trial judge to give the jury sections of the Criminal Code does not depend on a request from the jury and, depending on the circumstances, the trial judge may exercise his discretion and provide copies for use by the jury during their deliberations: *R. v. Tuckey, Baynham and Walsh* (1985), 20 C.C.C. (3d) 502, 46 C.R. (3d) 97 (Ont. C.A.).

It was held in *R. v. Stanford* (1975), 27 C.C.C. (2d) 520 (5:0) (Que. C.A.) that it is not only permissible but prudent for the Judge to give the jury portions of the Criminal Code where in his opinion such a procedure is necessary in order for the jury to properly follow his directions. In this case the jury had in fact been given an annotated copy of the Code but this was held to be an irregularity which did not lead to any prejudice. Crete, J.A., in a separate concurring opinion held that the practice of giving the jury copies of the Criminal Code should not be followed but in this case no substantial wrong was occasioned.

In *R. v. Vawryk and Appleyard* (1979), 46 C.C.C. (2d) 290, [1979] 3 W.W.R. 50 (Man. C.A.) (3:2) the majority of the Court held that where stringent safeguards are followed it might not be improper to give the jury typed portions of the Criminal Code but it was improper to direct the jury to the effect that they could decide what the provisions mean.

However, in the subsequent case of *R. v. Decloedt and Widenmaier* (1986), 28 C.C.C. (3d) 7 (Man. C.A.), one member of the court was of the view that the practice of giving the jury portions of the Criminal Code was to be discouraged.

The giving to the jury of memoranda containing portions of the Judge's charge, the evidence, or the Criminal Code is a dangerous procedure and should be adopted only in special circumstances and with great care: *R. v. Wong* (1978), 41 C.C.C. (2d) 196, [1978] 4 W.W.R. 468 (B.C.C.A.).

**Procedure in answering jury questions generally** – Where the trial Judge receives a question from the jury he should read it in open Court in the presence of the parties and give counsel an opportunity to make submissions in open Court before answering the question for the jury in open Court in the presence of the parties: *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, 28 C.R. (3d) 324 (Ont. C.A.). Folld: *R. v. Hay* (1982), 70 C.C.C. (2d) 286, 30 C.R. (3d) 37 (Sask. C.A.); *R. v. Parnell* (1983), 9 C.C.C. (3d) 353 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

Questions from the jury require careful consideration and must be clearly, correctly and comprehensively answered. The question presented by the jury gives the clearest possible indication of the particular problem that the jury is confronting and upon which

it seeks further instructions. Even where the question relates to a matter that has been carefully reviewed in the main charge, it still must be answered in a complete, accurate and careful manner. The longer the delay between the question and the charge, the more important it will be that the recharge is correct and comprehensive. As a general rule, an error in the recharge on the question presented will not be saved by a correct charge which was given earlier: *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521, 93 C.C.C. (3d) 1, 34 C.R. (4th) 1.

It is open to the jury to withdraw a question and the trial judge may take the jury's verdict without having answered the question: *R. v. Sit* (1989), 47 C.C.C. (3d) 44, 31 O.A.C. 21 (C.A.).

Where the jury's question is unclear, the trial judge must take steps to clarify it, if necessary by questioning the jury to ascertain the nature of the difficulty. To avoid disclosure of the jury's deliberations, it may be necessary for the trial judge to ask leading questions: *R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.).

Once the jury has begun to deliberate, the Crown should not be permitted to adduce further evidence, even in answer to a question from the jury: *R. v. Templeman* (1994), 88 C.C.C. (3d) 254, 65 W.A.C. 76 (B.C.C.A.).

**Right of jury to have evidence read back** – A jury is entitled to have read to them excerpts of evidence upon which their recollection is not clear: *R. v. Mace* (1975), 25 C.C.C. (2d) 121 (Ont. C.A.).

While the jury is entitled to have read to them excerpts of the testimony in order to clarify the evidence on any point, it is not wrong for the trial judge to inform the jury that it was not possible to accede to their request to provide them with a transcript of the entire evidence. The judge should, however, remind the jury of their right to have portions of the evidence read back by the reporter or to have the matter clarified by the judge by reference to his notes: *R. v. Andrade* (1985), 18 C.C.C. (3d) 41 (Ont. C.A.).

The trial judge is required to assist the jury where they express concern about an area of the evidence and it is important that the jury not be misled as to the availability of that assistance in the form of reference to the trial judge's notes or the notes of the court reporter: *R. v. Corriveau* (1985), 19 C.C.C. (3d) 238 (Ont. C.A.).

Where the jury requests that the evidence of a witness be read back, it is incumbent upon the trial judge not to permit the jury to hear a part only of the evidence without also hearing those portions of the evidence of the witness which qualify the part read: *Olbey v. The Queen* (1979), 50 C.C.C. (2d) 257, 14 C.R. (3d) 44 (S.C.C.) (6:1) approving authorities such as *R. v. Stewart and Johnson*, [1969] 2 C.C.C. 244, 5 C.R.N.S. 75 (B.C.C.A.); *R. v. Wydryk and Wilkie* (1971), 5 C.C.C. (2d) 473, 17 C.R.N.S. 336 (B.C.C.A.) and *R. v. Bell, Christiansen, Coolen and MacDonald* (1973), 14 C.C.C. (2d) 225, 28 C.R.N.S. 55 (S.C. App. Div.).

**Length of deliberations** – Save in exceptional circumstances the jury should not be permitted to deliberate into the early morning hours and where such circumstances exist they should be fully set out on the record: *R. v. Kulak* (1979), 46 C.C.C. (2d) 30, 7 C.R. (3d) 304 (Ont. C.A.); *R. v. Robertson* (1979), 50 C.C.C. (2d) 127 (Ont. C.A.); *R. v. Martin* (1980), 53 C.C.C. (2d) 250 (Ont. C.A.); *R. v. Owen* (1983), 4 C.C.C. (3d) 538, 56 N.S.R. (2d) 541 (S.C. App. Div.); *R. v. Mohamed* (1991), 64 C.C.C. (3d) 1 (B.C.C.A.).

**Effect of unauthorized publication or communication with jury** [Also see notes under s. 649] – The Appeal Court will not interfere with the Judge's discretion under this subsection refusing a mistrial unless he has acted on a wrong principle: *R. v. Demeter* (1975), 25 C.C.C. (2d) 417, 10 O.R. (2d) 321 (C.A.).

Not every communication by a witness with a member of a jury will result in a mistrial. When such communication has taken place, but it is clear after inquiry that there is no real prejudice to the accused or the Crown, then a trial judge has the discretion to continue with the trial. Where the communication takes place after the jury has been

sequestered to consider their verdict, there is a presumption of prejudice. However, where the communication takes place prior to the deliberations and thus the extent of the prejudice to the accused can be determined on a *voir dire* of the jurors and the offending witness, there is no such presumption: *R. v. Horne* (1987), 35 C.C.C. (3d) 427, 78 A.R. 144 (C.A.), leave to appeal to S.C.C. refused 36 C.C.C. (3d) vi.

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#### RESTRICTION ON PUBLICATION / Offence / Definition of “newspaper”.

**648.** (1) Where permission to separate is given to members of a jury under subsection 647(1), no information regarding any portion of the trial at which the jury is not present shall be published, after the permission is granted, in any newspaper or broadcast before the jury retires to consider its verdict.

(2) Every one who fails to comply with subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, “newspaper” has the same meaning as in section 297. 1972, c. 13, s. 49.

#### CROSS-REFERENCES

The offence under subsection (2) is tried in accordance with Part XXVII by a summary conviction court defined in s. 785.

#### SYNOPSIS

Unless the jurors have been sequestered it is an offence, punishable on summary conviction, to publish any part of the trial that was heard in their absence.

#### ANNOTATIONS

A violation of this section must be shown to have resulted in a miscarriage of justice before an appellate Court will interfere with the jury’s verdict: *R. v. Demeter* (1975) 25 C.C.C. (2d) 417 at p. 448, 10 O.R. (2d) 321 at p. 352 (5:0) (Ont. C.A.).

It was doubtful whether an incident which occurred between the accused and a member of the public, after the jury had left the courtroom, during a break in the proceedings could constitute “any portion of the trial” so as to invoke the prohibition against publication in this section: *R. v. Dobson* (1985), 19 C.C.C. (3d) 93 (Ont. C.A.).

While the ban on publication imposed by this section lapses once the jury has retired to begin its deliberations the trial judge, who was a superior court judge, had power to ban publication of evidence admitted on a *voir dire* in the course of controlling the proceedings in his court. Thus in an extortion case an order was justified in the public interest prohibiting publication of evidence which would identify persons involved with the accused, persons who might be potential blackmail victims or persons who were simply accidentally involved: *Toronto Sun Publishing Corp. v. A.-G. Alta.*, [1985] 6 W.W.R. 36 (Alta. C.A.).

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#### DISCLOSURE OF JURY PROCEEDINGS.

**649.** Every member of a jury who, except for the purposes of

(a) an investigation of an alleged offence under subsection 139(2) in relation to a juror, or

(b) giving evidence in criminal proceedings in relation to such an offence, discloses any information relating to the proceedings of the jury when it was absent from the courtroom that was not subsequently disclosed in open court is guilty of an offence punishable on summary conviction. 1972, c. 13, s. 49.

#### CROSS-REFERENCES

The offence under this section is tried in accordance with Part XXVII by summary conviction court



defined in s. 785. The limitation period is as set out in s. 786(2) and the penalty is as set out in s. 787(1).

### SYNOPSIS

It is an offence, punishable on summary conviction, for a juror to disclose matters which arose in the jury room when the same were not disclosed in open court (*e.g.*, what was discussed during the jury's deliberations). An exception exists where the disclosure is made for the purpose of an investigation into, or criminal proceedings on, a charge of obstructing justice (see s. 139(2)).

### ANNOTATIONS

Evidence either from a juror or from a third party as to alleged impropriety during the jury's deliberations is inadmissible in an appellate court: *R. v. Perras* (1974), 18 C.C.C. (2d) 47, 48 D.L.R. (3d) 145 (5:0) (Sask.C.A.).

The slightest communication with jurors about the case they are trying has always been prohibited. Thus it constituted contempt of Court for the accused, a member of a firm of lawyers one of whom was defending a case, to attempt to elicit from a juror discharged under s. 644 what the other jurors thought of the case: *R. v. Papineau* (1980), 58 C.C.C. (2d) 72, 16 C.R. (3d) 56 *sub nom. Re Papineau*; *R. v. Varin* (Que. S.C.).

In an unusual case, *R. v. Zacharias* (1987), 39 C.C.C. (3d) 280, 19 B.C.L.R. (2d) 379 (C.A.), the court, while confirming the general rule that a jury verdict cannot be impeached by the testimony of jurors, admitted such evidence on appeal where it had been disclosed in the course of an investigation permitted by para. (a). The court noted that while questions about the jury's deliberations, as opposed to those about an allegation of an attempt by third parties to improperly influence jurors, were not authorized by the para. (a) exception, the jurors would have believed that they were entitled to answer the questions which had been put by representatives of the Attorney-General. In the result it was disclosed that some jurors changed their vote to guilty because of a misunderstanding as to when a mistrial would be declared if the jury was unable to agree on a verdict.

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### ACCUSED TO BE PRESENT / Video links / Exceptions / To make defence.

**650. (1) Subject to subsections (1.1) and (2), an accused other than a corporation shall be present in court during the whole of the accused's trial.**

**(1.1) Where the court so orders, and where the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken.**

**(2) The court may**

- (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;**
- (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or**
- (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.**

**(3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel. R.S., c. C-34, s. 577; 1972, c. 13, s. 50; 1991, c. 43, s. 9; 1994, c. 44, s. 61.**

## CROSS-REFERENCES

A corporation appears by counsel or agent pursuant to s. 620. Sections 622 and 623 provide for trial of a corporation which does not appear by counsel or agent. Note s. 475 which provides that the trial may proceed in the absence of the accused where the accused has absconded in the course of the trial. Also note s. 486(2.1) which provides that in the case of trial of certain sexual offences specified therein, the judge may order that the complainant testify outside the courtroom or behind a screen or other device that would allow the complainant not to see the accused.

## SYNOPSIS

Unless the court orders otherwise an accused, other than a corporation, is required to be present throughout the trial. If the trial judge considers it proper the accused may be permitted to be absent (*e.g.*, during lengthy submissions on the admissibility of evidence) (subsec. (2)(b)).

An accused who interrupts the proceedings and interferes with the conduct of the trial may be removed from the court-room (subsec. (2)(a)). As well, a fitness hearing may be held in the absence of the accused if the judge feels that the accused's mental health might be adversely affected by his or her presence (subsec. (2)(c)).

Subsection (3) is a codification of the accused's right to make "full answer and defence" at the close of the Crown's case.

Provision is also made in subsec. (1.1) for appearance by counsel or through closed-circuit television or similar means.

## ANNOTATIONS

**Right of accused to be present [subsec. (1)]** – Without the authority of his client, counsel cannot, even with permission from the Court, proceed in his absence: *R. v. Page*, [1969] 1 C.C.C. 90, 64 W.W.R. 637 (B.C.C.A.).

The right of an accused to be present in court during the whole of his trial as provided by this subsection includes the right to have direct knowledge of anything that transpires in the course of the trial which could involve his vital interests. This would include not only proceedings which are part of the normal trial process for determining the guilt or innocence of the accused but also proceedings conducted by the judge during the trial for the purpose of investigating matters which have occurred outside the trial but which may affect its fairness. If on the facts of a particular case the trial judge receives a communication from a juror and is uncertain whether the accused's vital interests are involved, the judge may, in the absence of the accused, investigate the matter. This would include the questioning of jurors and if the judge determines that the vital interests of the accused are not in issue that ends the matter, subject to a record being kept of the proceedings in order to determine whether the trial judge erred as regards there being uncertainty of what was in issue at the outset and as regards his final determination of the matter. However, at the moment that it appears that the accused's vital interests are in issue, as where it is an issue as to the partiality of one of the jurors, then the matter must be determined in the presence of the accused: *Vezina v. The Queen*; *Cote v. The Queen* (1986), 23 C.C.C. (3d) 481 (S.C.C.) (7:0).

It is not everything that occurs during a trial that is part of the trial for the purposes of this section. Thus, things may occur which cannot reasonably be considered part of the trial for the purposes of the principle because they cannot reasonably be said to have a bearing on the substantive conduct of the trial, or the issue of guilt or innocence. However, an accused is entitled to be present at his trial not only so that he can hear the case made out against him, and having heard it, have the opportunity of answering it, but also because his presence at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. Thus, an accused was entitled to be present during an inquiry conducted by the trial judge concerning certain anonymous telephone calls made to members of the jury: *R. v. Hertzrich, Stewart and Skinner* (1982), 67 C.C.C. (2d) 510, 137 D.L.R. (3d) 400 (Ont. C.A.),

leave to appeal to S.C.C. refused 45 N.R. 629n. Similarly: *R. v. Fenton* (1984), 11 C.C.C. (3d) 109 (B.C.C.A.).

This subsection is to be given expansive interpretation. The examination following arraignment of potential jurors by the trial judge to determine claims for exemptions on grounds including partiality is part of the trial at which the accused is entitled to be present: *R. v. Barrow* (1987), 38 C.C.C. (3d) 193, [1987] 2 S.C.R. 694, 61 C.R. (3d) 305, (5:2).

Where there has been non-compliance with subsec. (1) in that the accused has been improperly excluded from the trial the conviction cannot stand. The error being fundamental and going to the Court's jurisdiction the provision in s. 686(1)(b)(iii) cannot be applied: *Meunier v. The Queen* (1965), 48 C.R. 14, [1966] Que. Q.B. 94n., (C.A.), affd [1966] S.C.R. 399, 50 C.R. 75 (5:0); *R. v. Grimba*, *supra*. [However, see cases noted under s. 686(1)(b)(iv), *infra*.]

**Discussion outside presence of accused** [*Also see notes under s. 647*] – Communications between a sheriff's officer and the trial judge and then between the judge and a juror's doctor concerning the juror's illness are not part of trial and therefore the accused's rights were not violated although he was absent during those discussions: *R. v. Chambers*, [1990] 6 W.W.R. 554 (S.C.C.).

An accused is not present within the meaning of this section where the proceedings although conducted in court take place out of earshot of the accused and his counsel: *R. v. Barrow*, *supra*.

**Removal of accused** [subsec. (2)] – A trial Judge's belief that the accused might tailor his evidence if he heard the argument as to the admissibility of a portion of his testimony is not an adequate basis for his exclusion from the court-room and if something transpires which is part of the trial, during the time when the accused is improperly excluded then this subsection has been contravened and the conviction must be quashed. Matters such as the adducing of evidence, presentation of argument, ruling on evidentiary points and addresses to the jury all constitute part of the trial, or advance the case, and if the accused is improperly excluded during those parts of the trial, then this subsection has been contravened: *R. v. Grimba* (1980), 56 C.C.C. (2d) 570, 30 O.R. (2d) 545 (C.A.). Similarly, *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13, 28 C.R. (3d) 324, 138 D.L.R. (3d) 221 (Ont. C.A.).

Where it becomes necessary to remove the accused under para. (a) and the accused is unrepresented by counsel then there is an obligation on the trial judge to cross-examine the Crown witnesses in an attempt to assist him: *R. v. Pawliw* (1985), 23 C.C.C. (3d) 14 (B.C.S.C.).

Paragraph (a) of subsec. (2) is not an unconstitutional infringement of the legal rights guaranteed by the Canadian Charter of Rights and Freedoms: *R. v. Pawliw*, *supra*.

The accused's absence from court initially because of his refusal to attend court and subsequently pursuant to subsec. (2)(c), while his fitness to stand trial is determined, cannot vitiate his subsequent plea of guilty: *R. v. Lefebvre* (1989), 71 C.R. (3d) 213 (Que. C.A.), leave to appeal to S.C.C. refused November 23, 1989.

Subsection (2)(b) involves an element of waiver by the accused, and for there to be a waiver, the accused must be fully aware of his right to present in court and freely give up his right without pressure of any kind, including the pressure of custodial expediency: *R. v. Fecteau*, *supra*.

The accused may be permitted to be absent for the arraignment and plea: *R. v. Butler* (1993), 81 C.C.C. (3d) 248, 21 C.R. (4th) 27, 86 Man. R. (2d) 50 (Q.B.).

**Right to interpreter** – When an accused is deprived of his interpreter for the Judge's charge he in effect is denied the right to be present at his trial: *R. v. Reale* (1973), 13 C.C.C. (2d) 345, [1973] 3 O.R. 905 (C.A.). Affd (7:2) (1975), 22 C.C.C. (2d) 571, 58 D.L.R. (3d) 560 (S.C.C.).

However, accidental contravention of the right to an interpreter during the sentence



proceedings does not vitiate the conviction itself following a trial which is otherwise untainted by jurisdictional error: *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416, 41 C.R. (3d) 275, 10 D.L.R. (4th) 697 (Ont. C.A.), leave to appeal to S.C.C. refused January 31, 1985.

As a general rule, s. 14 of the Charter requires that the court appoint an interpreter when it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing himself or understanding the proceedings and that the assistance of an interpreter would be helpful; or the accused or counsel for the accused requests the services of an interpreter and the judge is of the opinion that the request is justified. There is, however, no requirement that the courts inform all accused appearing before them of the existence of the right to interpreter assistance. Where the accused at trial claims the Charter right to an interpreter, assistance should not be denied unless there is cogent and compelling evidence that the accused's request is not made in good faith but rather for an oblique motive. The quality of interpretation must be high but the standard is not one of perfection. The interpretation of the proceedings should be continuous, precise, impartial, competent and contemporaneous. Summaries of the testimony are unlikely to meet the general standard of interpretation required: *R. v. Tran*, [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34. [Also see notes of this case under s. 14 of the Charter of Rights, *infra*]

**Crown's discretion to call witnesses** – Unless some oblique motive is shown, Crown counsel's discretion to determine who shall be called as witnesses shall not be interfered with. Furthermore, he is not obliged to call for cross-examination by the accused all persons who may be able to offer some evidence in relation to the charge: *Lemay v. The King* (1951), 102 C.C.C.1, 14 C.R.89 (S.C.C.).

While there is no absolute duty on the prosecution to call witnesses whose evidence may be adverse to the prosecution or supportive of the defence, Crown counsel is under a duty to be fair and advise counsel for the accused in a timely manner of the existence of witnesses which would demonstrate the accused's innocence: *Re Cunliffe and Law Society of British Columbia; Re Bledsoe and Law Society of British Columbia* (1984), 13 C.C.C. (3d) 560, 40 C.R. (3d) 67, [1984] 4 W.W.R. 451 (B.C.C.A.).

**Directed verdict** – In *Vander-Beek and Albright v. The Queen* (1970), 2 C.C.C. (2d) 45, 12 C.R.N.S.168 (S.C.C.), at trial the motion of the two appellants for dismissal at the conclusion of the Crown's case on the ground that there was no evidence upon which they could be convicted was dismissed, and their immediately succeeding motion that they be acquitted on the ground that there was insufficient evidence for conviction was reserved by the Judge until he heard all of the evidence. Their counsel took no further part in the evidence, even when the third accused testified to raise a reasonable doubt on his part at the expense of his other two co-accused. The trial judge acquitted the third accused on his evidence and excluding his evidence as against the two co-accused, acquitted them. It was held (9:0), that the case was not concluded until all of the evidence was in and that all testimony heard was evidence for or against each accused. Further, *per* Laskin, J., the accused's closing of his case at the conclusion of the Crown's case does not allow a co-accused to separate his trial from the joint trial.

The application for a directed verdict must be determined before the accused is called upon to elect whether or not he intends to call evidence: *R. v. Boissonneault* (1986), 29 C.C.C. (3d) 345 (Ont. C.A.).

In *Mezzo v. The Queen* (1986), 27 C.C.C. (3d) 97, 52 C.R. (3d) 113, [1986] 1 S.C.R. 802 (7:2), the majority of the court reaffirmed its adherence to the statement of the test set out in *United States of America v. Sheppard* (1976), 30 C.C.C. (2d) 424, 70 D.L.R. (3d) 136, [1977] 2 S.C.R. 1067, 34 C.R.N.S. 207 [noted under s. 548] for determining whether the evidence is sufficient to justify the trial judge putting the case to the jury. That test, whether there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty, employs as the measure of the sufficiency the

concept of a *prima facie* case, that is, a case containing evidence on all essential points of a charge which, if believed by the trier of fact and unanswered, would warrant a conviction. Questions of credibility and the quality, in the sense of the weight to be attached to the evidence, are for the jury to decide after appropriate directions from the trial judge.

If there is admissible evidence, whether direct or circumstantial, which if believed by a properly instructed jury acting reasonably would justify a conviction, then the case must be left to the jury. The trial judge on an application for a directed verdict is not entitled to weigh the evidence, test its quality or reliability, or draw inferences of fact from that evidence: *R. v. Monteleone* (1987), 35 C.C.C. (3d) 193, 59 C.R. (3d) 97, [1987] 2 S.C.R. 154 (7:0).

On a trial by judge and jury, where the trial judge rules that there is no evidence upon which a jury properly instructed may convict and so allows an application for a directed verdict of acquittal, then the trial judge should withdraw the case from the jury and enter the verdict of acquittal: *R. v. Rowbotham*, [1994] 2 S.C.R. 463, 90 C.C.C. (3d) 449, 30 C.R. (4th) 141.

**Right to make full answer and defence generally** – The seating and location of the accused is within the sole discretion of the trial judge and his decision refusing to permit the accused to sit outside the prisoner's dock will not be interfered with on appeal unless the decision manifestly precluded the accused from making full answer and defence: *R. v. Faid* (1981), 61 C.C.C. (2d) 28, [1981] 5 W.W.R. 349 (Alta. C.A.), revd on other grounds 2 C.C.C. (3d) 513, 33 C.R. (3d) 1, [1983] 1 S.C.R. 265.

In *R. v. Lovie* (1995), 100 C.C.C. (3d) 68, 24 O.R. (3d) 836, 83 O.A.C. 208 (C.A.), the accused refused to return to the witness-stand to complete his cross-examination. After several adjournments to permit examinations by psychiatrists, the trial judge rejected an application for a mistrial when the accused still refused to return to the witness-stand. In the circumstances, the trial judge could direct the jury that if they found the refusal was deliberate, or was based on symptoms of mental disorder that were simulated, the jury was entitled to consider that circumstance not only in assessing what weight they should give to the accused's testimony-in-chief, but they could also use it in assessing the accused's reliability as a witness. His refusal to complete the cross-examination could not, however, be considered evidence of consciousness of guilt.

**Right to counsel** – Where there is a conflict of interest between two accused the same counsel should not act for both, even at separate trials for the same offence: *R. v. Depatie* (1970), 2 C.C.C. (2d) 339, [1971] 1 O.R. 698 (C.A.).

A trial judge's order refusing to allow defence counsel to withdraw was, in its peculiar circumstances of delaying manoeuvres and the equivocal discharge, upheld: *R. v. Spataro* (1972), 7 C.C.C. (2d) 1, 26 D.L.R. (3d) 625 (3:2) (S.C.C.).

An accused has the right to make full answer and defence personally, and counsel cannot be forced upon an unwilling accused. Where an accused wishes to discharge counsel part way through his trial he must be permitted to do so: *R. v. Bowles and Danylak* (1985), 21 C.C.C. (3d) 540 (Alta. C.A.).

In *R. v. Barrette* (1976), 29 C.C.C. (2d) 189, 33 C.R.N.S. 377 (S.C.C.) the accused's case was called for trial some five months after that date was set on consent. His counsel improperly was not present and he was forced on and gave evidence. It was held (6:3) that even though the accused was treated with consideration by the Crown, the trial judge erred in visiting upon the accused the sins of his counsel's non-appearance and the congested court system particularly where the accused himself was without fault. While a decision for adjournment is in the judge's discretion, it is a judicial discretion which may be reviewed on appeal if it is based on reasons which are not well-founded in law. Accordingly, where it cannot be said on a review of the proceedings that the accused had a fair trial his conviction should be quashed and a new trial ordered.

An accused is entitled to an adjournment when, on the date set for trial, his counsel



fails to appear, unless, on the facts of the specific case, the trial judge can reasonably infer that the failure was a deliberate tactic to which the accused was a party: *R. v. Bruneau*, [1983] 5 W.W.R. 89, 26 Alta. L.R. (2d) 117, 44 A.R. 289 (C.A.).

Representation of the accused by counsel is generally essential to a fair trial. Where the accused desires to be defended by counsel then, unless the accused has deliberately failed to retain counsel or has discharged counsel with the intent of delaying the process of the court, the court should afford the accused a reasonable opportunity to retain counsel: *R. v. Smith* (1989), 52 C.C.C. (3d) 90, 35 O.A.C. 301 (C.A.).

Where following the withdrawal of his counsel the accused was given over a month and a half and two adjournments in order to obtain a new lawyer, and on the date set for trial on the last occasion the court was satisfied that the accused had not retained a lawyer and was attempting to delay the trial, there was no error in refusing a further request for an adjournment: *R. v. Manhas* (1978), 17 C.R. (3d) 331 (B.C.C.A.), affd [1980] 1 S.C.R. 591, 17 C.R. (3d) 348n (7:0).

While the Constitution has not expressly constitutionalized the right of an indigent accused to be provided with counsel, in cases not falling within the provincial legal aid plans, ss. 7 and 11(d) of the Charter of Rights and Freedoms, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. Where a trial judge is confronted with a case where legal aid has been refused to an indigent accused in circumstances where representation by counsel is essential, then the judge may stay the proceedings until the necessary funding of counsel is available. An accused, however, who has the means to pay the costs of her defence but refuses to retain counsel may properly be considered to have chosen to defend herself and there would be no breach of the Charter if the trial proceeded without counsel being appointed: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

An accused, entitled to receive the assistance of counsel in order to make full answer and defence, is entitled to effective assistance and it is generally recognized that a lawyer representing more than one accused in a joint criminal trial is potentially in a position of conflict such that he will not be able to provide effective assistance. In a case of joint representation of conflicting interests, defence counsel's basic duty of undivided loyalty and effective assistance is jeopardized and his performance may be adversely affected since he may refrain from doing certain things for one client by reason of his concern that his action might adversely affect his other client: *R. v. Silvini* (1991), 68 C.C.C. (3d) 251, 5 O.R. (3d) 545 (C.A.).

A provincial court judge has the power to appoint counsel in an appropriate case: *Re White and The Queen* (1976), 32 C.C.C. (2d) 478, 73 D.L.R. (3d) 275 (Alta. S.C.T.D.).

In principle, the accused's trial counsel is a compellable witness but it would only be in extraordinary circumstances that Crown counsel should, without prior warning, call defence counsel, with the result that counsel would be forced out of the case. Thus, in *R. v. St. Laurent* (1984), 11 C.C.C. (3d) 74, 38 C.R. (3d) 94, 7 D.L.R. (4th) 661 (Que. C.A.), a new trial was ordered where Crown counsel had insisted on calling defence counsel although it was totally unnecessary. In the circumstances justice was not seen to be done by the accused.

Although the accused had discharged his counsel and attempted to cross-examine the Crown witnesses himself, he should have been permitted to have his former counsel re-enter the case and complete cross-examination when the accused found he was unable to properly conduct the case: *R. v. Long* (1983), 9 C.C.C. (3d) 229 (Que. C.A.).

**Assistance to unrepresented accused** – Where an accused is not represented by counsel the extent to which the trial Judge intervenes on his behalf is a matter of the Judge's discretion. He is under no obligation to cross-examine on the accused's behalf: *R. v. Thorpe* (1976), 32 C.C.C. (2d) 46 (Man. C.A.).

However, in *R. v. Huebschwerlen*, [1965] 3 C.C.C. 212, 45 C.R. 393 (Y.T.C.A.) it was



held that where an unrepresented accused has shown a total incapacity to effectively cross-examine any witness a duty was imposed on the trial Judge to take up the cross-examination and pursue the lines of defence indicated by the accused.

Consistent with his duty to ensure that an unrepresented accused has a fair trial, the judge is required within reason to provide assistance to him, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. The judge is not, however, required to become the accused's advocate and, for example, search through the preliminary inquiry transcript for inconsistencies in the evidence of the Crown witnesses. The judge, having explained to the accused how he could cross-examine on the preliminary inquiry transcript, was not obliged to go any further: *R. v. McGibbon* (1988), 45 C.C.C. (3d) 334, 31 O.A.C. 10 (C.A.).

Moreover, it is not open to the trial judge to conduct an extensive cross-examination of the Crown witnesses as would be expected from defence counsel and which goes beyond merely assisting the accused: *R. v. Turlon* (1989), 49 C.C.C. (3d) 186, 70 C.R. (3d) 376, 32 O.A.C. 396 (C.A.).

**Accused's right to call witnesses** – The accused has an absolute right to call any Crown witness, who has previously testified and been cross-examined by him, as a defence witness: *R. v. Cook* (1960), 127 C.C.C. 287, 33 C.R. 126 (3:2) (Alta. S.C. App. Div.).

A trial judge should not make any order as to the sequence of the defence witnesses and where he indicated that if the accused did not precede his witnesses he would not consider his evidence too strongly a new trial was ordered: *R. v. Smuk* (1971), 3 C.C.C. (2d) 457, 15 C.R.N.S. 218 (B.C.C.A.). Nor can he simply direct the order in which the accused will testify: *R. v. Angelantoni* (1975), 28 C.C.C. (2d) 179, 31 C.R.N.S. 342 (Ont. C.A.).

In an earlier case, *R. v. Archer* (1972), 26 C.R.N.S. 225 (Ont. C.A.) the Court held that the trial Judge did not err in requiring the defence to call the accused first when the defence raised was alibi as it was to the accused's benefit that he do so.

In *R. v. Sparre* (1977), 37 C.C.C. (2d) 495 (Ont. Co. Ct.) the trial Judge considered *R. v. Archer*, *supra*, and held that no special rule applies where the defence is alibi and that defence counsel may call witnesses in any order that counsel sees fit and the accused need not be called first.

**Right to make submissions** – The failure of the trial Judge to invite an unrepresented accused to make submissions at the close of the evidence constitutes a deprivation of the right to make full answer and defence and will result in the conviction being set aside: *Aucoin v. The Queen*, [1979] 1 S.C.R. 554; *R. v. Gronka* (1979), 45 C.C.C. (2d) 573 (Ont. C.A.).

**Surrebuttal evidence** – Where the Crown in rebuttal led evidence raising a new issue for the first time at trial, the defence was permitted to call a witness in counter-rebuttal: *R. v. Morgentaler (No. 3)* (1973), 14 C.C.C. (2d) 453, 42 D.L.R. (3d) 441 (Que.Q.B.).

It is open to a Court to grant leave to the accused to call evidence in surrebuttal to reply evidence: *R. v. Demeter* (1975), 25 C.C.C. (2d) 417 at p. 473, 10 O.R. (2d) 321 at p. 377 (Ont. C.A.) (5:0).

Subsection (3), which gives the accused the right "after the close of the case for the prosecution" to make full answer and defence, must apply to evidence given by way of rebuttal as well as to that given during the Crown's case-in-chief. Accordingly, it was held in *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 (B.C.C.A.), that the rules regarding the permissible scope of surrebuttal must be applied liberally in favour of the accused where the accused relied on the defence of insanity and evidence to rebut that defence was first given by the Crown in rebuttal.

**Reopening the case** – The fundamental principle, in determining whether the Crown should be permitted to reopen its case, is whether the accused will suffer prejudice in his

defence and this will depend on the stage at which the application is made and the nature of the evidence to be called. Before the Crown has closed its case, the trial judge has considerable latitude to permit the Crown to recall a witness to correct earlier testimony. Once the Crown actually closes its case, the trial judge's discretion will be narrow with reopening being permitted to correct some oversight or inadvertent omission, provided that justice requires it and there will be no prejudice to the defence. Where the Crown has closed its case and the defence has started to answer the case, then the trial judge's discretion is very restricted and it will only be in the narrowest of circumstances that the Crown will be permitted to reopen its case: *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555, 89 C.C.C. (3d) 289, 29 C.R. (4th) 209.

Where during his address to the jury counsel for the accused, who had called no evidence, argued that the Crown had failed to prove the identity of the accused as the person referred to by the same name in the evidence of a Crown witness read in at trial, the trial judge had a discretion where the interest of justice so required and the accused was not in danger of being taken by surprise, to allow the Crown to reopen its case for the purpose of formal identification, an inference that the jury would have been entitled to assume in any event: *R. v. Robillard* (1975), 24 C.C.C. (2d) 36, 30 C.R.N.S. 351 (Que. C.A.) (2:1), affd 41 C.C.C. (2d) 1, 85 D.L.R. (3d) 449, [1978] 2 S.C.R. 728 (9:0).

A Judge sitting without a jury is not *functus officio* following a finding of guilt until he has imposed sentence or otherwise finally disposed of the case. Accordingly, he may in his discretion, following a finding of guilt, vacate that finding, reopen the case, and permit the accused to tender further evidence. However, this power should be exercised only in exceptional circumstances and where its exercise is clearly called for. It should be noted, however, that a Judge has no power to reopen a case following an acquittal since the proceeding has been terminated by such a verdict. Further, when sitting with a jury, under no circumstances has a Judge power to set aside the jury's verdict: *R. v. Lessard* (1976), 30 C.C.C. (2d) 70, 33 C.R.N.S. 16 (Ont. C.A.).

A judge does, however, have power to reopen an acquittal where the acquittal was not on the merits but solely on the basis of application of the rule against multiple convictions as set out in *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 26 C.R.N.S. 1, [1975] 1 S.C.R. 729; *R. v. Schmidt, Able and Medeiros* (1982), 66 C.C.C. (2d) 366, 35 O.R. (2d) 784 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 42 N.R. 179n.

When faced with an application to reopen the defence case, the trial judge should first determine whether the proposed evidence is relevant to a material issue in the case. The trial judge must then consider the potential prejudice to the other parties should the judge permit the reopening of the evidence and the effect of reopening the evidence on the orderly and expeditious conduct of the trial: *R. v. Hayward* (1993), 86 C.C.C. (3d) 193, 67 O.A.C. 379 (C.A.).

**Disclosure to defence** – At least in the case of indictable offences, the Crown is required to produce to the defence all relevant information whether or not the Crown intends to introduce it into evidence and whether it is inculpatory or exculpatory. The Crown does have a discretion to withhold information and as to the timing of the disclosure where necessary to protect the identity of an informer or a continuing investigation. A discretion must also be exercised with respect to the relevance of information. The exercise of this discretion is reviewable by the trial judge who will be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. Even then, the trial judge might conclude that the recognition of an existing privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence and thus require disclosure in spite of the law of privilege. Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. The obligation to disclose will be triggered by a request by or on behalf of the accused. In the case of an unrepresented accused, the trial judge should not take a plea unless satisfied that the accused

has been informed of his right to disclosure: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 9 C.R. (4th) 277 (7:0).

Where the Crown disputes the existence of material which the defence alleges is relevant, the defence must establish a basis which could enable the presiding judge to conclude that there is in existence further material which is potentially relevant. Relevance in this context means that there is a reasonable possibility of being useful to the accused in making full answer and defence. The existence of the disputed material must be sufficiently identified to reveal its nature and enable the judge to determine that it may meet the test for requiring disclosure as set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, 9 C.R. (4th) 277. In most cases, this preliminary issue can be determined on the basis of submissions. If the defence meets this preliminary test, then the Crown must justify a continuing refusal to disclose and is entitled to call relevant evidence on the issue: *R. v. Chaplin*, [1995] 1 S.C.R. 727, 96 C.C.C. (3d) 225, 36 C.R. (4th) 201.

There is no absolute right to have originals of documents or tape recordings produced. If the Crown has the originals, it should either produce them or allow them to be inspected. If, however, the originals are not available and if they have been in the Crown's possession then it should explain their absence. If the explanation is satisfactory, the Crown has discharged its obligations unless the conduct which resulted in the absence or loss of the original is itself such that it may warrant a remedy under the Charter: *R. v. Stinchcombe*, [1995] 1 S.C.R. 754, 96 C.C.C. (3d) 318, 38 C.R. (4th) 42.

The disclosure requirements upon the Crown do not put a duty on the Crown to obtain the prison records of a Crown witness. This was an ordinary criminal prosecution being conducted by a prosecutor in the department of the provincial Attorney General. The federal penitentiary authorities were strangers to the proceedings and there could not be any onus on the Crown to seek out such material which had nothing to do with the crime or the matters at issue in the case, but, at most, might bear on the credibility of a prospective Crown witness: *R. v. Gingras* (1992), 71 C.C.C. (3d) 53, 120 A.R. 300 (C.A.).

The manner of disclosure must be regarded as one of reviewable discretion on the part of Crown counsel. It ought, generally, to be accomplished by the delivery of photostatic copies of the materials required to be disclosed. In a case where there is reason not to make provision of photostatic copies, then defence counsel should be given the opportunity to make detailed notes. The duty rests upon Crown counsel to obtain from the police all material that should be properly disclosed to defence counsel. Where there is failure on the part of the Crown to make full disclosure, the proper remedy at trial is to order disclosure and not a stay of proceedings. It is generally only where the accused cannot receive a fair trial due to non-disclosure that a stay of proceedings should be ordered: *R. v. V. (W.J.)* (1992), 72 C.C.C. (3d) 97 (Nfld. C.A.).

Disclosure by Crown counsel is a primary basis upon which defence counsel must determine how the defence will be conducted and, in particular, whether or not the Crown's case will be made out. While there will always be cases where counsel may be taken by surprise in a criminal trial by some change or variation in the expected evidence, this surprise should not be caused by Crown counsel deliberately choosing not to carry out an undertaking to make prior to trial: *R. v. Mitchell* (1989), 70 C.R. (3d) 71, 33 O.A.C. 360 (C.A.).

The Crown is under a duty at common law to disclose to the defence all material evidence whether favourable to the accused or not. Failure to disclose may constitute grounds for appeal where it results in an unfair trial. Thus, on a charge of sexual assault, a new trial was ordered where the prosecution failed to disclose to the defence the existence of a witness who had questioned the complainant about sexual abuse. The complainant had denied being abused and, had the defence been aware of the statement, it might have been used to support the defence that the evidence of the complainant was fabricated: *R. v. C. (M.H.)* (1991), 63 C.C.C. (3d) 385 (S.C.C.) (5:0).

The Crown was required to disclose evidence in its possession which could rebut evi-



dence of good character which the accused proposed to call. That evidence could reasonably be used by the accused in advancing a defence and in making a decision which could affect the conduct of the defence, such as whether or not to call evidence: *R. v. Hutter* (1993), 86 C.C.C. (3d) 81, 16 O.R. (3d) 145, 18 C.R.R. 225 (C.A.), leave to appeal to S.C.C. refused 87 C.C.C. (3d) vi, 72 O.A.C. 140n, 20 C.R.R. (2d) 192n.

Counsel for the accused is required to bring any lack of disclosure to the attention of the trial judge at the earliest opportunity. At least in the case of a trial by judge alone includes a lack of disclosure which comes to counsel's attention after conviction and before sentence. During this period, the trial judge is still seized of the trial and would have the discretion to reopen the trial proceedings or to order a mistrial: *R. v. McAnespie*, [1993] 4 S.C.R. 501, 86 C.C.C. (3d) 191n, 68 O.A.C. 185.

The principles of fundamental justice as guaranteed by the Charter reflect and accommodate the nature of the common law doctrine of abuse of process. Issues relating to disclosure by the Crown would normally fall within ss. 7 and 11(d) of the Charter. Therefore, a challenge based on non-disclosure will generally require a showing of actual prejudice to the ability to make full answer and defence. The accused must establish that the impugned non-disclosure has, on the balance of probabilities, prejudiced or had an adverse effect on the accused's ability to make full answer and defence. Such a determination requires a reasonable inquiry into the materiality of the non-disclosed information. The propriety of the Crown's conduct or intention are not necessarily relevant to whether or not the accused's right to a fair trial has been infringed. Once a violation is made out, the remedy will typically be a disclosure order and an adjournment. There may be some extreme cases, however, where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those clearest of cases, a stay of proceedings will be appropriate. Other remedies would include permitting the defence to recall certain witnesses for examination or cross-examination, adjournments to permit the defence to subpoena additional witnesses or even, in extreme cases, declaring a mistrial. When considering the appropriate remedy, the court should consider whether the Crown's breach of its disclosure obligations has also violated fundamental principles underlying the community's sense of decency and fair play, and thereby caused prejudice to the integrity of the judicial system. For these purposes, among the most relevant considerations are the conduct and intention of the Crown. However, a demonstration of *mala fides* on the part of the Crown is not a necessary precondition to a finding of flagrant and intentional Crown misconduct which might lead to a stay of proceedings: *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, [1996] 2 W.W.R. 153 (S.C.C.) (5:3).

Therapeutic records in the possession of the Crown must be disclosed to the defence. Concerns relating to privacy or privilege disappear where the documents have fallen into the possession of the Crown and the Crown's well-established duty to disclose all information is not affected by the confidential nature of the therapeutic records. While the mere existence of therapeutic records is insufficient to establish the relevance of those records to the defence, the relevance of such records must be presumed where they are in the possession of the Crown. If the Crown found that they contained no relevant material, then the Crown would retain the opportunity to prove the irrelevance of the records on an application for disclosure by the defence. In cases involving the production of information which is in the hands of a third party, the court is concerned with the competing claims of a constitutional right to privacy in the information on the one hand and the right to full answer and defence on the other. Where the defence seeks production and disclosure of records in the possession of a third party, a two-stage procedure is involved. At the first stage in the production procedure, the onus is on the accused to satisfy the judge that the information is likely to be relevant. This is not an evidential burden requiring evidence and a *voir dire* in every case. To initiate the production procedure, the accused must bring a formal, written application supported by an affidavit setting out the specific grounds for production. A notice must be given to third parties in

possession of the documents as well as to those persons who have a privacy interest in the records. The accused must also ensure that the custodian and the records are subpoenaed to ensure their attendance in the court. The initial application for disclosure should be made to the judge seized of the trial, but may be brought prior to the empanelling of the jury, at the same time that other motions are heard. In the context of production, the test of likely relevance requires that the judge be satisfied that there is a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify. The issues at trial include not only the matters in issue in the case but also evidence relating to the credibility of witnesses and to the reliability of other evidence in the case. This burden on the accused should not be interpreted as an onerous one and it cannot be assumed that private therapeutic or counselling records are irrelevant to full answer and defence. Such records may be relevant in sexual assault cases because they contain information concerning the unfolding of events underlying the criminal complaint; they may reveal the use of a therapy which influenced the complainant's memory of the alleged offence or they may contain information that bears on the complainant's credibility including testimonial factors such as the quality of the complainant's perception of events at the time of the offence and her memory since. At the second stage, after the records have been produced to the court, the judge should examine the records to determine whether, and to what extent, they should be produced to the accused. In making this determination, the judge must examine and weigh the salutary and deleterious effects of a production order and determine whether a non-production order would constitute a reasonable limit on the ability of the accused to make full answer and defence. In some cases, it may be possible for the presiding judge to provide a judicial summary of the records to counsel, to enable them to assist in determining whether the material should be produced. In balancing the competing rights in question, the judge should consider the following factors: (1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any discriminatory belief or bias and (5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by a production of the record in question: *R. v. O'Connor*, *supra*.

Also see notes under s. 603.

**Intervention by trial judge** — While examination and cross-examination of witnesses are primarily the responsibility of counsel, the judge is not required to remain silent and may question witnesses to clear up ambiguities, explore some matter which the answers of a witness have left vague and he may put questions which should have been put to bring out some relevant matter, but which have been omitted. Generally speaking, the questions by the judge should be put after counsel has completed his examination, and the witnesses should not be cross-examined by the judge during their examination-in-chief. The judge also has a duty to intervene to clear the innocent. He has the duty to ensure that the accused is afforded the right to make full answer and defence, but he has the right and the duty to prevent the trial from being unnecessarily protracted by questions directed to irrelevant matters. This power must however be exercised with caution so as to leave unfettered the right of an accused to subject any witness' testimony to the test of cross-examination. The judge must not improperly curtail cross-examination that is relevant to the issues or the credibility of witnesses, but he has power to protect a witness from harassment by questions that are repetitious or are irrelevant: *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.).

The trial judge may not question the accused or his witnesses to such an extent or in such a manner that he conveys the impression of placing his authority on the side of the prosecution or the impression of disbelief of the defence evidence: *Brouillard v. The Queen* (1985), 17 C.C.C. (3d) 193, 16 D.L.R. (4th) 447, [1985] 1 S.C.R. 39.

Mere discourtesy to counsel by the trial judge is not itself ground for quashing a conviction. Where, however, the trial judge suggests that counsel is acting in a professionally unethical manner for the purpose of misleading the jury, the integrity and good faith of the defence may be denigrated and the appearance of an unfair trial created: *R. v. Turkiewicz, Barrow and MacNamara* (1979), 50 C.C.C. (2d) 406, 103 D.L.R. (3d) 332, 26 O.R. (2d) 570 (Ont. C.A.).

**SUMMING UP BY PROSECUTOR / Summing up by accused / Accused's right of reply / Prosecutor's right of reply where more than one accused.**

**651. (1) Where an accused, or any one of several accused being tried together, is defended by counsel, the counsel shall, at the end of the case for the prosecution, declare whether or not he intends to adduce evidence on behalf of the accused for whom he appears and if he does not announce his intention to adduce evidence, the prosecutor may address the jury by way of summing up.**

**(2) Counsel for the accused or the accused, where he is not defended by counsel, is entitled, if he thinks fit, to open the case for the defence, and after the conclusion of that opening to examine such witnesses as he thinks fit, and when all the evidence is concluded to sum up the evidence.**

**(3) Where no witnesses are examined for an accused, he or his counsel is entitled to address the jury last, but otherwise counsel for the prosecution is entitled to address the jury last.**

**(4) Where two or more accused are tried jointly and witnesses are examined for any of them, all the accused or their respective counsel are required to address the jury before it is addressed by the prosecutor. R.S., c. C-34, s. 578.**

**CROSS-REFERENCES**

The term "prosecutor" is defined in s. 2. For notes on the accused's right to counsel and the duty of the prosecution to call witnesses, see the notes following s. 650.

**SYNOPSIS**

This section contains the rules relating to the order of jury addresses.

By reason of subssecs. (1) and (3), if no defence evidence is called, the prosecutor shall address the jury first.

An accused who wishes to call evidence is entitled to make an opening statement to the jury (subsec. (2)).

Where an accused (or at least one of several accused) elects to call evidence, the Crown will address the jury last (subsec. (4)).

**ANNOTATIONS**

**Opening addresses** – The question whether defence counsel may make an opening statement immediately after Crown counsel's opening has been considered in a number of recent cases. The most restrictive view was taken in *R. v. Vitale* (1987), 40 C.C.C. (3d) 267 (Ont. Dist.Ct.), where it was held that defence counsel's only right to make an opening statement was as provided in this section, at the conclusion of the Crown's case if counsel intends to call evidence for the defence. In *R. v. Edwards* (1986), 2 W.C.B. (2d) 220 (Ont. H.C.J.), it was held that this section did not preclude defence counsel making an opening after Crown counsel's opening referring to the evidence counsel intended to call, provided that counsel undertook to call evidence. The most expansive view was taken in *R. v. Barrow* (1989), 48 C.C.C. (3d) 308, 91 N.S.R. (2d) 176 (S.C.), where it was held that counsel could make an opening statement after Crown counsel's opening whether or not counsel had decided to call evidence. If the defence does not intend to



call evidence or is unwilling to declare his intention at that time then counsel can tell the jury what evidence he expects to elicit in cross-examination of the Crown witnesses.

**Right to testify** – The right to call witnesses and testify is not absolute. In exceptional cases where, despite efforts by the trial judge to avoid the inevitable, an accused still persists in disruptive conduct and abuse of his rights, then he can lose the right to testify and call witnesses: *R. v. Fabrikant* (1995), 97 C.C.C. (3d) 544, 39 C.R. (4th) 1, 67 Q.A.C. 268 (C.A.), leave to appeal to S.C.C. refused 98 C.C.C. (3d) vi.

**Order of closing addresses** – The order of addresses as prescribed by subsec. (3) does not offend the fundamental justice and fair hearing guarantees in ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms: *R. v. Tzimopoulos* (1986), 29 C.C.C. (3d) 304, 54 C.R. (3d) 1 (Ont. C.A.); *R. v. Hutchinson* (1995), 99 C.C.C. (3d) 88, 141 N.S.R. (2d) 258 (C.A.); *R. v. Kerr* (1995), 38 C.R. (4th) 58 (B.C.S.C.).

Where the defence only succeeded in laying a bare foundation for expert medical evidence, which after a *voir dire* was ruled inadmissible, defence counsel was entitled to address the jury last: *R. v. Hawke* (1975), 22 C.C.C. (2d) 19, 29 C.R.N.S. 1 (Ont. C.A.).

The trial judge, having found that the prosecutor's decision not to call certain evidence was proper, should not have called that evidence himself simply to maintain the tactical advantage the defence enjoys of being able to address the jury last where it does not call evidence: *R. v. Finta* (1992), 73 C.C.C. (3d) 65, 92 D.L.R. (4th) 1, 53 O.A.C. 1 (C.A.).

**Content of closing addresses** – Where Crown counsel addressed the jury on extraneous prejudicial matters not found in the evidence a new trial was ordered: *Pisani v. The Queen* (1970), 1 C.C.C. (2d) 477, 15 D.L.R. (3d) 1 (S.C.C.).

It was held in *R. v. Bengert et al.* (No. 5) (1980), 53 C.C.C. (2d) 481, 15 C.R. (3d) 114 (B.C.C.A.) leave to appeal to S.C.C. refused 53 C.C.C. (2d) 481n that Crown counsel was properly permitted to give the members of the jury a typed chronology of dates and events to follow during his address after a lengthy and complicated conspiracy trial, and to take this chronology with them into the jury room during deliberations.

While counsel is obligated to comment only on admissible evidence, this responsibility must not be inverted to encourage jurors to make findings in conflict with undisputed facts which did not reach their attention simply because of trial safeguards: *R. v. Clarke* (1981), 63 C.C.C. (2d) 224, [1981] 6 W.W.R. 417 (Alta. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 34 A.R. 270n.

Comments by Crown counsel, which were extremely disparaging of a defence expert who was called to support an insanity defence, were sufficiently prejudicial as to impose a legal duty on the trial judge to comment and thus ensure that the position of the defence was fairly put to the jury. The failure of the trial judge to comment constituted an incorrect decision on a question of law and in this case the proviso in s. 686(1)(b)(iii) could not be applied: *R. v. Romeo* (1991), 62 C.C.C. (3d) 1, 119 N.R. 309 (S.C.C.) (6:1).

#### VIEW / Directions to prevent communication / Who shall attend.

652. (1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

(2) Where a view is ordered under subsection (1), the judge shall give any directions that he considers necessary for the purpose of preventing undue communication by

any person with members of the jury, but failure to comply with any directions given under this subsection does not affect the validity of the proceedings.

(3) Where a view is ordered under subsection (1) the accused and the judge shall attend. R.S., c. C-34, s. 579.

#### CROSS-REFERENCES

The accused's right to be present during his trial as guaranteed by s. 650 extends to the taking of a view.

#### SYNOPSIS

Subsection (1) enables the trial judge to give directions with respect to the jury leaving the court-room for the purpose of viewing any place, person or thing (*e.g.*, the scene of the alleged offence).

A failure to comply with any of the judge's directions relating to communications with the jury does not affect (automatically) the validity of the proceedings (subsec. (2)).

The judge and accused shall also attend the view (subsec. (3)).

#### ANNOTATIONS

A view of the occurrence is an extension of the trial and if the accused was absent at that time his conviction must be quashed: *R. v. Tanguay And Pilon* (1971), 15 C.R.N.S.21 (Que.C.A.).

However, this section must be read with s. 650 and the Judge has the same power to permit the accused to be absent from the view as from any other part of the trial: *R. v. Auger* (1982), 4 C.C.C. (3d) 282 (Que. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 48 N.R. 319n.

Mere failure on the part of the accused or his counsel to object to the accused being kept handcuffed in a sheriff's vehicle so that he was not present while the Judge conducted the view does not constitute an express waiver of the provisions of subsec. (3). Where something occurred to advance the case such as the hearing of the submissions as to the manner in which the view should be conducted the accused's conviction must be quashed: *R. v. Gavin* (1983), 10 C.C.C. (3d) 92 (B.C.C.A.).

By virtue of s. 572 this section applies to non-jury cases and a provincial court judge has power to take a view: *R. v. Prentice*, [1965] 4 C.C.C. 118, 47 C.R. 231, 52 W.W.R. 126 (B.C.C.A.).

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#### DISAGREEMENT OF JURY / Discretion not reviewable.

653. (1) Where the judge is satisfied that the jury is unable to agree on its verdict and that further detention of the jury would be useless, he may in his discretion discharge that jury and direct a new jury to be empanelled during the sittings of the court, or may adjourn the trial on such terms as justice may require.

(2) A discretion that is exercised under subsection (1) by a judge is not reviewable. R.S., c. C-34, s. 580.

#### CROSS-REFERENCES

Section 672 preserves the common law power of the court with respect to trials by jury and would permit the discharge of a jury for reasons other than the jury's inability to reach a verdict. Although the jury may be given permission to separate pursuant to s. 647 once they have retired to consider their verdict they must be sequestered. Section 644 provides for the discharge of a juror for cause. Under s. 654, the taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on a Sunday or on a holiday.

#### SYNOPSIS

If the trial judge is of the opinion that the jurors are unable to reach a unanimous verdict

(i.e., the jury is “hung”) he or she can declare a mistrial and discharge the jury or, alternatively, adjourn the trial. Where a mistrial occurs there will be a new trial (subsec. (1)).

The exercise of the discretion in this regard is not subject to an appeal (subsec. (2)).

## ANNOTATIONS

**Direction on right to disagree** – A trial judge is not obliged to tell the jury that they may disagree, and accordingly a direction that the verdict returned must be unanimous is not improper, this is particularly so where the trial judge then continued on to tell the jury that they will be “attempting to reach a verdict”: *Harrison v. The Queen* (1974), 18 C.C.C. (2d) 129, 27 C.R.N.S. 294 (6:3) (S.C.C.).

Where a member of the jury might have reasonably concluded from the Judge's charge that they cannot disagree a new trial will be ordered: *R. v. Davidson* (1975), 24 C.C.C. (2d) 161 (Ont. C.A.).

In *R. v. Wedge and Three Others* (1973), 14 C.C.C. (2d) 490, 25 C.R.N.S. 209 (Man. C.A.) the Court did not find that a particular direction had the effect of leaving the jury with the impression that they must agree. However, the Court suggested that the following direction be given: “To render a verdict, you must be unanimous. This does not mean that you must bring in a verdict, juries cannot always agree, but if you do bring in a verdict, it must be the verdict of all of you.”

**Exhortation to reach verdict** – In *R. v. Palmer*, [1970] 3 C.C.C. 402, 9 C.R.N.S. 342 (B.C.C.A.) it was held that the trial judge's exhortation for unanimity must be examined very carefully, particularly where it is followed shortly by a guilty verdict. The Court adopted with approval the general principles stated by Lord Denning in his address in *Shoukatallie v. The Queen*, [1962] A.C. 81, at pp. 90-1, [1961] 3 All E.R. 996 (P.C.).

In exhorting a jury to endeavour to reach a verdict the trial Judge must avoid language that is coercive and which constitutes an interference with the jury's right to deliberate uninfluenced by extraneous pressures and which may convey to a juror that despite his genuine doubts he is entitled to give way and agree with the majority: *R. v. Littlejohn and Tirabasso* (1978), 41 C.C.C. (2d) 161 (Ont. C.A.).

While it is quite proper for a trial judge to exhort a jury to attempt to reach a verdict, the exhortation must not be given in such a way as to tempt a juror to abandon an honestly-held view of the evidence in favour of extraneous concerns. Where a jury indicates that it is deadlocked, there is a very delicate situation and no member of the jury should be encouraged to avoid the oath which is solely to bring in an honest verdict according to the evidence. The trial judge gave an improper exhortation where he used words capable of inducing sympathy for the accused and his wife and, thus, encouraging a decision on grounds other than the evidence. The words used by the trial judge might also be viewed as a vote by the trial judge for the accused. References to the cost and inconvenience to the community should also be avoided: *R. v. Alkerton* (1992), 72 C.C.C. (3d) 184 (Ont. C.A.).

A trial judge ought not to offer his or her opinion on the facts to a deadlocked jury, in the course of an exhortation, except to the extent that the jury has indicated the need for assistance on some particular point. The purpose of the exhortation is to impress on the jury the need to listen to each other and consider each other's views in order to avoid a disagreement, but is not to suggest to the jury that one view of the evidence may be preferable to another, or that a particular inference should be drawn: *R. v. Sims* (1992), 75 C.C.C. (3d) 278, [1992] 2 S.C.R. 858, 15 C.R. (4th) 279.

**Polling jury** – There is no legal requirement that the jury be polled after it has rendered its verdict but a request to poll is usually granted where doubt as to unanimity appears to exist: *Laforet v. The Queen* (1979), 50 C.C.C. (2d) 1, 105 D.L.R. (3d) 1 (S.C.C.) (5:2).

**Ambiguous verdict** – On the return of the jury, if a clear and unambiguous verdict is given, it is the duty of the trial judge to accept the verdict and, in accordance with the



practice of his court, cause it to become a part of the record of the court. Where the verdict is one of acquittal, the prisoner is entitled to an immediate discharge unless subject to continued lawful detention for some other reason. Where, however, there is ambiguity in the verdict or where there is reason to doubt that the verdict is unanimous, the trial judge should inquire into the matter to ascertain the true position and where necessary he should give such further directions as may be required and allow further deliberation by the jury to satisfy himself that any verdict given will indeed be unanimous, complete and expressive of the actual findings of the jury. The judge has a discretion in such a case to accept a substituted or second verdict for the first one returned. This discretion, however, is one which must be exercised during the course of the trial in the presence of the accused and his counsel, and prior to the dissolution of the court by the discharge of the jury. It will be too late to make inquiries relating to the true nature of the verdict when the jury is discharged and the court created for the trial of the accused has dissolved. Once the accused and the jury have been discharged the court is wholly functus: *Head v. The Queen* (1986), 30 C.C.C. (3d) 481, 55 C.R. (3d) 1, [1986] 2 S.C.R. 684 (7:0).

Upon receipt of a verdict of “guilty with a plea of leniency on account of conflicting evidence” the trial Judge acted correctly by recharging on the doctrine of reasonable doubt and sending the jury out to reconsider its verdict: *R. v. Goforth* (1974), 19 C.C.C. (2d) 88, [1974] 6 W.W.R. 119 (2:1) (Sask.C.A.).

**Use of “verdict sheet”** – There is no objection to use of a “verdict sheet” which sets out the different verdicts available. The sheet must not, however, require the jury to give particulars as to the offences of which they found the accused guilty, as in the case of sexual assault causing bodily harm, of what the assault consisted. Members of the jury must be unanimous in their verdict but may arrive at their verdict for different reasons and on separate evidential bases: *R. v. Tuckey, Baynham and Walsh* (1985), 20 C.C.C. (3d) 502, 46 C.R. (3d) 97 (Ont. C.A.).

**Constitutional considerations respecting mistrial** – After a mistrial the judge may adjourn the case to the next jury sittings. Where the jurors are unable to agree and the jury is discharged the accused has not been “finally acquitted” within the meaning of s. 11(h) of the Canadian Charter of Rights and Freedoms so as to prevent his retrial on the same offence: *R. v. Misra* (1985), 18 C.C.C. (3d) 134, 44 C.R. (3d) 179 (Sask. Q.B.).

While a third trial (after juries were unable to agree on two prior occasions) may stretch the limits of the community’s sense of fair play it does not of itself exceed them so as to constitute an abuse of process: *R. v. Keyowski* (1988), 40 C.C.C. (3d) 481, [1988] 4 W.W.R. 97, [1988] 1 S.C.R. 657, 62 C.R. (3d) 349 (7:0).

At common law, the power of the trial judge to discharge the jury is discretionary and whether his discretion to discharge the jury was exercised properly or improperly was not subject to review, and the improper exercise of his discretion in discharging the jury did not bar a second trial. However, notwithstanding these common law limitations, the propriety of a decision to declare a mistrial is subject to scrutiny under the Charter of Rights and Freedom where a second trial, after the improper termination of the first trial, would contravene the principles of fundamental justice as guaranteed under s. 7 of the Charter. For example, if upon a breakdown of the Crown’s case, a judge were to declare a mistrial in order to give the prosecution an opportunity to strengthen its case against the accused by attempting to find additional witnesses thereby depriving the accused of an acquittal where the Crown’s initial preparation had been negligent, a second trial in those circumstances would contravene the principles of fundamental justice: *R. v. D. (T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.).

#### PROCEEDING ON SUNDAY, ETC., NOT INVALID.

**654.** The taking of the verdict of a jury and any proceeding incidental thereto is not invalid by reason only that it is done on Sunday or on a holiday. R.S., c. C-34, s. 581.

**CROSS-REFERENCES**

The term "holiday" is defined in s. 35 of the Interpretation Act, R.S.C. 1985, c. I-21. Where the jury is unable to agree on its verdict then it may be discharged pursuant to s. 653.

**ANNOTATIONS**

In *Kinch v. The Queen* (1961), 131 C.C.C.342, it was held that Easter Monday, although included in the definition of "holiday" in the Interpretation Acts of Canada and of P.E.I. is not *dies non juridicus*. A plea, conviction and sentence are not invalid because they took place on that day. *Ex p. Cormier* (1907), 12 C.C.C.339, followed.

The jury being permitted to continue its deliberations on Sunday is also entitled to be assisted by having evidence read back. The whole of this process is incidental to the taking of the verdict: *R. v. Baillie* (1991), 66 C.C.C. (3d) 274 (B.C.C.A.).

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**Evidence on Trial**

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**ADMISSIONS AT TRIAL.**

**655. Where an accused is on trial for an indictable offence, he or his counsel may admit any fact alleged against him for the purpose of dispensing with proof thereof.** R.S., c. C-34, s. 582.

**CROSS-REFERENCES**

The term "counsel" is defined in s. 2.

**ANNOTATIONS**

**Admissions** – In *Castellani v. The Queen*, [1970] 4 C.C.C. 287, 9 C.R.N.S. 111 (9:0) (S.C.C.), the purpose of this section was said to be to eliminate the necessity of proof by the Crown of any fact it desires to prove that the accused is prepared to admit and accordingly the accused cannot admit a fact until it is alleged against him by the Crown.

An agreed statement of facts should only be used where the facts are clearly agreed upon and if it becomes apparent during his testimony that the accused's evidence conflicts with the agreed statement of facts the trial Judge should require the Crown to call evidence on the points in issue: *R. v. Coburn* (1982), 66 C.C.C. (2d) 463, 27 C.R. (3d) 259 (Ont. C.A.).

A justice presiding at a preliminary hearing may admit a statement of facts agreed to by the Crown and defence. This statement constitutes evidence upon which the justice may base a decision as to order to stand trial: *Re Ulrich and The Queen* (1977), 38 C.C.C. (2d) 1, [1978] 1 W.W.R. 422 (Alta. S.C.T.D.).

**Necessity of *voir dire* to determine voluntariness of confession** – It was held in *R. v. Dietrich* (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22 (Ont. C.A.) that while this section was probably not authority for permitting the accused to waive a *voir dire* as to the voluntariness of a confession, such a right exists apart from any provision of the Criminal Code.

This approach was approved in *Park v. The Queen* (1981), 59 C.C.C. (2d) 385, 21 C.R. (3d) 182, [1981] 2 S.C.R. 64 (9:0) where the Court held that no particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial Judge be satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*. It is sufficient for counsel to indicate that no objection is taken to admission of the statement without a *voir dire*, or that voluntariness is not in issue.

In *Powell v. The Queen* (1976), 28 C.C.C. (2d) 148, 66 D.L.R. (3d) 443, [1977] 1 S.C.R. 362 (9:0) the Court held that a *voir dire* as to the admissibility of a confession is required even on a trial by a Judge alone.

In *Erven v. The Queen* (1978), 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, 6 C.R. (3d) 97

(S.C.C.) (6:3) Dickson, J., for the plurality held that there is no exception from the rule requiring the holding of a *voir dire* on the basis that the statement is “obviously volunteered” to the person in authority.

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#### EVIDENCE OF STEALING ORES OR MINERALS.

**656.** In any proceeding in respect of theft of ores or minerals, the possession, contrary to any law in that behalf, of smelted gold or silver, gold-bearing quartz, or unsmelted or unmanufactured gold or silver, by an operator, workman or labourer actively engaged in or on a mine, is, in the absence of any evidence to the contrary, proof that the gold, silver or quartz was stolen by him. R.S., c. C-34, s. 583.

#### CROSS-REFERENCES

The general theft offence is defined in s. 322. Note, however, the exemption in s. 333 for the taking of specimens for the purpose of exploration or scientific investigation. Other offences in relation to minerals and mines are found in ss. 394 and 396.

#### SYNOPSIS

This section establishes a presumption in trials for theft of precious minerals. Unlawful possession of gold, silver or gold- or silver-bearing material by a person actively employed in a mine is rebuttable proof that such person stole the material.

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#### USE IN EVIDENCE OF STATEMENT BY ACCUSED.

**657.** A statement made by an accused under subsection 541(3) and purporting to be signed by the justice before whom it was made may be given in evidence against the accused at his or her trial without proof of the signature of the justice, unless it is proved that the justice by whom the statement purports to be signed did not sign it. R.S., c. C-34, s. 584; 1994, c. 44, s. 62.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2. Section 541(2) refers to the statement made by an accused after he was warned at the conclusion of the evidence adduced by the prosecutor at his preliminary inquiry. It may be that this section must now be read in light of s. 13 of the Charter.

#### SYNOPSIS

A statement made by an accused at a preliminary inquiry (see s. 541) may be tendered in evidence by the Crown at trial if signed by the justice of the peace or provincial court judge before whom it was made. The signature need not be proved, but it may be proved to be false.

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#### PROOF OF OWNERSHIP AND VALUE OF PROPERTY / Statements to be made / Notice of intention to produce affidavit or solemn declaration / Attendance for examination.

**657.1. (1)** In any proceedings, an affidavit or a solemn declaration of a person who claims to be the lawful owner of, or the person lawfully entitled to possession of, property that was the subject-matter of the offence, or any other person who has specialized knowledge of the property or of that type of property, containing the statements referred to in subsection (2), shall be admissible in evidence and, in the absence of evidence to the contrary, is evidence of the statements contained in the affidavit or solemn declaration without proof of the signature of the person appearing to have signed the affidavit or solemn declaration.

**(2)** For the purposes of subsection (1), a person shall state in an affidavit or a solemn declaration



- (a) that the person is the lawful owner of, or is lawfully entitled to possession of, the property, or otherwise has specialized knowledge of the property or of property of the same type as the property;
  - (b) the value of the property;
  - (c) in the case of a person who is the lawful owner of or is lawfully entitled to possession of the property, that the person has been deprived of the property by fraudulent means or otherwise without the lawful consent of the person; and
  - (d) any facts within the personal knowledge of the person relied on to justify the statements referred to in paragraphs (a) to (c).
- (3) Unless the court orders otherwise, no affidavit or solemn declaration shall be received in evidence pursuant to subsection (1) unless the prosecutor has, before the trial or other proceeding, given to the accused a copy of the affidavit or solemn declaration and reasonable notice of intention to produce it in evidence.
- (4) Notwithstanding subsection (1), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of any of the statements contained in the affidavit or solemn declaration. R.S.C. 1985, c. 23 (4th Supp.), s. 3.

#### CROSS-REFERENCES

Note s. 4(6) which provides for proof of service by way of affidavit or solemn declaration. Also note s. 491.2 which provides for the admissibility of photographic evidence of property that would otherwise be required to be produced for the purposes of a preliminary inquiry, trial or other proceedings.

#### SYNOPSIS

The purpose of this section is to obviate the need for the Crown to call *viva voce* evidence to prove ownership and value of property.

Proof of such matters may be given by way of affidavit or declaration wherein the affiant/declarant states: (a) that he or she is the lawful owner of the property or the person entitled to possession; (b) the value of the property; and (c) how the person was deprived of the property (subsec. (2)).

The Crown must give the accused a copy of the document and reasonable notice of its intention to tender it. The court can order the affiant/declarant to attend for cross-examination (subsecs. (3), (4)).

## Children and Young Persons

### TESTIMONY AS TO DATE OF BIRTH / Testimony of a parent / Proof of age / Other evidence / Inference from appearance.

658. (1) In any proceedings to which this Act applies, the testimony of a person as to the date of his or her birth is admissible as evidence of that date.
- (2) In any proceedings to which this Act applies, the testimony of a parent as to the age of a person of whom he or she is a parent is admissible as evidence of the age of that person.
- (3) In any proceedings to which this Act applies,
- (a) a birth or baptismal certificate or a copy of such a certificate purporting to be certified under the hand of the person in whose custody the certificate is held is evidence of the age of that person; and
  - (b) an entry or record of an incorporated society or its officers who have had the

control or care of a child or young person at or about the time the child or young person was brought to Canada is evidence of the age of the child or young person if the entry or record was made before the time when the offence is alleged to have been committed.

(4) In the absence of any certificate, copy, entry or record mentioned in subsection (3), or in corroboration of any such certificate, copy, entry or record, a jury, judge, justice or provincial court judge, as the case may be, may receive and act on any other information relating to age that they consider reliable.

(5) In the absence of other evidence, or by way of corroboration of other evidence, a jury, judge, justice or provincial court judge, as the case may be, may infer the age of a child or young person from his or her appearance. R.S., c. C-34, s. 585; 1994, c. 44, s. 64.

#### CROSS-REFERENCES

Age is determined in accordance with s. 30 of the Interpretation Act, R.S.C. 1985, c. I-21. As to the taking of evidence of children, see s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5.

#### SYNOPSIS

This section deals with some of the methods by which the age of a person may be proven and most conveniently allows the witness to testify to his or her own age, although technically that evidence would be hearsay.

Where an incorporated society was involved in the child's immigration to Canada and had custody or care of the child, a record of the society made before the commission of the alleged offence is receivable as to the child's age (subsec. (2)(b)).

In the absence of any other evidence, either direct or corroborative, the court may infer the age of a child from his or her appearance (subsec. (5)).

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659. (old provision) [*Repealed*. R.S.C. 1985, c. 19 (3rd Supp.), s. 15.]

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### *Corroboration*

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#### CHILDREN'S EVIDENCE.

659. Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated. 1993, c. 45, s. 9.

#### SYNOPSIS

Prior to recent decisions of the Supreme Court of Canada [see notes under s. 150.1] there was some common law authority requiring the trial judge to warn the jury as to the danger of convicting the accused on the evidence of a child. Any such *mandatory* rules are now abrogated.

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### *Verdicts*

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#### FULL OFFENCE CHARGED, ATTEMPT PROVED.

660. Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt. R.S., c. C-34, s. 587.

**CROSS-REFERENCES**

The definition of attempt is found in s. 24. For most offences, the attempt to commit an offence is punished in accordance with s. 463. However, attempted murder, for example, is punished under s. 239. Section 661 provides for the case where an attempt to commit an offence is charged by the evidence discloses the commission of the complete offence. With respect to other included offences, see s. 662.

**SYNOPSIS**

This section provides that in a trial for a complete offence, proof only of an attempt can result in a conviction for an attempt.

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**ATTEMPT CHARGED, FULL OFFENCE PROVED / Conviction a bar.**

**661. (1)** Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

**(2)** An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit. R.S., c. C-34, s. 588.

**CROSS-REFERENCES**

Attempt to commit an offence is defined in s. 24. The general provisions respecting the pleas of *autrefois convict* are found in ss. 607 to 610.

**SYNOPSIS**

Where the accused has been charged with an attempt, but the Crown proves the full offence, the trial judge can direct that there be a trial for the full offence or record the conviction for the attempt (subsec. (1)).

If the accused is convicted of an attempt he or she cannot subsequently be charged with the full offence (subsec. (2)).

**ANNOTATIONS**

This section also applies to a judge or provincial court judge sitting without a jury: *R. v. Doiron* (1960), 129 C.C.C.283, 34 C.R.188 (B.C.C.A.).

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**OFFENCE CHARGED, PART ONLY PROVED / First degree murder charged / Conviction for infanticide or manslaughter on charge of murder / Conviction for concealing body of child where murder or infanticide charged / Conviction for dangerous driving where manslaughter charged / Conviction for break and enter with intent.**

**662. (1)** A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

- (a) of an offence so included that is proved, notwithstanding that the whole offence that is charged is not proved; or
- (b) of an attempt to commit an offence so included.

**(2)** For greater certainty and without limiting the generality of subsection (1), where a count charges first degree murder and the evidence does not prove first degree murder but proves second degree murder or an attempt to commit second degree murder, the jury may find the accused not guilty of first degree murder but guilty of sec-



ond degree murder or an attempt to commit second degree murder, as the case may be.

(3) Subject to subsection (4), where a count charges murder and the evidence proves manslaughter or infanticide but does not prove murder, the jury may find the accused not guilty of murder but guilty of manslaughter or infanticide, but shall not on that count find the accused guilty of any other offence.

(4) Where a count charges the murder of a child or infanticide and the evidence proves the commission of an offence under section 243 but does not prove murder or infanticide, the jury may find the accused not guilty of murder or infanticide, as the case may be, but guilty of an offence under section 243.

(5) For greater certainty, where a count charges an offence under section 220, 221 or 236 arising out of the operation of a motor vehicle or the navigation or operation of a vessel or aircraft, and the evidence does not prove such offence but does prove an offence under section 249, the accused may be convicted of an offence under section 249.

(6) Where a count charges an offence under paragraph 348(1)(b) and the evidence does not prove such offence but does prove an offence under paragraph 348(1)(a), the accused may be convicted of an offence under paragraph 348(1)(a). R.S., c. C-34, s. 589; 1973-74, c. 38, s. 6; 1974-75-76, c. 105, s. 11; R.S.C. 1985, c. 27 (1st Supp.), s. 134.

#### CROSS-REFERENCES

The term “indictment” is defined in s. 2. The offence of murder is defined in ss. 229 and 231. The offence of infanticide is defined in s. 233, although see s. 663 which enacts special rules where an accused is charged with infanticide but the evidence does not prove that offence.

#### SYNOPSIS

This section deals with situations where an accused may be convicted on less than the full offence charged. Subsection (1) provides that if the full offence is not proven the accused may still be found guilty of a lesser included offence or an attempt to commit the full offence.

For greater certainty murder is partially dealt with in subsec. (2). An accused charged with first degree murder may be convicted of second degree murder or an attempt to commit second degree murder.

Subsection (3) provides that on a charge of murder the accused may be convicted of manslaughter or infanticide. Where the victim is a child, and the charge is murder or infanticide, it is open to the trier of fact to convict of the offence of concealing the body of a child (see s. 243) (subsec. (4)).

For greater certainty, subsec. (5) provides that where the charge is criminal negligence causing death (see s. 220), criminal negligence causing bodily harm (see s. 221) or manslaughter (see s. 236) arising out of the operation of a motor vehicle, vessel or aircraft, the accused may be convicted of dangerous operation of a motor vehicle, etc. (see s. 249).

By reason of subsec. (6) it is open to convict a person of breaking and entering with intent to commit an indictable offence (see s. 348(1)(a)) on a charge of breaking and entering and committing an indictable offence (see s. 348(1)(a)).

#### ANNOTATIONS

**Definition of included offence** – Where all the elements of an included offence are contained in the count in the indictment charging the greater offence, and the included offence is a part of the same transaction as the alleged greater offence, then a conviction

may be found for the included offence: *R. v. Ovcarić* (1973), 11 C.C.C. (2d) 565, 22 C.R.N.S. 26 (Ont. C.A.).

An included offence is one that an accused committed in the commission of the offence charged: *R. v. Foote* (1974), 16 C.C.C. (2d) 44 (N.B.S.C.App.Div.).

It was held in *R. v. McDowell* (1976), 32 C.C.C. (2d) 309, [1977] 1 W.W.R. 97 (Alta. S.C. App. Div.) that there are three ways in which an offence may be included in another:

1. Where the Code prescribes that certain offences are included offences such as in subsecs. (2) to (6) of this section.
2. Where the description of the offence as described in the enactment creating it includes the commission of that other offence as provided by this subsection.
3. Where the description of the offence as charged in the count includes the commission of another offence.

To come within the words "as described in the enactment creating it" the lesser offence must be included in the offence charged as described in the enactment, albeit not in all the subsections and it is sufficient if the other offence is included in the enactment creating it. Thus on a charge that the accused "did commit robbery" common assault is an included offence since it is a lesser offence in at least one, albeit not all, the descriptions of the offence of robbery under s. 343: *Luckett v. The Queen* (1980), 50 C.C.C. (2d) 489, 105 D.L.R. (3d) 577, [1980] 1 S.C.R. 1140 (7:0).

It was held in *Fergusson v. The Queen* (1961), 132 C.C.C. 112, [1962] S.C.R. 229, 36 C.R. 271 that:

The count must therefore include but not necessarily mention the commission of another offence, but the latter must be a lesser offence than the offence charged. The expression "lesser offence" is a "part of an offence" which is charged, and it must necessarily include some elements of the "major offence", but be lacking in some of the essentials, without which the major offence would be incomplete. . .

In *R. v. Simpson (No. 2)* (1981), 58 C.C.C. (2d) 122, 20 C.R. (3d) 36 (Ont. C.A.) the Court considered *Luckett v. The Queen*, *supra*, but held that a charge in an indictment simply that the accused "did attempt to cause the death of [the victim] and did thereby attempt to commit murder, contrary to s. 222" did not include the offences of causing bodily harm with intent to wound, assault causing bodily harm or unlawfully causing bodily harm. Such an indictment does not charge any of these offences as included offences and s. 222 [now s. 239] either alone or read with ss. 24, 222, 229 or 230 does not describe the various ways in which attempted murder can be committed so as to include these ways as included offences within the meaning of this subsection.

For an offence to be included by the addition of apt words of description to the principal charge the charge must be so worded that the accused is afforded reasonable notice of the offence or offences alleged to be included in the principal offence charged. Moreover, the offence must be one which is properly included in the count: *R. v. Harmer and Miller* (1976), 33 C.C.C. (2d) 17, 75 D.L.R. (3d) 20 (Ont. C.A.). In this case on a charge of robbery in that the accused did steal and at the same time used violence which caused bodily harm to the victim the offence of assault causing bodily harm was an included offence.

**Application of provision** – In *Rickard v. The Queen* (1970), 1 C.C.C. (2d) 153, 12 C.R.N.S.172 (S.C.C.), both the majority and the minority held that subsec. (5) is also applicable to proceedings by way of summary conviction.

**Duty to direct jury on included offences** – In *R. v. Longson* (1976), 31 C.C.C. (2d) 421, [1976] 6 W.W.R. 534 (B.C.C.A.) it was held that where there is evidence upon which a jury could convict of an included offence the Judge is under a duty to properly instruct the jury on that included offence. A conviction for attempted murder was set aside and a new trial ordered where the Judge failed to instruct the jury on the included offences of discharging a firearm with intent to wound or endanger life contrary to s. 244(a) and (b) and dangerous use of a firearm contrary to the former s. 86 (b). In this case the indict-

ment charged that the accused “did attempt to murder [the victim] by discharging a firearm at him”.

A trial Judge does not have an untrammelled discretion to decide whether or not to charge the jury on included offences. He must be governed by the issues raised in the evidence: *Smith v. The Queen* (1978), 43 C.C.C. (2d) 417, 91 D.L.R. (3d) 1, [1979] 1 S.C.R. 215 (9:0).

**Included offences in murder case** – The mere verdict of “guilty of manslaughter” is not in accordance with subsec. (2): *R. v. Vincent* (1957), 119 C.C.C. 188, [1957] O.W.N. 577 (C.A.).

It would appear that the accused may properly apply at the close of the Crown’s case for a directed verdict of acquittal on the charge of first degree murder, where for example there is no evidence of planning and deliberation, with the case then proceeding on the charge of second degree murder: *Titus v. The Queen* (1983), 2 C.C.C. (3d) 321, 144 D.L.R. (3d) 577 (S.C.C.) (7:0); *R. v. Talbot* (No. 3) (1977), 38 C.C.C. (2d) 562 (Ont. H.C.J.). *Contra*: *R. v. Andrews, Elton and Van Amerongen* (1979), 8 C.R. (3d) 1 (B.C.C.A.).

The words of subsec. (3) are clear and unambiguous and on a trial on a charge of murder the Court may not return a verdict such as assault causing bodily harm: *R. v. Chichak* (1978), 38 C.C.C. (2d) 489 (Alta. S.C. App. Div.). *Contra*, *R. v. Sandhu et al.* (1973), 29 C.R.N.S. 126, [1975] 1 W.W.R. 204 (B.C.S.C.).

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#### NO ACQUITTAL UNLESS ACT OR OMISSION NOT WILFUL.

**663.** Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,

- (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and
- (b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,

she may be convicted unless the evidence establishes that the act or omission was not wilful. R.S., c. C-34, s. 590.

#### CROSS-REFERENCES

The offence of infanticide is defined in s. 233 and punished pursuant to s. 237. As to cause of death, see the notes under s. 233.

#### SYNOPSIS

This section states that a female accused may be convicted of infanticide (see s. 233) if the evidence *establishes* that she caused the death of her child and if both elements of the defence outlined in s. 233 are not made out. The accused must not have recovered from the effects of giving birth or consequent lactation, and must have been of disturbed mind due to these effects at the time the infant was killed. However, it is still a defence that the killing was not wilful. In effect, the section prevents acquittal of the accused of infanticide, because she had a greater *mens rea* than that prescribed by s. 233.

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### Previous Convictions

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#### NO REFERENCE TO PREVIOUS CONVICTION.

**664.** No indictment in respect of an offence for which, by reason of previous convic-



tions, a greater punishment may be imposed shall contain any reference to previous convictions. R.S., c. C-34, s. 591.

#### CROSS-REFERENCES

The term "indictment" is defined in s. 2. Section 665 sets out the procedure where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions. Section 667 provides a method of proving the prior conviction.

#### SYNOPSIS

Certain offences (such as impaired operation, s. 255) carry a greater minimum or maximum penalty, if the accused has previously been convicted of the same (or sometimes a related) offence. This section provides, however, that there shall be no reference to such previous convictions in the information or indictment.

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#### PREVIOUS CONVICTION / Procedure / Where hearing *ex parte* / Corporations / Section does not apply.

665. (1) Subject to subsections (3) and (4), where an accused or a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on him by reason thereof unless the prosecutor satisfies the court that the accused or defendant, before making his plea, was notified that a greater punishment would be sought by reason thereof.

(2) Where an accused or a defendant is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the accused or defendant was notified in accordance with subsection (1), ask the accused or defendant whether he was previously convicted and, if he does not admit that he was previously convicted, evidence of previous convictions may be adduced.

(3) Where a summary conviction court holds a trial pursuant to subsection 803(2) and convicts the defendant, the court may, whether or not the defendant was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the defendant and if any such conviction is proved may impose a greater punishment by reason thereof.

(4) Where, pursuant to section 623, the court proceeds with the trial of a corporation that has not appeared and pleaded and convicts the corporation, the court may, whether or not the corporation was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the corporation and if any such conviction is proved may impose a greater punishment by reason thereof.

(5) This section does not apply to a person referred to in paragraph 742(a.1). R.S., c. C-34, s. 592; R.S.C. 1985, c. 27 (1st Supp.), s. 135.

**NOTE:** Section 665 repealed 1995, c. 22, s. 3 (to come into force by order of the Governor in Council).

#### CROSS-REFERENCES

Section 667 provides a method of proof of a prior conviction. The reference in subsec. (5) to s. 742(a.1) is to an accused convicted of second degree murder where he has previously been convicted of culpable homicide that is murder. Section 742 sets the period of parole ineligibility for such person at 25 years. The reference in subsec. (3) to s. 803(2) is to the case where the defendant has been tried *ex parte* on a summary conviction offence. Reference in subsec. (4) to s. 623 is to the trial of a corporation which has failed to appear by counsel or agent.

## SYNOPSIS

This section deals with the procedures to be followed where the Crown seeks a higher range of sentence by reason of the accused's previous criminal record.

Except where a trial has proceeded *ex parte* (see subsecs. (3), (4)), no greater punishment can be imposed unless the Crown proves that it notified the accused of its intention to seek an increased sentence before the accused entered a plea (subsec. (1)). This is commonly referred to as giving notice of greater punishment.

If, having been duly notified, the accused does not admit the earlier convictions proof of the same may be given (subsec. (2)).

Notice is not required in cases where the sentence for second degree murder is increased as a result of an earlier murder conviction (see s. 742(a.1)).

## ANNOTATIONS

**Editor's Note:** Some of the following cases were decided in relation to former s. 740(1), now repealed. Those decisions are applicable to cases falling under this section which now applies to indictable and summary conviction proceedings.

**Procedure** – The failure to carry out the requirements of this section in the order set out therein does not affect the validity of the sentence: *R. v. Langlois* (1991), 67 C.C.C. (3d) 375, 35 M.V.R. (2d) 71 (B.C.S.C.).

**When notice required** – This section also applies where the Crown seeks the longer fire-arms prohibition provided for in s. 100(1)(b) by reason of the accused's prior conviction for an offence involving violence: *R. v. Jobb* (1988), 43 C.C.C. (3d) 476, [1988] 6 W.W.R. 268 (Sask. C.A.).

**Sufficiency of notice** – Since subsec. (1) does not specify written notice, verbal notice may be given: *R. v. Bolley*, [1966] 3 C.C.C. 57, 47 C.R. 247 *sub nom. R. ex rel. Perry v. Bolley* (B.C.S.C.); *R. v. Collini* (1979), 3 M.V.R. 218 (Ont. H.C.J.).

The accused is not entitled to "reasonable" notice of the Crown's intention to seek a higher penalty and thus notification the morning of the accused's trial is scheduled to commence is sufficient. If the accused has been prejudiced by the short notice he may apply for an adjournment: *R. v. Boufford* (1988), 46 C.C.C. (3d) 116, 13 M.V.R. (2d) 89 (Ont. Dist. Ct.).

As long as the error in it did not mislead or prejudice the defendant, a notice reasonably identifying the previous conviction and the Crown's intention is sufficient: *R. v. Reid*, [1970] 5 C.C.C. 368, 12 C.R.N.S. 112 (B.C.C.A.).

In *R. v. Thunderblanket* (1979), 2 Sask. R. 199, 5 M.V.R. 84 (C.A.), the Court held that a notice is valid although given to the accused prior to the charge being laid.

A notice to the effect that the Crown would seek a greater punishment by reason of a previous conviction or convictions without specifying the previous convictions intended to be proved is sufficient compliance with this section: *R. v. Pidlubny* (1973), 10 C.C.C. (2d) 178, 20 C.R.N.S. 310 (Ont. C.A.).

The notice of intent to seek greater punishment need not refer specifically to the offence for which the greater punishment would be sought: *R. v. Duncan* (1982), 1 C.C.C. (3d) 444, [1983] 1 W.W.R. 574 (B.C.C.A.).

Similarly, a notice which referred to the accused as having been convicted of "offence(s)" is sufficient. There is no requirement that the notice specify the number of convictions or whether the Crown intends to proceed by way of a second or third conviction: *R. v. Monk* (1981), 62 C.C.C. (2d) 6, 24 C.R. (3d) 183 (Ont. C.A.).

A notice which inaccurately refers to the accused as having been charged with several drinking and driving offences could not have prejudiced or misled the accused. Further, a notice need not specifically identify the offence with which the accused was charged, nor the alleged previous offences. Finally, the prosecution at the time of serving the notice need not have a reasonable belief that the accused has previous convictions: *R. v. Kelly* (1986), 40 M.V.R. 50 (N.B.Q.B.).

A notice which merely indicates that if he has previously been convicted the accused "may" receive a greater punishment does not comply with this section: *R. v. Riley* (1982), 69 C.C.C. (2d) 245, 38 O.R. (2d) 174 (H.C.J.).

There is no requirement that the nature or character of the greater punishment being sought be set out in the notice. Thus it is not necessary to set out that a jail term will be sought: *R. v. Bear* (1979), 47 C.C.C. (2d) 462, 2 Sask. R. 191 (C.A.).

This section and s. 667 constitute a complete code of procedure by which a greater punishment may be sought and there is no requirement that s. 28 of the Canada Evidence Act be complied with: *R. v. Jonasson* (1980), 56 C.C.C. (2d) 121, 5 Sask. R. 154 (C.A.).

**Sufficiency of service of notice** – The notice must be given to the accused personally and service of the notice on a member of the accused's family is not sufficient: *R. v. Boileau*; *R. v. Lepine* (1979), 50 C.C.C. (2d) 189 (Que. S.C.).

In *R. v. Godon* (1984), 12 C.C.C. (3d) 446, 33 Sask. R. 180 (C.A.) the court distinguished *R. v. Boileau*; *R. v. Lepine*, *supra*, and held that service on the accused's mother was sufficient as she had appeared as agent for the accused pursuant to s. 800(2).

However, it was held in *R. v. Fowler* (1982), 2 C.C.C. (3d) 227, 18 M.V.R. 101 (N.S.S.C. App. Div.) that this section does not require personal service and service on the accused's counsel was sufficient. Similarly: *R. v. Simms* (1986), 31 C.C.C. (3d) 350, 64 Nfld. & P.E.I.R. 360 (Nfld. C.A.).

**Effect of failure to give notice** – The trial judge is entitled to take into account the accused's previous record in determining the appropriate sentence even if notice has not been given pursuant to this section. The giving or not giving of notice merely fixes the bottom limit to the judge's power to sentence for an offence such as "over 80" which, as a result of s. 255, has a different minimum depending on the number of prior convictions. However, failure to give notice does not require that the accused be treated as a first offender: *R. v. Norris* (1988), 41 C.C.C. (3d) 441, 63 C.R. (3d) 200, [1988] 4 W.W.R. 63 (N.W.T.C.A.).

## EVIDENCE OF CHARACTER.

**666.** Where, at a trial, the accused adduces evidence of his good character, the prosecutor may, in answer thereto, before a verdict is returned, adduce evidence of the previous conviction of the accused for any offences, including any previous conviction by reason of which a greater punishment may be imposed. R.S., c. C-34, s. 593.

## CROSS-REFERENCES

The term "prosecutor" is defined in s. 2. Also note s. 12 of the Canada Evidence Act, R.S.C. 1985, c. C-5 which permits cross-examination of an accused on a prior criminal record. Section 667 provides a method of proof of a prior conviction.

## SYNOPSIS

This section permits the Crown to lead evidence as part of its case of the accused's criminal record where the accused has put his or her character in issue without.

## ANNOTATIONS

The evidence of good character is not some personal attributes of the accused brought out on cross-examination of a Crown witness but is an expression of the accused's reputation in the community: *R. v. Demyen* (No. 2) (1976), 31 C.C.C. (2d) 383, [1976] 5 W.W.R. 324 (Sask. C.A.).

This section lets in only evidence of previous convictions and does not deal with previous misconduct not resulting in convictions. Further, the evidence of good character must be adduced at trial and does not include a statement to the police: *R. v. Drysdale*, [1969] 2 C.C.C. 141, 66 W.W.R. 664 (Man. C.A.).



Whenever the accused puts his character in issue, it is open to the Crown to prove his bad character, *i.e.*, that his general reputation or moral disposition is bad. Resort to this section is not the only method open to the Crown to prove the accused's bad character but was enacted rather to avoid the rule that bad character cannot generally be proven by specific acts of misconduct. Where an accused in examination-in-chief testified that he had never been convicted nor arrested he put his character in issue: *Morris v. The Queen* (1978), 43 C.C.C. (2d) 129, 91 D.L.R. (3d) 161, [1979] 1 S.C.R. 405 (5:4).

An accused does not put his character in issue merely by denying his guilt and repudiating the allegations against him, nor by giving an explanation of matters which are essential to his defence. However, he may not, without putting his character in issue, assert expressly or implicitly that he would not have done the acts alleged against him because he is a person of good character. Thus an accused may during his own testimony put his character in issue. It is not merely by adducing evidence of general reputation that he does so. Evidence of good character may be rebutted by the Crown by extrinsic evidence of bad reputation, extrinsic evidence of similar facts and cross-examination of the accused as to specific past acts of disreputable conduct, subject to a possible discretion in the trial Judge to exclude cross-examination on acts which did not result in a conviction, were of little probative value or remote in time, and gravely prejudicial: *R. v. McNamara et al. (No. 1)* (1981), 56 C.C.C. (2d) 193 (Ont. C.A.), at pp. 342-54.

This section permits the Crown to lead evidence of convictions registered either before or after the incident giving rise to the charge upon which the accused is being tried provided that convictions after the incident relate to offences which are so closely related in time to the charge as to show his disposition at that time: *R. v. Close* (1982), 68 C.C.C. (2d) 105, 137 D.L.R. (3d) 655 (Ont. C.A.).

**PROOF OF PREVIOUS CONVICTION / Idem / Proof of identity / Attendance and right to cross-examine / Notice of intention to produce certificate / Definition of "fingerprint examiner".**

**667. (1) In any proceedings,**

- (a) a certificate setting out with reasonable particularity the conviction, discharge under section 736 or the conviction and sentence in Canada of an offender signed by
  - (i) the person who made the conviction or order for the discharge,
  - (ii) the clerk of the court in which the conviction or order for the discharge was made, or
  - (iii) a fingerprint examiner,
 is, on proof that the accused or defendant is the offender referred to in the certificate, evidence that the accused or defendant was so convicted, so discharged or so convicted and sentenced without proof of the signature or the official character of the person appearing to have signed the certificate;

**NOTE:** Subsection (1)(a) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

- (b) evidence that the fingerprints of the accused or defendant are the same as the fingerprints of the offender whose fingerprints are reproduced in or attached to a certificate issued under subparagraph (a)(iii) is, in the absence of evidence to the contrary, proof that the accused or defendant is the offender referred to in that certificate;
- (c) a certificate of a fingerprint examiner stating that he has compared the fingerprints reproduced in or attached to that certificate with the fingerprints reproduced in or attached to a certificate issued under subparagraph (a)(iii) and that they are those of the same person is evidence of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate; and

(d) a certificate under subparagraph (a)(iii) may be in Form 44, and a certificate under paragraph (c) may be in Form 45.

(2) In any proceedings, a copy of the summary conviction or discharge under section 736 in Canada of an offender, signed by the person who made the conviction or order for the discharge or by the clerk of the court in which the conviction or order for the discharge was made, is, on proof that the accused or defendant is the offender referred to in the copy of the summary conviction, evidence of the conviction or discharge under section 736 of the accused or defendant, without proof of the signature or the official character of the person appearing to have signed it.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the references to s. 736 with s. 730.

(2.1) In any summary conviction proceedings, where the name of a defendant is similar to the name of an offender referred to in a certificate made under subparagraph (1)(a)(i) or (ii) in respect of a summary conviction or referred to in a copy of a summary conviction mentioned in subsection (2), that similarity of name is, in the absence of evidence to the contrary, evidence that the defendant is the offender referred to in the certificate or the copy of the summary conviction.

(3) An accused against whom a certificate issued under subparagraph (1)(a)(iii) or paragraph (1)(c) is produced may, with leave of the court, require the attendance of the person who signed the certificate for the purposes of cross-examination.

(4) No certificate issued under subparagraph (1)(a)(iii) or paragraph (1)(c) shall be received in evidence unless the party intending to produce it has given to the accused reasonable notice of his intention together with a copy of the certificate.

(5) In this section, "fingerprint examiner" means a person designated as such for the purposes of this section by the Solicitor General of Canada. R.S., c. C-34, s. 594; 1972, c. 13, s. 51; R.S.C. 1985, c. 27 (1st Supp.), s. 136.

#### CROSS-REFERENCES

This section does not displace other means of proving previous convictions either by application of the common law or provisions of the Canada Evidence Act, R.S.C. 1985, c. C-5. Note s. 665 which requires that where an accused is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on him by reason thereof unless the prosecutor has given notice of intention to seek the greater punishment. Such notice is not, however, required in the case of an accused convicted of second degree murder who has previously been convicted of culpable homicide that is murder and who is sentenced in accordance with s. 742(a.1). Note s. 841(3) which provides that any pre-printed portions of forms must be in both official languages.

#### SYNOPSIS

This section deals with the methods available to prove a previous conviction.

Subsection (1)(a) provides for the issuance and admissibility of a certificate of conviction which may be signed by a judge, clerk of the court or a "fingerprint examiner" designated by the Solicitor General of Canada. In the absence of evidence to the contrary, evidence that the fingerprints of the accused are the same as those which form part of that certificate is evidence that the accused is the person referred to in the certificate (subsec. (1)(b)). A "fingerprint examiner" may also issue a certificate which links fingerprints attached to that certificate to those in the certificate of conviction (subsec. (1)(c)). The signature and official character of the person signing any of the above mentioned certificates is presumed and need not be proven (subsec. (1)(a), (c)).

With respect to summary conviction proceedings a copy of the summary conviction or discharge signed by either the judge or clerk of the court may be used to prove that the

accused has previously been convicted. The signature and official character of the person signing the document need not be proven (subsec. (2)).

In summary conviction proceedings similarity of name will be sufficient, in the absence of evidence to the contrary, to connect the accused to a judge's or clerk's certificate, or to the copy of a summary conviction (subsec. (2.1)). (**Note:** In many cases a person convicted of a summary conviction offence will not have been fingerprinted in connection with that matter.)

The court may grant leave to require the "fingerprint examiner" to attend for cross-examination (subsec. (3)).

The Crown must give an accused reasonable notice of its intention to produce the certificate of a "fingerprint examiner" together with a copy of the certificate (subsec. (4)).

## ANNOTATIONS

**Proof of previous conviction** – Since subsec. (1)(c) provides a convenient shortcut for the Crown its provisions must be strictly followed and accordingly a certificate referring to the section's previous number prior to the coming into force of R.S.C.1970, with no S.C. 1953-54 reference is inadmissible: *R. v. Gordon* (1972), 8 C.C.C. (2d) 132 (B.C.C.A.).

In view of the definition of "clerk of the court" in s. 2, there is no requirement that the person performing the duties of a clerk of the court has been appointed as such under the provincial legislation for that person to sign a copy of the summary conviction under subsec. (2): *R. v. Hughes* (1981), 60 C.C.C. (2d) 16, 31 Nfld. & P.E.I.R. 349 (P.E.I.S.C. *in banco*).

**Circumstances in which accused liable to greater penalty** – In the absence of explicit and unqualified language to the contrary the increased penalty for a subsequent offence may only be imposed where there was a prior conviction at the time the subsequent offence was committed. Thus the accused was not liable to the increased minimum penalty prescribed by s. 85(1)(d) in the case of a "second or subsequent offence" of using a firearm while committing an indictable offence where all offences were committed prior to the first conviction: *R. v. Cheetham* (1980), 53 C.C.C. (2d) 109, 17 C.R. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 33 N.R. 539n. Folld: *R. v. Oswald* (1981), 57 C.C.C. (2d) 484 (B.C.C.A.).

The same principle was applied in *R. v. Negridge* (1980), 54 C.C.C. (2d) 304, 17 C.R. (3d) 14 (Ont. C.A.) a case involving the drinking and driving provisions.

Similarly, the accused was not liable to the increased penalty for a third offence under s. 236(1)(c) [now s. 255(1)(a)(iii)] where his two prior convictions for the offences contrary to ss. 234 [now 253] and 235 [now 254] were registered on the same day. In such circumstances he has had only one "warning" and is therefore only liable to be sentenced for a second offence under s. 236(1)(b) [now s. 255(1)(a)(ii)]: *R. v. Skolnick* (1982), 68 C.C.C. (2d) 385, 29 C.R. (3d) 143, [1982] 2 S.C.R. 47 (9:0).

A copy of a previous conviction certified in accordance with this section is admissible without compliance with the notice provisions of s. 28 of the Canada Evidence Act: *R. v. Jonasson* (1980), 56 C.C.C. (2d) 121, 5 Sask. R. 154 (C.A.).

Since proof of prior convictions is part of the sentencing hearing, the common law rule which permits the admission of evidence, even hearsay evidence, which is credible and trustworthy at a sentence hearing applies. Thus an extract of a provincial driving record although hearsay would be admissible. However, if the accuracy of the certificate is seriously put in issue, then it would be incumbent upon the Crown to call whoever signed the certificate and make him available for cross-examination: *R. v. Albright* (1987), 37 C.C.C. (3d) 105, 60 C.R. (3d) 97, [1987] 2 S.C.R. 383 (5:0).

An admission by the accused during his testimony in the trial proper, as to his prior criminal record is proof of that record for the purposes of sentencing: *R. v. Protz* (1984), 13 C.C.C. (3d) 107, [1984] 5 W.W.R. 263, 27 M.V.R. 85 (Sask. C.A.).



Proof of previous conviction must establish that the conviction was in Canada: *R. v. Marois*, [1969] 4 C.C.C. 208, [1968] Que.Q.B. 797n, (Que. C.A.).

It is the number of previous convictions, and not the number of times that s. 665 has been resorted to by the Crown that will determine the minimum penalty: *R. v. Bohnet* (1976), 31 C.C.C. (2d) 253. [1976] 6 W.W.R. 176 (N.W.T.C.A.).

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## Sentence

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### ACCUSED FOUND GUILTY MAY SPEAK TO SENTENCE.

**668.** Where a jury finds an accused guilty, or where an accused pleads guilty, the judge presiding at the trial shall ask the accused whether he has anything to say before sentence is passed on him, but an omission to comply with this section does not affect the validity of the proceedings. **R.S., c. C-34, s. 595.**

**NOTE:** Section 668 repealed (with heading) by 1995, c. 22, s. 4 (to come into force by order of the Governor in Council).

#### CROSS-REFERENCES

Provision for taking a guilty plea is set out in s. 606. Imposition of sentence is generally in accordance with the provisions of Part XXIII. However, special provision is made for sentencing in case of dangerous offenders pursuant to the provisions of Part XXIV.

#### ANNOTATIONS

The deliberate refusal of a trial judge to comply with this section constitutes a violation of the accused's rights under s. 7 of the Charter. While the error does not invalidate the earlier proceedings leading to conviction, it is not a sufficient remedy on appeal to merely give the accused an opportunity to make the submissions that he would have made before the trial judge. Rather, the appellate court should reduce the length of what otherwise was a fit sentence: *R. v. Dennison* (1990), 60 C.C.C. (3d) 342, 80 C.R. (3d) 78 (N.B.C.A.).

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### SENTENCE JUSTIFIED BY ANY COUNT.

**669.** Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence. **R.S., c. C-34, s. 596.**

**NOTE:** Section 669 repealed by 1995, c. 22, s. 4 (to come into force by order of the Governor in Council).

#### CROSS-REFERENCES

Provisions respecting imposition of sentence are found in Part XXIII or exceptionally in the case of dangerous offenders in Part XXIV. Notwithstanding the provisions of this section, it is the general practice to impose sentence in respect of each count upon which the accused has been found guilty.

#### ANNOTATIONS

Although the imposition of a single sentence for two offences is permitted by this section it is preferable that one sentence be imposed for each conviction and the sentences may, of course, be made concurrent: *R. v. Thorpe* (1976), 32 C.C.C. (2d) 46 (Man. C.A.).

This section does not authorize the imposition of concurrent fines. A separate fine must be imposed with respect to each count: *R. v. Stubel* (1990), 25 M.V.R. (2d) 118 (Alta. C.A.).

## Jurisdiction

### JURISDICTION / Adjournment.

669.1 (1) Where any judge, court or provincial court judge by whom or which the plea of the accused or defendant to an offence was taken has not commenced to hear evidence, any judge, court or provincial court judge having jurisdiction to try the accused or defendant has jurisdiction for the purpose of the hearing and adjudication.

(2) Any court, judge or provincial court judge having jurisdiction to try an accused or a defendant, or any clerk or other proper officer of the court, or in the case of an offence punishable on summary conviction, any justice, may, at any time before or after the plea of the accused or defendant is taken, adjourn the proceedings. R.S.C. 1985, c. 27 (1st Supp.), s. 137.

### CROSS-REFERENCES

Where the trial has actually commenced with the taking of evidence but the judge has been unable to continue, see s. 669.2.

### SYNOPSIS

Provided that no evidence has been called the judge before whom the accused has entered a plea is not “seized” of the matter and, therefore, another member of that court has jurisdiction to hear and decide the case (*e.g.*, where the first judge is unavailable due to illness) (subsec. (1)).

Adjournments may be granted not only by a judge but also by the court clerk or other proper officer. Justices of the peace may adjourn summary conviction proceedings (subsec. (2)).

### ANNOTATIONS

This section does not apply so as to give a judge other than the trial judge jurisdiction to hear a pre-trial application for an order allowing a defence expert access to the breathalyzer machine and to analyze samples of the accused’s breath: *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 89 N.S.R. (2d) 253, 13 M.V.R. (2d) 1 (C.A.).

This section applies to proceedings on a guilty plea. However, the judge has “commenced to hear evidence” when she hears the Crown’s version of the facts prior to deciding whether or not to accept the plea and thus, absent the circumstances set out in s. 669.2, the judge who took the plea and heard the evidence must also impose the sentence: *R. v. Cataract* (1994), 93 C.C.C. (3d) 483, 35 C.R. (4th) 186 *sub nom.*, *Saskatchewan (Attorney General) v. Saskatchewan (Provincial Court Judge)*, 81 W.A.C. 196 (Sask. C.A.).

### CONTINUATION OF PROCEEDINGS / Where adjudication is made / Where no adjudication is made / Where no adjudication is made – jury trials / Where trial continued.

669.2 (1) Subject to this section, where an accused or a defendant is being tried by

(a) a judge or provincial court judge,

(b) a justice or other person who is, or is a member of, a summary conviction court, or

(c) a court composed of a judge and jury,

as the case may be, and the judge, provincial court judge, justice or other person dies or is for any reason unable to continue, the proceedings may be continued before another judge, provincial court judge, justice or other person, as the case may be, who has jurisdiction to try the accused or defendant.

(2) Where a verdict was rendered by a jury or an adjudication was made by a judge, provincial court judge, justice or other person before whom the trial was commenced, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, impose the punishment or make the order that is authorized by law in the circumstances.

(3) Subject to subsections (4) and (5), where the trial was commenced but no adjudication was made or verdict rendered, the judge, provincial court judge, justice or other person before whom the proceedings are continued shall, without further election by an accused, commence the trial again as if no evidence had been taken.

(4) Where a trial that is before a court composed of a judge and a jury was commenced but no adjudication was made or verdict rendered, the judge before whom the proceedings are continued may, without further election by an accused,

(a) continue the trial; or

(b) commence the trial again as if no evidence had been taken.

(5) Where a trial is continued under paragraph (4)(a), any evidence that was adduced before a judge referred to in paragraph (1)(c) is deemed to have been adduced before the judge before whom the trial is continued but, where the prosecutor and the accused so agree, any part of that evidence may be adduced again before the judge before whom the trial is continued. R.S.C. 1985, c. 27 (1st Supp.), s. 137; 1994, c. 44, s. 65.

#### CROSS-REFERENCES

Where the plea has been taken from the accused but the judge has not commenced to hear evidence than the provisions of s. 669.1 apply. As regards the preliminary inquiry, see s. 547.1

#### SYNOPSIS

This section deals with the continuation of proceedings where the trial judge dies or for any reason is unable to carry on with the proceedings.

Where a verdict has been rendered by a jury, or a finding of guilt has been made by a judge sitting alone, another judge may continue the proceedings and impose sentence (subsec. (2)).

If the trial has commenced but a verdict or decision has not yet been rendered, another judge may recommence the trial, without further election by the accused, as if no evidence had been taken (subsec. (3)). In essence, the original proceedings will be considered a mistrial. However, if the trial was a jury trial, the judge has the discretion to simply continue the trial.

#### ANNOTATIONS

**Editor's Note:** Some of the decisions noted below, although decided under the predecessor legislation, were felt to be relevant to these provisions.

Unless the situation falls precisely within one of the enumerated instances a judge has no jurisdiction after the commencement of trial to waive jurisdiction to another judge: *Re Ramsey and The Queen* (1972), 8 C.C.C. (2d) 188, 4 N.B.R. (2d) 809 (N.B.C.A.).

In the absence of provincial legislation, there being nothing in the Code covering the issue, once he has resigned, a County Court Judge has no power to impose sentence on an accused against whom a conviction was entered by his predecessor in office: *Ritcey et al. v. The Queen* (1980), 50 C.C.C. (2d) 481 (S.C.C.) (7:0).

**Procedure** – It was held, prior to the addition of subsecs. (4) and (5), that where subsec. (3) applies then, in the case of a jury trial, a new jury must be selected. Parliament could not have intended that the same jury would be required to rehear the same witnesses: *R. v. Pasini* (1991), 63 C.C.C. (3d) 436, 4 C.R. (4th) 188, [1991] R.J.Q. 669 (C.A.), affd 71 C.C.C. (3d) 573n (S.C.C.) (7:0).



**Jurisdiction to declare mistrial** [*Also see notes under s. 653*] – It would offend the principles of fundamental justice for a judge upon breakdown of the Crown’s case to declare a mistrial in order to give the prosecution an opportunity to strengthen its case against the accused by endeavouring to find additional evidence thereby depriving the accused of an acquittal: *R. v. D.(T.C.)* (1987), 38 C.C.C. (3d) 434 (Ont. C.A.).

A Judge sitting without a jury has jurisdiction to declare a mistrial. The power of a Judge to disqualify himself for good and sufficient reason is one which exists aside from this section: *R. v. Bucholz* (1976), 32 C.C.C. (2d) 331 (Ont. C.A.); *Re The Queen and Jassman* (1975), 27 C.C.C. (2d) 271 (B.C.S.C.). In both these cases the Courts refused to follow the case of *Re McRitchie and The Queen* (1974), 23 C.C.C. (2d) 255, [1975] 2 W.W.R. 383 (B.C.S.C.) which held that a Judge sitting alone has no power to declare a mistrial.

A provincial court judge who has made a finding of guilt still has power to declare a mistrial prior to imposition of sentence where he feels he must disqualify himself as where the police sent the judge certain information about the accused which was not disclosed to the defence and considered prejudicial: *Re R. and Bertucci* (1984), 11 C.C.C. (3d) 83, [1984] 2 W.W.R. 459 (Sask. C.A.).

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## JURISDICTION WHEN APPOINTMENT TO ANOTHER COURT.

**669.3.** Where a court composed of a judge and a jury, a judge or a provincial court judge is conducting a trial and the judge or provincial court judge is appointed to another court, he or she continues to have jurisdiction in respect of the trial until its completion. 1994, c. 44, s. 66.

## SYNOPSIS

This section confirms the jurisdiction of a judge who has been appointed to another court to complete any trial that the judge was presiding over.

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## Formal Defects in Jury Process

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### JUDGMENT NOT TO BE STAYED ON CERTAIN GROUNDS.

**670.** Judgment shall not be stayed or reversed after verdict on an indictment  
 (a) by reason of any irregularity in the summoning or empanelling of the jury; or  
 (b) for the reason that a person who served on the jury was not returned as a juror by a sheriff or other officer. R.S., c. C-34, s. 598.

## CROSS-REFERENCES

This section is one of several saving provisions respecting jury proceedings and thus, also see ss. 643(3), 671 and 672 and also consider the application of s. 686(1)(b)(iv).

## SYNOPSIS

This section provides that formal defects in jury proceedings on indictment shall not be grounds for overturning or staying judgment. The “formal defects” identified in this section are irregularities in summoning or empanelling the jury and the presence on the jury of a person not returned by an appropriate officer.

## ANNOTATIONS

Paragraph (a) of this section applies only to irregularities and has no application where the error is such that the accused has been deprived of a statutory right, or to an error depriving an accused of the right to a trial by a jury lawfully constituted. Thus it could not apply to a case where the trial judge, instead of following the procedure prescribed in s. 642 for summoning of *talesmen*, purported to continuously expand the jury panel by

adding additional members with the result that these potential jurors who were directed by the Crown to stand by were never called again to be sworn, unless challenged: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 112 (Ont. C.A.).

#### DIRECTIONS RESPECTING JURY OR JURORS DIRECTORY.

**671.** No omission to observe the directions contained in any Act with respect to the qualification, selection, balloting or distribution of jurors, the preparation of the jurors' book, the selecting of jury lists, or the drafting of panels from the jury lists, is a ground for impeaching or quashing a verdict rendered in criminal proceedings. R.S., c. C-34, s. 599.

#### CROSS-REFERENCES

See the notes following s. 670, *supra*.

#### SYNOPSIS

This section provides that a failure to observe statutory procedural directions regarding juries is not grounds for quashing a jury's verdict.

#### ANNOTATIONS

The presence of an exempt person on a jury is not a ground for disturbing its legal verdict: *R. v. Rushton* (1974), 20 C.C.C. (2d) 297, 28 C.R.N.S. 120 (Ont. C.A.).

This section was applied where the jury panel was selected from the municipal electoral list and not the provincial electoral list as required by the Jury Act, R.S.N.B. 1973, c. J-3. The qualifications for both lists were the same: *R. v. Arseneau* (1977), 36 C.C.C. (2d) 65, 17 N.B.R. (2d) 292 (S.C. App. Div.) applying *Reference re Regina v. Coffin* (1956), 114 C.C.C. 1, 33 C.R. 1, [1956] S.C.R. 191.

#### SAVING POWERS OF COURT.

**672.** Nothing in this Act alters, abridges or affects any power or authority that a court or judge had immediately before April 1, 1955, or any practice or form that existed immediately before April 1, 1955, with respect to trials by jury, jury process, juries or jurors, except where the power or authority, practice or form is expressly altered by or is inconsistent with this Act. R.S., c. C-34, s. 600.

#### CROSS-REFERENCES

Also note s. 8 which preserves the criminal law of England that was in force in the province immediately before April 1, 1955, except as altered, varied, modified or affected by this Act or an Act of Parliament. Section 8(3) also preserves common law justifications, excuses and defences. The common law authority of the court to punish for contempt of court is preserved by s. 9.

#### SYNOPSIS

This section preserves powers held by judges prior to April 1, 1955, with respect to juries, except as altered by or inconsistent with the current Criminal Code.

#### ANNOTATIONS

This section preserves the common law power of a court to arrest judgment and discharge the accused, as where following verdict and the discharge of the jury the trial judge discovers that the accused was found guilty of an offence not known to law at the time of the incident. In this case, through an error in the drafting of the indictment, the accused was found guilty of dangerous driving causing death arising out of an incident prior to the enactment of that offence in December, 1985: *R. v. Jacobson* (1988), 46 C.C.C. (3d) 50, [1989] 1 W.W.R. 541, 11 M.V.R. (2d) 194 (Sask. C.A.).

## Part XX.1 / MENTAL DISORDER

### *Transitional provision*

**Note:** 1991, c. 43, s. 10 in force, except subsec. (8), provides as follows with the unproclaimed text of subsec. (8) printed in *lightface italics*:

10. (1) Any order for the detention of an accused or accused person made under section 614, 615 or 617 of the *Criminal Code* or section 200 or 201 of the *National Defence Act*, as those sections read immediately before the coming into force of section 3 or 18 of this Act, shall continue in force until the coming into force of section 672.64 of the *Criminal Code*, subject to any order made by a court or Review Board under section 672.54 of the *Criminal Code*.

(2) The Review Board of a province shall, within twelve months after the coming into force of this section, review the case of every person detained in custody in the province by virtue of an order of detention referred to in subsection (1).

(3) Sections 672.5 to 672.85 of the *Criminal Code* apply, with such modifications as the circumstances require, to a review under subsection (2) as if

(a) the review were a review of a disposition conducted pursuant to section 672.81 of that Act;

(b) the warrant issued by the lieutenant governor pursuant to which the person is being detained in custody were a disposition made under section 672.54 of that Act;

(c) there were included in the definition “designated offence” in subsection 672.64(1) of that Act a reference to any offence under any Act of Parliament, as that Act read at the time of the commission of the alleged offence for which the person is in custody, involving violence or a threat of violence to a person or danger to the safety or security of the public, including, without limiting the generality of the foregoing, a reference to the following sections of the *Criminal Code*, as those sections read immediately before January 4, 1983, namely,

(i) section 144 (rape),

(ii) section 145 (attempt to commit rape),

(iii) section 149 (indecent assault on female),

(iv) section 156 (indecent assault on male),

(v) section 245 (common assault),

(vi) section 246 (assault with intent); and

(d) there were included in the offences mentioned in paragraph 672.64(3)(a) a reference to any of the following offences under any Act of Parliament, as that Act read at the time of the commission of the alleged offence for which the person is in custody, namely,

(i) murder punishable by death or punishable by imprisonment for life, capital murder, non-capital murder and any offence of murder, however it had been described or classified by the provisions of the *Criminal Code* that were in force at that time, and

(ii) any other offence under any Act of Parliament for which a minimum punishment of imprisonment for life had been prescribed by law.

(4) The Attorney General of Canada shall appoint a Commissioner from among the judges of superior courts of criminal jurisdiction to review and determine, before the coming into force of section 672.64 of the *Criminal Code*, whether any person detained in custody by virtue of an order of detention described in subsection (1) would have been a dangerous mentally disordered accused under section 672.65 of the *Criminal Code*, if that section were in force at the time the order of detention was made.

(5) Where an order of detention referred to in subsection (1) was issued against a person found not guilty by reason of insanity of an offence that is a designated offence as



defined in subsection 672.64(1) of the *Criminal Code* or that is included as a designated offence under paragraph (3)(c), the Attorney General of the province where the order was made, or of the province where the person is detained in custody, may apply to the Commissioner for review and determination of whether the person would be a dangerous mentally disordered accused.

(6) Sections 672.65 and 672.66 of the *Criminal Code* apply to an application made under subsection (5) with such modifications as the circumstances require, and

(a) in addition to the evidence described in paragraph 672.65(3)(a), the Commissioner shall consider any relevant evidence subsequent to the detention of the person in respect of whom the application is made; and

(b) where the Commissioner determines that the person would be a dangerous mentally disordered accused, the Commissioner may make an order that the person be detained in custody for a maximum of life.

(7) An order made by the Commissioner in respect of an application under this section shall have effect on the coming into force of section 672.64 of the *Criminal Code* and be subject to the rights of appeal described in sections 672.79 and 672.8 as if the order were an order of a court under section 672.65 of that Act.

(8) *Where, before the coming into force of section 5 of this Act, a person has committed an offence but a sentence has not been imposed on that person for that offence, that person may be detained in accordance with section 736.11 of the Criminal Code, as enacted by section 6 of this Act.*

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## **Interpretation**

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**DEFINITIONS** / "Accused" / "Assessment" / "Chairperson" / "Court" / "Disposition" / "Dual status offender" / "Hospital" / "Medical practitioner" / "Party" / "Placement decision" / "Prescribed" / "Review Board" / "Verdict of not criminally responsible on account of mental disorder".

### **672.1. In this Part,**

"accused" includes a defendant in summary conviction proceedings and an accused in respect of whom a verdict of not criminally responsible on account of mental disorder has been rendered;

"assessment" means an assessment by a medical practitioner of the mental condition of the accused pursuant to an assessment order made under section 672.11, and any incidental observation or examination of the accused;

"chairperson" includes any alternate that the chairperson of a Review Board may designate to act on the chairperson's behalf;

"court" includes a summary conviction court as defined in section 785, a judge, a justice and a judge of the court of appeal as defined in section 673;

"disposition" means an order made by a court or Review Board under section 672.54 or an order made by a court under section 672.58;

"dual status offender" means an offender who is subject to a sentence of imprisonment in respect of one offence and a custodial disposition under paragraph 672.54(c) in respect of another offence;

"hospital" means a place in a province that is designated by the Minister of Health for the province for the custody, treatment or assessment of an accused in respect of whom an assessment order, a disposition or a placement decision is made.

“medical practitioner” means a person who is entitled to practise medicine by the laws of a province;

“party” in relation to proceedings of a court or Review Board to make or review a disposition, means

- (a) the accused,
- (b) the person in charge of the hospital where the accused is detained or is to attend pursuant to an assessment order or a disposition,
- (c) an Attorney General designated by the court or Review Board under subsection 672.5(3),
- (d) any interested person designated by the court or Review Board under subsection 672.5(4), or
- (e) where the disposition is to be made by a court, the prosecutor of the charge against the accused;

“placement decision” means a decision by a Review Board under subsection 672.68(2) as to the place of custody of a dual status offender;

“prescribed” means prescribed by regulations made by the Governor in Council under section 672.95;

“Review Board” means the Review Board established or designated for a province pursuant to subsection 672.38(1);

“verdict of not criminally responsible on account of mental disorder” means a verdict that the accused committed the act or made the omission that formed the basis of the offence with which the accused is charged but is not criminally responsible on account of mental disorder. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

Reference should be had to the specific provisions of Part XX.1 of the Criminal Code. In particular, “electro-convulsive therapy” is defined in s. 672.61(2); “psychosurgery” is defined in s. 672.61(2); “protected statement” is defined in s. 672.21; and “Minister” is defined in s. 672.68(1).

Reference should also be made to s. 2 of the Criminal Code which includes definitions of “mental disorder” and “unfit to stand trial”.

## Assessment Orders

### ASSESSMENT ORDER.

672.11. A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

- (a) whether the accused is unfit to stand trial;
- (b) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);
- (c) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
- (d) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused; or
- (e) whether an order should be made under subsection 736.11(1) to detain the accused in a treatment facility, where the accused has been convicted of the offence. 1991, c. 43, s. 4.

**NOTE:** Paragraph (e) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736.11(1) with s. 747.1(1).

#### CROSS-REFERENCES

The terms “accused”, “assessment” and “verdict of not criminally responsible on account of insanity” are defined in s. 672.1. The terms “newly-born child”, “unfit to stand trial” and “mental disorder” are defined in s. 2. Paragraph (c) refers to the offence of infanticide, thus see s. 233. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

#### SYNOPSIS

The court is afforded a broad discretion to require an assessment of the accused’s mental condition where the court has jurisdiction over the accused in the course of a preliminary hearing, indictable trial, indictable appeal, summary conviction trial and summary conviction appeal.

An assessment order may be issued to determine: (1) fitness to stand trial; (2) exemption from criminal responsibility as a result of mental disorder; (3) mental condition with respect to infanticide; (4) the appropriate disposition where the accused is found unfit to stand trial or not criminally responsible on account of mental disorder; and (5) whether an order pursuant to s. 736.11(1) detaining the accused in a treatment facility subsequent to conviction is necessary.

Unlike the previous Criminal Code provisions, s. 672.11 does not require medical evidence in order to support the assessment order. An assessment order may be issued simply if the court has “reasonable ground to believe such evidence is necessary” to determine the aforementioned issues. Therefor, while medical evidence may be adduced, it would appear that the observations of the accused’s behavior by lay witnesses or the court would be sufficient to constitute reasonable grounds to require an assessment order.

#### ANNOTATIONS

This provision exhaustively sets out the circumstances in which a judge may make an assessment order. Inasmuch as s. 736.11 has not been proclaimed in force, the judge has no power to make an assessment order for the purposes of psychiatric assessment prior to sentencing. However, the judge may, in a proper case, resort to provincial legislation which permits a remand to a psychiatric facility to obtain a report as to the accused’s mental condition: *R. v. Snow* (1992), 76 C.C.C. (3d) 43, 10 O.R. (3d) 109 (Gen. Div.).

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#### **WHERE COURT MAY ORDER ASSESSMENT / Limitation on prosecutor’s application for assessment fitness / Limitation on prosecutor’s application for assessment.**

**672.12. (1)** The court may make an assessment order at any stage of proceedings against the accused of its own motion, on application of the accused or, subject to subsections (2) and (3), on application of the prosecutor.

**(2)** Where the prosecutor applies for an assessment in order to determine whether the accused is unfit to stand trial for an offence that is prosecuted by way of summary conviction, the court may only order the assessment if

- (a)** the accused raised the issue of fitness; or
- (b)** the prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.

**(3)** Where the prosecutor applies for an assessment in order to determine whether the accused was suffering from a mental disorder at the time of the offence so as to be exempt from criminal responsibility, the court may only order the assessment if

- (a)** the accused puts his or her mental capacity for criminal intent into issue; or
- (b)** the prosecutor satisfies the court that there are reasonable grounds to doubt



**that the accused is criminally responsible for the alleged offence, on account of mental disorder. 1991, c. 43, s. 4.**

#### CROSS-REFERENCES

The terms “accused”, “assessment”, “court” and “verdict of not criminally responsible on account of insanity” are defined in s. 672.1. The term “prosecutor” is defined in ss. 2 and 785; and “unfit to stand trial” and “mental disorder” are defined in s. 2. The assessment order is in Form 48, see s. 672.13. As to grounds for making the order, see s. 672.11 and for the length of time that order may be in force, see ss. 672.14 and 672.15. The assessment order may require that the accused also be detained pursuant to s. 672.16 in which case the accused is not eligible for bail, s. 672.17. The court has power to vary the terms of the detention or interim release order under s. 672.18 but no assessment order may direct that the accused submit to treatment, s. 672.19. The order may require that a report be submitted, s. 672.2. Statements made by accused for the purposes of preparation of an assessment report are admissible in limited circumstances referred to in s. 672.21.

#### SYNOPSIS

The court may make an assessment order at any stage of the proceedings either on its own motion or on the application of the accused or the prosecutor.

The provision restricts, however, the availability of the application to the Crown in the context of summary conviction proceedings. In a summary conviction offence, the prosecutor may not make an application for an assessment order relating to the issue of fitness unless the accused has raised the issue of fitness or the prosecutor establishes that there are reasonable grounds to doubt the accused’s fitness. There are no similar restrictions on the Crown raising the issue of fitness in the context of an indictable offence.

Where the issue of the accused’s exemption from criminal responsibility as a result of a mental disorder is raised either in the context of a summary or indictable offence, the Crown may raise the issue only if the accused puts their mental capacity for criminal intent into issue or reasonable grounds to question the accused’s responsibility as a result of a mental disorder are established.

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#### CONTENTS OF ASSESSMENT ORDER / Form.

##### **672.13. (1) An assessment order must specify**

- (a) the service that or the person who is to make the assessment, or the hospital where it is to be made;**
- (b) whether the accused is to be detained in custody while the order is in force; and**
- (c) the period that the order is to be in force, including the time required for the assessment and for the accused to travel to and from the place where the assessment is to be made.**

##### **(2) An assessment order may be in Form 48. 1991, c. 43, s. 4.**

#### CROSS-REFERENCES

The terms “accused”, “assessment” and “hospital” are defined in s. 672.1. The length of time that an assessment order may be in force is governed by ss. 672.14 and 672.15. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

#### SYNOPSIS

The assessment order must specify the service or person who is to make the assessment or the hospital in which the assessment is to be conducted, whether the assessment is to be conducted in custody and the period of the order. An assessment order may be in the prescribed Form 48 which also provides the assessment officer with the reason for the assessment.

**GENERAL RULE FOR PERIOD / Exception in fitness cases / Exception for compelling circumstances.**

**672.14. (1) An assessment order shall not be in force for more than thirty days.**

**(2) No assessment order to determine whether the accused is unfit to stand trial shall be in force for more than five days, excluding holidays and the time required for the accused to travel to and from the place where the assessment is to be made, unless the accused and the prosecutor agree to a longer period not exceeding thirty days.**

**(3) Notwithstanding subsections (1) and (2), a court may make an assessment order that remains in force for sixty days where the court is satisfied that compelling circumstances exist that warrant it. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The terms "accused", "assessment" and "hospital" are defined in s. 672.1. An assessment order may be extended pursuant to s. 672.14. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

**SYNOPSIS**

This provision provides a 30-day limitation for assessment orders despite the purpose of the assessment except in the case of a fitness assessment which is limited to five days. Notwithstanding these time limitations, however, the court does have the discretion to issue an assessment order for a period of not more than 60 days where the court is satisfied that "compelling circumstances" exist to do so.

**EXTENSIONS / Maximum duration of extensions.**

**672.15. (1) Subject to subsection (2), a court may extend an assessment order, of its own motion or on the application of the accused or the prosecutor made during or after the period that the order is in force, for any further period that is required, in its opinion, to complete the assessment of the accused.**

**(2) No extension of an assessment order shall exceed thirty days, and the period of the initial order together with all extensions shall not exceed sixty days. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The terms "accused" and "assessment" are defined in s. 672.1. The term "prosecutor" is defined in s. 2. The limitations on the length of time for the initial order are set out in s. 672.14. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

**SYNOPSIS**

A court has the discretion to extend an assessment order either of its own motion or on the application of the accused or the prosecutor at any time during the force of the assessment order for a period of not more than 30 days at a time. In addition, the provision limits the extensions such that the period of the initial order together with all the extensions shall not exceed 60 days.

**PRESUMPTION AGAINST CUSTODY / Report of medical practitioner / Presumption of custody in certain circumstances.**

**672.16. (1) Subject to subsection (3), an accused shall not be detained in custody pursuant to an assessment order unless**

**(a) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;**

- (b) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or
  - (c) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10).
- (2) For the purposes of paragraph (1)(a), where the prosecutor and the accused agree, the evidence of a medical practitioner may be received in the form of a report in writing.
- (3) An accused who is charged with an offence described in any of paragraphs 515(6)(a) to (d) in the circumstances described in that paragraph, or an offence described in subsection 522(2), shall be detained in custody pursuant to an assessment order, unless the accused shows that custody is not justified under the terms of that paragraph or subsection. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms “accused” and “assessment” are defined in s. 672.1. The term “prosecutor” is defined in s. 2. Section 672.17 provides that during the time that the assessment order is in force no application may be made for interim release or detention in respect of the offence for which the order is made. However, provision is made to vary the terms of the detention or release order under s. 672.18. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

#### SYNOPSIS

An assessment order is presumed to be conducted out of custody unless custody is necessary or custody is desirable in view of the evidence of a medical practitioner and the accused consents to custody. In addition, an in-custody assessment will be conducted where the accused is required to be in custody in respect of any other matter or by virtue of any other provision of the Act or where the prosecutor shows that the detention of the accused is just on either the primary or secondary grounds set out in s. 515(10).

There is presumption of in-custody assessment, however, where the accused is charged with an offence described in any of s. 515(6)(a) to (d) or 552(2). In these circumstances, the accused must bear the burden of proof that an in-custody assessment is not just under the terms of that paragraph or subsection.

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#### ASSESSMENT ORDER TAKES PRECEDENCE OVER BAIL HEARING.

**672.17.** During the period that an assessment order of an accused charged with an offence is in force, no order for the interim release or detention of the accused may be made by virtue of Part XVI or section 679 in respect of that offence or an included offence. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms “accused” and “assessment” are defined in s. 672.1. Provision for detention of an accused for the purposes of making the detention order is in s. 672.16 and to vary the terms of release or custody, see s. 672.18. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

#### SYNOPSIS

An assessment order takes priority over an interim release order and consequently, no interim release order or detention order may be issued during the period of the assessment order.



**APPLICATION TO VARY ASSESSMENT ORDER.**

**672.18.** Where at any time while an assessment order made by a court is in force the prosecutor or an accused shows cause, the court may vary the terms of the order respecting the interim release or detention of the accused in such manner as it considers appropriate in the circumstances. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms "accused" and "assessment" are defined in s. 672.1. "Prosecutor" is defined in s. 2. Provision for detention of an accused for the purposes of making the detention order is in s. 672.16 and for limitation on application for interim release or detention during the currency of the order, see s. 672.17. For further cross-references respecting the making of assessment orders see the references under s. 672.12.

**SYNOPSIS**

Notwithstanding s. 672.17, this provision authorizes the variation of an interim release order while an assessment order is in force.

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**NO TREATMENT ORDER ON ASSESSMENT.**

**672.19.** No assessment order may direct that psychiatric or any other treatment of the accused be carried out, or direct the accused to submit to such treatment. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms "accused" and "assessment" are defined in s. 672.1. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

**SYNOPSIS**

Under this section, the scope of the assessment order is limited to examination and cannot direct treatment or that the accused submit to such treatment subject to the provisions of s. 672.58 which allow a treatment order to issue for a period of not more than 60 days where forced treatment will render the accused fit to stand trial.

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***Assessment Reports***

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**ASSESSMENT REPORT /** Assessment report to be filed with court / Court to send assessment report to Review Board / Copies of reports to accused and prosecutor.

**672.2.** (1) An assessment order may require the person who makes the assessment to submit in writing an assessment report on the mental condition of the accused.

(2) An assessment report shall be filed with the court that ordered it, within the period fixed by the court.

(3) The court shall send to the Review Board without delay a copy of any report filed with it pursuant to subsection (2), to assist in determining the appropriate disposition to be made in respect of the accused.

(4) Subject to subsection 672.51(3), copies of any report filed with a court pursuant to subsection (2) shall be provided without delay to the prosecutor, the accused and any counsel representing the accused. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms "accused", "assessment" and "Review Board" are defined in s. 672.1. "Prosecutor" is defined in s. 2. A limitation on the use of statements made by an accused in the course of prepara-

tion of the assessment report is set out in s. 672.21. For further cross-references respecting the making of assessment orders, see the references under s. 672.12.

### SYNOPSIS

The court may require a written assessment report within a time period fixed by the court. Where such a report is received, a copy shall be provided to the prosecutor, the accused, any counsel to the accused and a copy shall also be forwarded to the Review Board to assist in the determination of the disposition relating to the accused.

It is important to note, however, that this provision is subject to the restrictions imposed in the disclosure of disposition information contained in s. 672.51. An assessment report may be withheld from the accused where its disclosure would endanger the safety of another person or would seriously impair the treatment or recovery of the accused.

## Protected Statements

**DEFINITION OF “PROTECTED STATEMENT” / Protected statements not admissible against accused / Exceptions.**

**672.21. (1)** In this section, “protected statement” means a statement made by the accused during the course and for the purposes of an assessment or treatment directed by a disposition, to the person specified in the assessment order or the disposition, or to anyone acting under that person’s direction.

**(2)** No protected statement or reference to a protected statement made by an accused is admissible in evidence, without the consent of the accused, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.

**(3)** Notwithstanding subsection (2), evidence of a protected statement is admissible for the purpose of

- (a)** determining whether the accused is unfit to stand trial;
- (b)** making a disposition or placement decision respecting the accused;
- (c)** finding whether the accused is a dangerous mentally disordered accused under section 672.65;
- (d)** determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
- (e)** determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
- (f)** challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
- (g)** establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding. 1991, c. 43, s. 4.

### CROSS-REFERENCES

The terms “accused”, “assessment” and “verdict of not criminally responsible on account of insanity” are defined in s. 672.1. The terms “newly-born child”, “prosecutor”, “unfit to stand trial” and “mental disorder” are defined in s. 2. Subsection (3)(d) refers to the offence of infanticide, thus see s. 233.

**SYNOPSIS**

This provision, in effect, establishes a narrow patient-doctor privilege in criminal law. The statutory privilege, however, applies only to "protected statements" which are defined as: (1) statements made by the accused in the course and for the purpose of an assessment or treatment directed by a disposition; and (2) statements must be made to a person specified in the assessment order or the disposition or to anyone acting under that persons's direction. Statements not made pursuant to compliance with a disposition or assessment order, therefore, do not fall within the scope of "protected statements" as defined by this privilege. It is important to note that this provision does not erode the solicitor-client privilege which attaches to assessments or examinations conducted independent of the court by a solicitor's agent.

In addition, the privilege is circumscribed in subsection (3) which mandates the admission of the evidence of a protected statement the following purposes: (1) to determine fitness; (2) at a determination of a disposition or placement decision; (3) to determine whether the accused is a dangerous mentally disordered person; (4) to determine whether the accused was disturbed where the offence is infanticide; (5) at a trial to determine if the accused is suffering from automatism or a mental disorder where the issue is raised either by the accused or by the prosecutor subsequent to the rendering of the verdict; (6) for the limited purpose of an inconsistent statement in a material issue; or (7) to establish a charge of perjury.

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***Fitness to Stand Trial***

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**PRESUMPTION OF FITNESS.**

**672.22. An accused is presumed fit to stand trial unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

References should be made to s. 2 of the Criminal Code which defines "unfit to stand trial" and s. 672.1 which defines "accused". For further cross-references in respect of fitness to stand trial, see the references under s. 672.23.

**SYNOPSIS**

This provision entrenches a general presumption of fitness unless the court is satisfied on the balance of probabilities that the accused is unfit to stand trial.

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**COURT MAY DIRECT ISSUE TO BE TRIED / Burden of proof.**

**672.23. (1) Where the court has reasonable grounds, at any stage of the proceedings before a verdict is rendered, to believe that the accused is unfit to stand trial, the court may direct, of its own motion or on application of the accused or the prosecutor, that the issue of fitness of the accused be tried.**

**(2) An accused or a prosecutor who makes an application under subsection (1) has the burden of proof that the accused is unfit to stand trial. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

To assist in the determination of the fitness issue, the court may make an assessment order which can include preparation of an assessment report. Thus, see ss. 672.11 to 672.21. Note in particular that the limitation on use of statements made by the accused in the course of the assessment does not apply to proceedings to determine fitness. Section 672.24 provides for the appointment of counsel for the purposes of the fitness hearing. Section 672.25 allows the court to postpone the fitness hearing and if the accused is acquitted then the issue is never tried, s. 672.3. Section 672.26 governs



the procedure where the accused is to be tried by jury. Otherwise, pursuant to s. 672.27, the issue is tried by the “court” defined in s. 672.1 and, in particular, may be tried at the preliminary inquiry stage. The terms “unfit to stand trial” and “prosecutor” are defined in s. 2. If the accused is found to be fit to stand trial, then the trial proceeds in accordance with s. 672.28, although, under s. 672.29 provision may be made to permit the accused to remain in custody in a hospital where there is reason to believe that the accused may otherwise become unfit. If the accused is found unfit, then the proceedings are conducted in accordance with ss. 672.31 to 672.33. Note, in particular, provision for review every two years of the sufficiency of the evidence to put the accused on trial. While the accused is unfit, his or her case is reviewed by the Review Board, defined in s. 672.1 in accordance with ss. 672.38 to 672.53. Note, however, that the court which found the accused unfit may hold a disposition hearing itself in accordance with s. 672.45 and may also vacate any interim release or detention order in accordance with s. 672.46.

## SYNOPSIS

The court may order the trial of the issue of fitness at any stage in the proceedings provided it is before a verdict is rendered either on its own motion or on the application of the accused or prosecutor. The court must be satisfied that there are reasonable grounds to believe that the issue of fitness should be tried and the party raising the issue of fitness bears the burden of proof in establishing there are reasonable grounds to try the issue.

## ANNOTATIONS

Section 2 gives a statutory definition of “unfit to stand trial” in the following terms:

“unfit to stand trial” means unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to

- (a) understand the nature or object of the proceedings,
- (b) understand the possible consequences of the proceedings, or
- (c) communicate with counsel

The following cases were decided under the predecessor legislation [former s. 615] which, however, did not contain a statutory definition of unfitness. Nevertheless, it is suggested that many of the following cases will be applicable to the interpretation of this section.

**Procedure on fitness hearing** – The trial judge has a discretion as to whether or not he will submit the issue of the accused’s capacity to instruct counsel to the jury and furthermore, where there was no evidence to support such a request his refusal was justified: *R. v. Wolfson*, [1965] 3 C.C.C. 304, 46 C.R. 8 (Alta. S.C. App. Div.). See also *R. v. Kolbe* (1974), 27 C.R.N.S. 1, [1974] 4 W.W.R. 579 (Alta. S.C. App. Div.), where approval was given to the trial judge’s discretionary refusal when the issue was first raised after the accused had given evidence.

The predecessor to this section was held to envisage a two-stage process. The first stage is for the judge alone to decide whether there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence. The second stage, which is only pursued if the first stage is answered affirmatively, is for the jury to determine whether the accused is fit to stand trial. In the first stage, it is not for the judge to determine any conflict of evidence. There is, however, a discretionary element and where the trial judge, who had the advantage of hearing the expert witnesses and observing the accused, determined that there was nothing in the evidence to support a finding that the accused was incapable of conducting his defence, then the appellate court will not interfere: *R. v. McLeod, Pinnock and Farquharson* (1983), 6 C.C.C. (3d) 29, 66 N.R. 309 (Ont. C.A.), *affd* as to *Farquharson* 27 C.C.C. (3d) 383n, [1986] 1 S.C.R. 703n, 66 N.R. 308.

The term “may”, as used in former s. 615(1) was held to intend to confer authority, rather than to vest in the trial judge a discretion. Where a doubt as to fitness arises, the

accused has a statutory right to have the issue directed. A statement by counsel as to the fitness of the accused is entitled to very serious consideration. There is a discretion only in the limited sense that a court is not bound to try the issue where there is no real basis for the request and under subsec. (5)(a), the judge is expressly permitted to postpone the trial of the issue up to the opening of the case for the defence where it arises in the course of the Crown's case: *R. v. Steele* (1991), 63 C.C.C. (3d) 149, 4 C.R. (4th) 53, 36 Q.A.C. 47 (C.A.).

In the first stage of the inquiry, where the judge must determine whether or not there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence and therefore, whether he should direct an inquiry into the accused's fitness to stand trial, the judge may act on the material placed before him by Crown and defence or direct that a further assessment of the accused be made. It may in some cases be necessary to hear psychiatrists and other witnesses: *R. v. McIlvride* (1986), 29 C.C.C. (3d) 348 (B.C.C.A.).

The trial of the issue as to whether the accused is fit to stand trial is a separate issue prior to trial, and accordingly, without the consent of the accused, medical evidence given in that prior proceeding cannot be automatically considered at trial without the doctor being recalled: *R. v. Curran* (1974), 21 C.C.C. (2d) 23, 9 N.B.R. (2d) 683 (C.A.).

**Test for fitness to stand trial** – The test of whether an accused is fit to stand trial is not whether or not he is able to act in his own best interests. The fact that the accused is emotionally unwilling to accept a defence of insanity and therefore refused to allow his counsel to advance this defence did not render him unfit. *Reference Re: R. v. Gorecki (No. 1)* (1976), 32 C.C.C. (2d) 129, 14 O.R. (2d) 212 (C.A.).

The test to be applied is one of limited cognitive ability, whether the accused understands the nature and object of the proceedings, understands the possible consequences, and can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not necessary that the accused be able to meet some higher test of analytic capacity or capacity to make rational decisions beneficial to himself: *R. v. Taylor* (1992), 77 C.C.C. (3d) 551, 17 C.R. (4th) 371, 11 O.R. (3d) 323 (C.A.).

An accused is incapable of conducting his defence if he cannot distinguish between available pleas; does not understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel; is unable to communicate with counsel rationally or make critical decisions on counsel's advice; or is unable to take the stand to testify if necessary: *R. v. Steele, supra*.

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## COUNSEL.

**672.24. Where the court has reasonable grounds to believe that an accused is unfit to stand trial and the accused is not represented by counsel, the court shall order that the accused be represented by counsel. 1991, c. 43, s. 4.**

## CROSS-REFERENCES

For further cross-references respecting fitness to stand trial, see references under s. 672.23.

## SYNOPSIS

Unlike the previous provision which afforded the court some discretion in the appointment of counsel, under the new provisions, where the issue of fitness arises with respect to an unrepresented accused, the court *must* appoint counsel for the accused.

## ANNOTATIONS

**Note:** The following case was decided under the predecessor legislation, s. 615.

It is not, in general, the duty of the trial judge to force counsel on an accused. Where, however, it was the Crown who was seeking to rely on the insanity defence and it was

unclear that the accused understood the consequences if the Crown was successful, the trial judge must be extremely careful to ensure that an accused who may be mentally ill is not prejudiced in his defence. Where the psychiatric evidence adduced by the Crown raised a doubt that the accused was, on account of insanity, capable of conducting his defence then the judge must conduct an inquiry into fitness and if necessary appoint counsel: *R. v. Fairholm* (1990), 60 C.C.C. (3d) 289 (B.C.C.A.).

#### POSTPONING TRIAL OF ISSUE / *Idem*.

**672.25.** (1) The court shall postpone directing the trial of the issue of fitness of an accused in proceedings for an offence for which the accused may be prosecuted by indictment or that is punishable on summary conviction, until the prosecutor has elected to proceed by way of indictment or summary conviction.

(2) The court may postpone directing the trial of the issue of fitness of an accused

- (a) where the issue arises before the close of the case for the prosecution at a preliminary inquiry, until a time that is not later than the time the accused is called on to answer to the charge; or
- (b) where the issue arises before the close of the case for the prosecution at trial, until a time not later than the opening of the case for the defence or, on motion of the accused, any later time that the court may direct. 1991, c. 43, s. 4.

#### ANNOTATIONS

Although subsec. (2) implies that the trial of the issue can be held at any time prior to the opening of the defence, in exercising this discretion the judge must consider whether there is any dispute as to the Crown's ability to demonstrate that the accused committed the offence. If there is a dispute, the trial judge should not decide the question of fitness without being satisfied that the Crown is in a position to establish that the accused committed the acts alleged. The trial judge may thus proceed with the trial proper or at least require the Crown to demonstrate at the outset of the fitness hearing that it is in a position to establish that the accused committed the acts alleged: *R. v. Taylor* (1992), 77 C.C.C. (3d) 551, 17 C.R. (4th) 371, 11 O.R. (3d) 323 (C.A.).

#### TRIAL OF ISSUE BY JUDGE AND JURY.

**672.26.** Where an accused is tried or is to be tried before a court composed of a judge and jury,

- (a) if the judge directs that the issue of fitness of the accused be tried before the accused is given in charge to a jury for trial on the indictment, a jury composed of the number of jurors required in respect of the indictment in the province where the trial is to be held shall be sworn to try that issue and, with the consent of the accused, the issues to be tried on the indictment; and
- (b) if the judge directs that the issue of fitness of the accused be tried after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issues in respect of which it is already sworn. 1991, c. 43, s. 4.

#### TRIAL OF ISSUE BY COURT.

**672.27.** The court shall try the issue of fitness of an accused and render a verdict where the issue arises.

- (a) in respect of an accused who is tried or is to be tried before a court other than a court composed of a judge and jury; or
- (b) before a court at a preliminary inquiry or at any other stage of the proceedings. 1991, c. 43, s. 4.



**PROCEEDING CONTINUES WHERE ACCUSED IS FIT.**

**672.28.** Where the verdict on trial of the issue is that an accused is fit to stand trial, the arraignment, preliminary inquiry, trial or other stage of the proceeding shall continue as if the issue of fitness of the accused had never arisen. 1991, c. 43, s. 4.

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**WHERE CONTINUED DETENTION IN CUSTODY.**

**672.29.** Where an accused is detained in custody on delivery of a verdict that the accused is fit to stand trial, the court may order the accused to be detained in a hospital until the completion of the trial, if the court has reasonable grounds to believe that the accused would become unfit to stand trial if released. 1991, c. 43, s. 4.

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**ACQUITTAL.**

**672.3.** Where the court has postponed directing the trial of the issue of fitness of an accused pursuant to subsection 672.25(2) and the accused is discharged or acquitted before the issue is tried, it shall not be tried. 1991, c. 43, s. 4.

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**CROSS-REFERENCES**

Reference should be made to subsection 672.25(2) which affords the judge the discretion to postpone the trial of the issue of fitness if the issue arises before the close of the prosecution's case at a preliminary inquiry or trial until the accused is called on to answer the charge, until the opening of the accused's case or on motion of the accused until any later time that the court may direct. For further cross-references respecting fitness to stand trial, see references under s. 672.23.

**SYNOPSIS**

The issue of fitness is not to be tried where it has been postponed pursuant to s. 672.25(2) and the accused is discharged at the preliminary hearing or acquitted before the opening of the defence's case or until any later time as the court may direct.

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**VERDICT OF UNFIT TO STAND TRIAL.**

**672.31.** Where the verdict on trial of the issue is that an accused is unfit to stand trial, any plea that has been made shall be set aside and any jury shall be discharged. 1991, c. 43, s. 4.

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**CROSS-REFERENCES**

Where the accused is found unfit, then the procedure to be followed is set out in s. 672.45 *et seq.* For further cross-references respecting fitness to stand trial, see references under s. 672.23.

**SYNOPSIS**

This section requires that where the verdict in a trial turns on the issue of fitness to stand trial, any plea by the accused must be struck and any jury which has been empanelled must be discharged.

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**SUBSEQUENT PROCEEDINGS / Burden of proof.**

**672.32. (1)** A verdict of unfit to stand trial shall not prevent the accused from being tried subsequently where the accused becomes fit to stand trial.

**(2)** The burden of proof that the accused has subsequently become fit to stand trial is on the party who asserts it, and is discharged by proof on the balance of probabilities. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

Although the accused is found fit, the court may order that he or she be detained in a hospital if there is reason to believe the accused may become unfit otherwise, s. 672.29.

For further cross-references respecting fitness to stand trial, see references under s. 672.23.

**SYNOPSIS**

An accused who subsequently becomes fit to stand trial must be tried provided that the party asserting fitness establishes fitness on the balance of probabilities.

**PRIMA FACIE CASE TO BE MADE EVERY TWO YEARS / Court may order inquiry to be held / Burden of proof / Admissible evidence at an inquiry / Conduct of inquiry / Where *prima facie* case not made.**

**672.33. (1)** The court that has jurisdiction in respect of the offence charged against an accused who is found unfit to stand trial shall hold an inquiry, not later than two years after the verdict is rendered and every two years thereafter until the accused is acquitted pursuant to subsection (6) or tried, to decide whether sufficient evidence can be adduced at that time to put the accused on trial.

**(2)** On application of the accused, the court may order an inquiry under this section to be held at any time if it is satisfied, on the basis of the application and any written material submitted by the accused, that there is reason to doubt that there is a *prima facie* case against the accused.

**(3)** At an inquiry under this section, the burden of proof that sufficient evidence can be adduced to put the accused on trial is on the prosecutor.

**(4)** In an inquiry under this section, the court shall admit as evidence

- (a)** any affidavit containing evidence that would be admissible if given by the person making the affidavit as a witness in court; or
- (b)** any certified copy of the oral testimony given at a previous inquiry or hearing held before a court in respect of the offence with which the accused is charged.

**(5)** The court may determine the manner in which an inquiry under this section is conducted and may follow the practices and procedures in respect of a preliminary inquiry under Part XVIII where it concludes that the interests of justice so require.

**(6)** Where, on the completion of an inquiry under this section, the court is satisfied that sufficient evidence cannot be adduced to put the accused on trial, the court shall acquit the accused. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

Reference should be made to s. 2 of the Criminal Code which defines “unfit to stand trial” and s. 672.1 which defines “accused” and “Review Board”. While the accused is unfit, his or her case is reviewed by the Review Board in accordance with ss. 672.38 to 672.53.

For further cross-references in respect of fitness to stand trial, see the references under s. 672.23.

**SYNOPSIS**

This provision imposes a continuing obligation on the Crown, with respect to an unfit accused, to demonstrate its case every two years such that no individual declared unfit to stand trial may continue to be held where the Crown is unable to prove the charge against the accused if required to do so.

In addition, the accused may apply for a review of the case at any time pursuant to s. 672.33(2) provided it is established that there is reason to doubt that there is a *prima facie* case against the accused. In either case, the Crown bears the burden of establishing that a *prima facie* case still exists against the accused. If on completion of an inquiry

under this section, the court is satisfied that a *prima facie* does not exist, the court shall acquit the accused.

The procedure prescribed by the provisions with respect to such an inquiry allows the court to consider evidence in the form of oral testimony at a previous hearing in respect of the same offence or affidavit evidence containing admissible evidence of a person who would be a witness in court. In addition, s. 672.33(5) also allows the procedure in respect of a preliminary inquiry under Part XVIII to be adopted where the court concludes that the interests of justice so require.

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## ***Verdict of Not Criminally Responsible on Account of Mental Disorder***

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### **VERDICT OF NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER.**

**672.34.** Where the jury, or the judge or provincial court judge where there is no jury, finds that an accused committed the act or made the omission that formed the basis of the offence charged, but was at the time suffering from mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), the jury or the judge shall render a verdict that the accused committed the act or made the omission but is not criminally responsible on account of mental disorder. 1991, c. 43, s. 4.

#### **CROSS-REFERENCES**

The term "mental disorder" is defined in s. 2 and "verdict of not criminally responsible on account of mental disorder" is defined in s. 672.1. Reference should be made to s. 16 which contains the defence of not criminally responsible on account of mental disorder.

Reference should also be made to s. 672.54(a) authorizing the court or Review Board to either discharge the accused absolutely subsequent to a finding of not criminally responsible on account of mental disorder or direct the accused to be detained where the accused is a significant threat to the safety of the public.

#### **SYNOPSIS**

This provision replaces the previous terminology of "not guilty by reason of insanity" with "not criminally responsible on account of mental disorder". The verdict is defined to mean that the person committed the act or omission but is not criminally responsible on account of mental disorder.

#### **ANNOTATIONS**

The following cases were decided under the predecessor legislation, s. 614 but may be of assistance in applying these new provisions.

It was held that former s. 614(1) was mandatory and a new trial was ordered on a Crown appeal where the trial judge failed to direct the jury that if they found the accused not guilty by reason of insanity they must so state in their verdict: *R. v. Potvin* (1971), 16 C.R.N.S. 233 (Que. C.A.).

In *R. v. Conkie* (1978), 39 C.C.C. (2d) 408, 3 C.R. (3d) 7 (Alta. S.C. App. Div.) the court considered whether the trial judge should inform the jury of the consequences of an insanity verdict. Leberman, J.A., was of the view that he should in certain circumstances where a possible misapprehension that the accused would go free if found not guilty by reason of insanity could affect the jury's verdict. Such a case would be where the evidence discloses the accused is a dangerous individual and defence counsel has not referred to this subsection in his jury address. Moir, J.A., considered that the judge was not required to so inform the jury, the practice in Alberta being that defence counsel could enforce the jury in his jury address. Haddad, J.A., while leaning to the view that



the judge should inform the jury of the provisions of this subsection did not feel that in this case it was necessary to decide the issue.

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#### EFFECT OF VERDICT OF NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER.

**672.35.** Where a verdict of not criminally responsible on account of mental disorder is rendered, the accused shall not be found guilty or convicted of the offence, but

- (a) the accused may plead *autrefois acquit* in respect of any subsequent charge relating to that offence;
- (b) any court may take the verdict into account in considering an application for judicial interim release or in considering what dispositions to make or sentence to impose for any other offence; and
- (c) the National Parole Board or any provincial parole board may take the verdict into account in considering an application by the accused for parole or pardon in respect of any other offence. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The term “mental disorder” is defined in s. 2. The term “verdict of not criminally responsible on account of mental disorder” is defined in s. 672.1. Reference should also be made to s. 672.36 excluding the verdict of not criminally responsible on account of mental disorder from the meaning of a previous conviction for the purpose of any offence under any Act of Parliament for which an increased penalty is provided by reason of a previous conviction.

#### SYNOPSIS

Although the verdict of not criminally responsible on account of mental disorder is not a previous conviction for the purpose of any offence for which a greater punishment is provided by reason of previous convictions (see s. 672.36), the verdict may be used as a basis for the accused to plead *autrefois acquit* in respect of a subsequent charge relating to the offence, for the purpose of judicial interim release, disposition or sentence with respect to any other offence and by the National Parole Board or any provincial parole board for the purpose of considering an application for parole or pardon with respect to any other offence.

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#### VERDICT NOT A PREVIOUS CONVICTION.

**672.36.** A verdict of not criminally responsible on account of mental disorder is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is provided by reason of previous convictions. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The term “mental disorder” is defined in s. 2. The term “verdict of not criminally responsible on account of mental disorder” is defined in s. 672.1.

Reference should be made to s. 672.35 which states that a verdict of not criminally responsible on account of mental disorder may be relied on in the following circumstances: (1) by the accused to plead *autrefois acquit* [s. 672.35(a)]; (2) by the court in an application for judicial interim release [s. 672.35(b)]; (3) by the court in considering the sentence or disposition in another offence [s. 672.35(b)]; and (4) by the National Parole Board or any provincial parole board in considering an application for a parole or pardon in respect of any other offence [s. 672.35(c)].

#### SYNOPSIS

A finding of not criminally responsible on account of mental disorder cannot be used as a previous conviction in a subsequent proceeding under any federal act for which a greater

punishment is provided by reason of previous convictions such as the offence of impaired driving.

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**DEFINITION OF "APPLICATION FOR FEDERAL EMPLOYMENT" / Application for federal employment / Punishment.**

**672.37. (1)** In this section, "application for federal employment" means an application form relating to

- (a) employment in any department, as defined in section 2 of the *Financial Administration Act*;
- (b) employment by any Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*;
- (c) enrollment in the Canadian Forces; or
- (d) employment in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament.

(2) No application for federal employment shall contain any question that requires the applicant to disclose any charge or finding that the applicant committed an offence that resulted in a finding or a verdict of not criminally responsible on account of mental disorder if the applicant was discharged absolutely or is no longer subject to any disposition in respect of that offence.

(3) Any person who uses or authorizes the use of an application for federal employment that contravenes subsection (2) is guilty of an offence punishable on summary conviction. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The term "mental disorder" is defined in s. 2. The term "verdict of not criminally responsible on account of mental disorder" is defined in s. 672.1. Reference should be made to s. 2 of the *Financial Administration Act* defining "department" and s. 83(1) of the Act defining "Crown corporation".

**SYNOPSIS**

This provision creates the summary conviction offence of use or authorizing the use of an application for federal employment that contains a question requiring the applicant to disclose a charge or finding regarding the commission of an offence that resulted in a finding of not criminally responsible on account of mental disorder where the applicant was discharged or is not subject to any disposition.

An "application for federal employment" is defined as an application relating to employment in the following: any department as defined in s. 2 of the *Financial Administration Act*; any Crown corporation as defined in s. 83(1) of the *Financial Administration Act*; enrollment in the Canadian Forces or in the operation of any work, undertaking or business that is within the legislative authority of Parliament.

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## **Review Boards**

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**REVIEW BOARDS TO BE ESTABLISHED / Treated as provincial Board.**

**672.38. (1)** A Review Board shall be established or designated for each province to make or review dispositions concerning any accused in respect of whom a verdict of not criminally responsible by reason of mental disorder or unfit to stand trial is rendered, and shall consist of not fewer than five members appointed by the lieutenant governor in council of the province.

(2) A Review Board shall be treated as having been established under the laws of the province. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “unfit to stand trial” and “mental disorder” are defined in s. 2. The terms “accused”, “not criminally responsible on account of mental disorder”, “chairperson”, “medical practitioner” and “Review Board” are defined in s. 672.1.

The constitution of the Review Board is outlined in ss. 672.39 to 672.44. In particular, the board must have at least one member who is entitled to practise psychiatry in that province and where there is only one member qualified in psychiatry, the board must have another member entitled to practice medicine or psychology by virtue of s. 672.39. The chairperson of the board must be a judge or a person who is so qualified or has retired as a judge of the Federal Court or of a superior, district or county court [s. 672.4(1)]. Where the board is established prior to the coming into force of s. 672.4(1), the existing chairperson who is not a judge may continue to act until the end of his term if at least one other member of the board is a judge or person referred to in subsection (1) or a member of the bar of the province. Pursuant to s. 672.41, a quorum is constituted by a chairperson, a psychiatrist and any other member unless the board pre-existed the new provisions in which case the quorum may be composed of a chairperson, a psychiatrist and a member who is referred to in that subsection or a member of the bar. A decision of the majority is a decision of the Review Board [s. 672.42]. Pursuant to s. 672.43, the chairperson has all the powers of a commissioner conferred by ss. 4 and 5 of the Inquiries Act in disposition or review hearings held by the board. In addition, the Review Board is entitled to make rules relating to practice and procedure before the board, subject to the approval of the lieutenant governor in council of the province [s. 672.44].

As to disposition hearings before the Review Board, see ss. 672.46 to 672.49. As to the procedure on disposition hearings before the Review Board, see s. 672.5. As to the release of disposition information by the Review Board, see ss. 672.51 to 672.52. As to the power of the Review Board to make dispositions in relation to an accused, see ss. 672.54 to 672.57 and 672.63. As to appeals from a decision of the Review Board, see ss. 672.72 to 672.8 and as to the review of dispositions of a court or Review Board, see ss. 672.81 to 672.85.

**SYNOPSIS**

This provision requires the establishment of Review Boards by the province. In addition, subsec. (2) provides that the Review Board is treated as having been established under provincial law thus excluding the application of the Federal Court Act to the actions of the Review Board.

The Review Board must consist of at least five members who are appointed by the lieutenant governor in council of the province.

**MEMBERS OF REVIEW BOARD.**

**672.39. A Review Board must have at least one member who is entitled under the laws of a province to practise psychiatry and, where only one member is so entitled at least one other member must have training and experience in the field of mental health, and be entitled under the laws of a province to practise medicine or psychology. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The terms “chairperson”, “medical practitioner” and “Review Board” are defined in s. 672.1. Reference should also be made to s. 672.4 which requires the chairperson of the Review Board to be a judge, or a person who is qualified or retired from judicial office. If the Review Board pre-exists the new provisions, however, the chairperson may continue to act until the end of his term provided that another member of the board is a judge, a person qualified for or retired from judicial office or a member of the bar.

For further cross-references respecting the Review Board, see references under s. 672.38.

**SYNOPSIS**

Section 672.39 prescribes the composition of the Review Board which must have at least one member of the board who is a psychiatrist. Where there is only one member trained



in psychiatry, at least one other member of the Review Board must be trained in the practise of medicine or psychology.

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**CHAIRPERSON OF A REVIEW BOARD / Transitional.**

**672.4. (1)** Subject to subsection (2), the chairperson of a Review Board shall be a judge of the Federal Court or of a superior, district or county court of a province, or a person who is qualified for appointment to, or has retired from, such a judicial office.

**(2)** Where the chairperson of a Review Board that was established before the coming into force of subsection (1) is not a judge or other person referred to therein, the chairperson may continue to act until the expiration of his or her term of office if at least one other member of the Review Board is a judge or other person referred to in subsection (1) or is a member of the bar of the province. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms "chairperson" and "Review Board" are defined in s. 672.1. For further cross-references respecting Review Boards, see references under s. 672.38.

**SYNOPSIS**

The chairperson of a Review Board must be a retiring, acting or qualified judge of the Federal Court or of a superior, district or county court of a province. Where, however, the Review Board pre-exists the new provisions, a chairperson who is not a judge may continue to act until the end of his term provided that at least one member of the Review Board is a judge or member of the bar of that province.

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**QUORUM OF REVIEW BOARD / Transitional.**

**672.41. (1)** Subject to subsection (2), the quorum of a Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practise psychiatry, and any other member.

**(2)** Where the chairperson of a Review Board that was established before the coming into force of this section is not a judge or other person referred to in subsection 672.4(1), the quorum of the Review Board is constituted by the chairperson, a member who is entitled under the laws of a province to practise psychiatry, and a member who is a person referred to in that subsection or a member of the bar of the province. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The term "Review Board" and "chairperson" are defined in s. 672.1. For further cross-references respecting Review Boards, see references under s. 672.38.

**SYNOPSIS**

A Review Board must have a quorum of three persons composed of the chairperson, a psychiatrist and any other member.

Where the Review Board pre-exists the new provisions, however, the quorum must be constituted of the chairperson, a psychiatrist and a judge or member of the bar of the province.

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**MAJORITY VOTE.**

**672.42.** A decision of a majority of the members present and voting is a decision of a Review Board. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

“Review Board” is defined in s. 672.1. For further cross-references respecting Review Boards, see references under s. 672.38.

**SYNOPSIS**

A decision of the majority governs the Review Board.

**POWERS OF REVIEW BOARDS.**

**672.43.** At a hearing held by a Review Board to make a disposition or review a disposition in respect of an accused, the chairperson has all the powers that are conferred by sections 4 and 5 of the *Inquiries Act* on persons appointed as commissioners under Part I of that Act. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “accused”, “Review Board”, “chairperson” and “disposition” are defined in s. 672.1. In addition, reference should be made to ss. 4 and 5 of the *Inquiries Act* which outline the powers of a person appointed as a commissioner. For further cross-references respecting “Review Boards”, see references under s. 672.38.

**SYNOPSIS**

A chairperson of the Review Board has all the powers of a commissioner conferred by ss. 4 and 5 of the *Inquiries Act*.

**RULES OF REVIEW BOARD / Application and publication of rules / Regulations.**

**672.44. (1)** A Review Board may, subject to the approval of the lieutenant governor in council of the province, make rules providing for the practice and procedure before the Review Board.

**(2)** The rules made by a Review Board under subsection (1) apply to any proceeding within its jurisdiction, and shall be published in the *Canada Gazette*.

**(3)** Notwithstanding anything in this section, the Governor in Council may make regulations to provide for the practice and procedure before Review Boards, in particular to make the rules of Review Boards uniform, and all regulations made under this subsection prevail over any rules made under subsection (1). 1991, c. 43, s. 4.

**CROSS-REFERENCES**

“Review Board” is defined in s. 672.1. The procedures to be followed by a Review Board with respect to a disposition hearing are outlined in s. 672.5. With respect to procedures of the Review Board to be followed in the review of dispositions, see s. 672.83. For further cross-references respecting Review Boards, see references under s. 672.38.

**SYNOPSIS**

A Review Board has the authority to make rules as to the practice of the Review Board subject to the approval of the lieutenant governor. The Governor in Council, however, may also make rules for practice and procedure in order to make Review Board practices uniform. The Federal rules take precedence over any rules established by the provincial Review Board.

## Disposition Hearings

### HEARING TO BE HELD BY A COURT / Disposition to be made.

**672.45. (1)** Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the court may of its own motion, and shall on application by the accused or the prosecutor, hold a disposition hearing.

**(2)** At a disposition hearing, the court shall make a disposition in respect of the accused, if it is satisfied that it can readily do so and that a disposition should be made without delay. 1991, c. 43, s. 4.

### CROSS-REFERENCES

The terms "mental disorder", "prosecutor" and "unfit to stand trial" are defined in s. 2. The terms "accused", "court", "disposition" and "verdict of not criminally responsible on account of mental disorder" are defined in s. 672.1.

The court may choose not to exercise its discretion to hold a disposition hearing, in which case, a disposition hearing must be held by the Review Board within 45 days subsequent to the verdict unless there are exceptional circumstances warranting a court to extend the time limit. See s. 672.47(1) and (2). In addition, pursuant to s. 672.47(3), even if the court has rendered a disposition subsequent to a hearing, the Review Board must hold a review hearing not less than 90 days subsequent to the disposition. Where the court does not make a disposition, the accused's release or detention order continues in force until the Review Board renders a disposition [s. 672.46(1)]. It is important to note that, notwithstanding this subsection, a court may vary or vacate any order or detain the accused until the disposition hearing if the court considers it appropriate to do so. The procedures to be followed in a review hearing are set out in s. 672.5. See also s. 672.52 requiring a record of the proceedings of the hearing to be kept. Pursuant to s. 672.53, any procedural irregularity in a disposition hearing does not render the hearing a nullity unless the accused is caused substantial prejudice as a result of the irregularity. Pursuant to s. 672.48, where the Review Board either holds a disposition hearing or a review hearing and finds the accused fit to stand trial subsequent to a finding of unfitness, the board must order that the accused be sent to trial. The Review Board has the power to detain the accused pursuant to s. 672.49 subsequent to a finding of fitness if there are grounds to believe that, if the accused were released, he would subsequently become unfit. Reference should also be had to s. 672.51 which provides a definition for "disposition information" and under what circumstances this information may be released to the accused, a party or a non-party.

As to the power of the Review Board to make dispositions in relation to an accused, see ss. 672.54 to 672.57 and 672.63. As to appeals from a decision of the Review Board, see ss. 672.72 to 672.8 and as to the review of dispositions of a court or Review Board, see ss. 672.81 to 672.85.

### SYNOPSIS

Subsequent to a finding of unfitness or not criminally responsible on account of mental disorder, the court has the discretion on its own motion to hold a disposition hearing. Where the application to hold a disposition hearing is brought by the accused or the prosecutor, however, the provision requires that the court hold a disposition hearing.

Section 672.45(2) establishes a test for the jurisdiction of the court in disposition hearings. The court is required to make a disposition only if it is satisfied that it can readily do so and that the disposition should be made without delay.

### ANNOTATIONS

In *R. v. Swain* (1991), 63 C.C.C. (3d) 481, 5 C.R. (4th) 253, 125 N.R. 1 (S.C.C.) the court held that the predecessor legislation, which also provided for the confinement of persons found to be not guilty by reason of insanity, was a valid exercise of Parliament's



criminal law power under s. 91(27) of the Constitution Act, 1867. There is no reason to believe that this legislation would not also be held to be valid criminal law. [The predecessor legislation was, however, held to violate ss. 7 and 9 of the Charter.]

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**STATUS QUO PENDING REVIEW BOARD HEARING / Variation of order.**

**672.46. (1)** Where the court does not make a disposition in respect of the accused at a disposition hearing, any order for the interim release or detention of the accused or any appearance notice, promise to appear, summons, undertaking or recognizance in respect of the accused that is in force at the time the verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered continues in force, subject to its terms, until the Review Board makes a disposition.

**(2)** Notwithstanding subsection (1), a court may, on cause being shown, vacate any order, appearance notice, promise to appear, summons, undertaking or recognizance referred to in that subsection and make any other order for the interim release or detention of the accused that the court considers to be appropriate in the circumstances, including an order directing that the accused be detained in custody in a hospital pending a disposition by the Review Board in respect of the accused. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “accused”, “court” and “disposition” are defined in s. 672.1. Reference should also be made to Part XVI of the Criminal Code as to compelling the appearance of the accused by way of order for interim release, detention, appearance notice, promise to appear, summons or undertaking or recognizance. For further cross-references respecting disposition hearing, see references under s. 672.45.

**SYNOPSIS**

Where the court does not make a disposition, the accused’s release or detention order continues in force until the review board renders a disposition. [s. 672.46(1)].

Notwithstanding subsection (1), however, a court may vary or vacate any order or detain the accused until the disposition hearing if the court considers it appropriate to do so.

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**REVIEW BOARD TO MAKE DISPOSITION WHERE COURT DOES NOT / Extension of time for hearing / Where disposition made by court.**

**672.47. (1)** Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered and the court makes no disposition in respect of an accused, the Review Board shall, as soon as is practicable but not later than forty-five days after the verdict was rendered, hold a hearing and make a disposition.

**(2)** Where the court is satisfied that there are exceptional circumstances that warrant it, the court may extend the time for holding a hearing under subsection (1) to a maximum of ninety days after the verdict was rendered.

**(3)** Where a court makes a disposition under section 672.54 other than an absolute discharge in respect of an accused, the Review Board shall hold a hearing on a day not later than the day on which the disposition ceases to be in force, and not later than ninety days after the disposition was made, and shall make a disposition in respect of the accused. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “mental disorder”, “prosecutor” and “unfit to stand trial” are defined in s. 2. The terms “accused”, “court”, “disposition”, “Review Board” and “verdict of not criminally responsible on account of mental disorder” are defined in s. 672.1. A disposition other than an absolute discharge

is an order discharging the accused with conditions or an order detaining the accused in custody in a hospital, see s. 672.54(b) and (c). As to the procedures to be followed at a disposition hearing before the Review Board, see s. 672.5. As to the review of dispositions made by the Review Board, see s. 672.81 requiring a review every 12 months. For further cross-references respecting disposition hearings, see references under s. 672.45.

### SYNOPSIS

If the court does not exercise its discretion to make a disposition after the accused is found to be unfit or not criminally responsible on account of mental disorder pursuant to s. 672.4, the Review Board must hold a disposition hearing not later than 45 days subsequent to the verdict unless the court is satisfied that there are exceptional circumstances warranting an extension of the time period.

Where the court has made a disposition pursuant to s. 672.54 other than an absolute discharge, the Review Board must hold a hearing not later than the day on which the disposition expires and, in any event, not later than 90 days subsequent to the court disposition.

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**REVIEW BOARD TO DETERMINE FITNESS / Review Board shall send accused to court / Chairperson may send accused to court.**

**672.48. (1) Where a Review Board holds a hearing to make or review a disposition in respect of an accused who has been found unfit to stand trial, it shall determine whether in its opinion the accused is fit to stand trial at the time of the hearing.**

**(2) If a Review Board determines that the accused is fit to stand trial, it shall order that the accused be sent back to court, and the court shall try the issue and render a verdict.**

**(3) The chairperson of a Review Board may, with the consent of the accused and the person in charge of the hospital where an accused is being detained, order that the accused be sent back to court for trial of the issue of whether the accused is unfit to stand trial, where the chairperson is of the opinion that**

**(a) the accused is fit to stand trial; and**

**(b) the Review Board will not hold a hearing to make or review a disposition in respect of the accused within a reasonable period. 1991, c. 43, s. 4.**

### CROSS-REFERENCES

Reference should be made to s. 2 of the Criminal Code which defines "unfit to stand trial" and to s. 672.1 which defines "accused", "chairperson", "court", "hospital" and "Review Board". If the accused is found to be fit to stand trial, then the trial proceeds in accordance with s. 672.28, although under s. 672.29, provision may be made to permit the accused to remain in custody in a hospital where there is reason to believe that the accused may otherwise become unfit. For further references as to the issue of fitness, see cross-references under s. 672.23 and for further cross-references respecting the disposition hearings, see s. 672.45.

### SYNOPSIS

This provision requires the Review Board, during the course of the making or review of a disposition of unfitness where he is subsequently found fit, to send the accused back to trial. In addition, the chairperson may, with the consent of the accused and the person in charge of the hospital, dispense with the hearing and send the accused back to trial where the chairperson is of the opinion that the accused is presently fit to stand trial. For further cross-references respecting disposition hearings, see references under s. 672.44.

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**CONTINUED DETENTION IN HOSPITAL / Copy of disposition to be sent to court.**

**672.49. (1) In a disposition made pursuant to section 672.47 the Review Board or**

chairperson may require the accused to continue to be detained in a hospital until the court determines whether the accused is fit to stand trial, if the Review Board or chairperson has reasonable grounds to believe that the accused would become unfit to stand trial if released.

(2) The Review Board or chairperson shall send a copy of a disposition made pursuant to section 672.47 without delay to the court having jurisdiction over the accused and to the Attorney General of the province where the accused is to be tried. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

Section 2 of the Criminal Code defines “unfit to stand trial”. The terms “accused”, “chairperson”, “disposition”, “hospital” and “Review Board” are defined in s. 672.1. See also s. 672.29 which accords the court the same power to detain the accused where the release of the accused could render the accused unfit. Further cross-references respecting disposition hearings may be found in references under s. 672.45.

#### SYNOPSIS

The Review Board or the chairperson has the discretion to detain the accused until the court determines the issue of fitness if there are reasonable grounds to believe that the accused would become unfit if released.

Subsection (2) provides for notice requiring the Review Board or chairperson to send a copy of the disposition to the court having jurisdiction over the accused and the Attorney General of the province in which the accused is to be tried.

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**PROCEDURE AT DISPOSITION HEARING / Hearing to be informal / Attorneys General may be parties / Interested person may be a party / Notice of hearing / Order excluding the public / Right to counsel / Assigning counsel / Right of accused to be present / Removal or absence of accused / Rights of parties at hearing / Request to compel attendance of witnesses.**

**672.5. (1) A hearing held by a court or Review Board to make or review a disposition in respect of an accused shall be held in accordance with this section.**

**(2) The hearing may be conducted in as informal a manner as is appropriate in the circumstances.**

**(3) On application, the court or Review Board shall designate as a party the Attorney General of the province where the disposition is to be made and, where an accused is transferred from another province, the Attorney General of the province from which the accused is transferred.**

**(4) The court or Review Board may designate as a party any person who has a substantial interest in protecting the interests of the accused, if the court or Review Board is of the opinion that it is just to do so.**

**(5) Notice of the hearing shall be given to the parties, the Attorney General of the province where the disposition is to be made and, where the accused is transferred to another province, the Attorney General of the province from which the accused is transferred, within the time and in the manner prescribed, or within the time and in the manner fixed by the rules of the court or Review Board.**

**(6) Where the court or Review Board considers it to be in the best interests of the accused and not contrary to the public interest, the court or Review Board may order the public or any members of the public to be excluded from the hearing or any part of the hearing.**

**(7) The accused or any other party has the right to be represented by counsel.**



(8) The court or Review Board shall, if an accused is not represented by counsel, assign counsel to act for any accused.

- (a) who has been found unfit to stand trial; or
- (b) wherever the interests of justice so require.

(9) Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

(10) The court or the chairperson of the Review Board may

- (a) permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper; or
- (b) cause the accused to be removed and barred from re-entry for the whole or any part of the hearing
  - (i) where the accused interrupts the hearing so that to continue in the presence of the accused would not be feasible,
  - (ii) on being satisfied that failure to do so would likely endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused, or
  - (iii) in order to hear, in the absence of the accused, evidence, oral or written submissions, or the cross-examination of any witness concerning whether grounds exist for removing the accused pursuant to subparagraph (ii).

(11) Any party may adduce evidence, make oral or written submissions, call witnesses and cross-examine any witness called by any other party and, on application, cross-examine any person who made an assessment report that was submitted to the court or Review Board in writing.

(12) A party may not compel the attendance of witnesses, but may request the court or the chairperson of the Review Board to do so. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The term "unfit to stand trial" is defined in s. 2 of the Criminal Code. The terms "accused", "court", "disposition", "party" and "Review Board" are defined in s. 672.1.

Pursuant to s. 672.84, the Review Board shall hold a review hearing under s. 672.81 or 672.82 in accordance with the procedures described in s. 672.5. Where the court is exercising its review power pursuant to s. 672.33 to determine whether there is sufficient evidence to put the accused on trial after a verdict of unfit to stand trial has been rendered, the court does not follow the procedures outlined in s. 672.5 but, pursuant to s. 672.33 (5), the court may determine the manner in which the inquiry is conducted and has the discretion to incorporate the procedures in respect of a preliminary inquiry under Part XVIII. Reference should be made to s. 672.51(8) regulating the disclosure of "disposition information" obtained at disposition hearings during which the accused was excluded from the proceedings. Disposition information is defined in s. 672.51. In particular, note that no information may be disclosed to either the accused or a non-party where the accused has been excluded from the proceedings pursuant to s. 672.5(10)(b)(ii) or (iii). For further cross-references respecting disposition hearings, see references under s. 672.45.

#### SYNOPSIS

This section sets out the procedures to be followed at disposition hearings by courts and review boards. The court or Review Board may designate, as a party on an application, the Attorney General of the province where the disposition was made or, where the accused is transferred from another province, the Attorney General of the province from which the accused is transferred. In addition, the court or Review Board has the power to designate any person as a party if they have a substantial interest in protecting the interests of the accused, provided that it is satisfied that it is just to so designate the party.

General notice provisions provide that notice of the hearing be given to the parties and

the Attorney General of the province where the disposition is made or the Attorney General of the province from which the accused has been transferred whether or not the Attorney General has been made a party to the proceedings. The specific time period within which notice is to be provided is not specified in the section but is to be fixed by the rules of the court or Review Board [s. 672.5(5)]. The proceedings are conducted in an open forum subject to the right of the court or review board to exclude the public where it is in the best interests of the accused *and* not contrary to the public interest to do so [s. 672.5(6)].

The provisions allow for the hearings to be conducted in an informal manner [s. 672.5(2)]. A party is entitled to adduce evidence, make oral or written submissions, call and cross-examine witnesses and on application, cross-examine any person who made an assessment report which is submitted to the court or Review Board. However, no party has the authority to compel the attendance of any witness. The attendance of a witness may be compelled, only, by the court or chairperson of the Review Board on the request of a party [s. 672.5(11), (12)].

Section 672.5(7) creates the right of the accused or any other party to the proceedings to be represented by counsel. Where the accused is not represented, the court or Review Board must assign counsel to act for an accused who has been found unfit to stand trial or wherever the interests of justice so require.

The accused has the *prima facie* right to be present at a disposition hearing. The accused may be permitted to be absent on such conditions as the court or chairperson deems appropriate. The court or chairperson of the Review Board also has the authority to bar the accused from the hearing if the accused interrupts the hearing to the point that continuation is not feasible, where it is necessary so as not to endanger the life or safety of another person, where continued attendance would seriously impair the treatment or recovery of the accused or in order to hear evidence relating to the grounds for removing the accused pursuant to s. 672.5(10)(b)(ii).

#### ANNOTATIONS

Subsection (6) does not infringe ss. 7 and 15 of the Charter. It is appropriate that the board be required to take into account the public interest in determining whether or not to exclude the public: *Blackman v. British Columbia (Review Board)* (1995), 95 C.C.C. (3d) 412, 88 W.A.C. 170, 27 C.R.R. (2d) 106 (B.C.C.A.).

**DEFINITION OF “DISPOSITION INFORMATION” /** Disposition information to be made available to parties / Exception where disclosure dangerous to any person / *Idem* / Exception where disclosure unnecessary or prejudicial / Exclusion of certain persons from hearing / Prohibition of disclosure in certain cases / *Idem* / Information to be made available to specified persons / Disclosure for research or statistical purposes / Prohibition on publication / Powers of courts not limited.

**672.51. (1)** In this section, “disposition information” means all or part of an assessment report submitted to the court or Review Board and any other written information before the court or Review Board about the accused that is relevant to making a disposition.

**(2)** Subject to this section, all disposition information shall be made available for inspection by, and the court or Review Board shall provide a copy of it to, each party and any counsel representing the accused.

**(3)** The court or Review Board shall withhold some or all of the disposition information from an accused where it is satisfied, on the basis of that information and the evidence or report of the medical practitioner responsible for the assessment or treatment of the accused, that disclosure of the information would be likely to endanger the life or safety of another person or would seriously impair the treatment or recovery of the accused.

(4) Notwithstanding subsection (3), the court or Review Board may release some or all of the disposition information to an accused where the interests of justice make disclosure essential in its opinion.

(5) The court or Review Board shall withhold disposition information from a party other than the accused or an Attorney General, where disclosure to that party, in the opinion of the court or Review Board, is not necessary to the proceeding and may be prejudicial to the accused.

(6) A court or Review Board that withholds disposition information from the accused or any other party pursuant to subsection (3) or (5) shall exclude the accused or the other party, as the case may be, from the hearing during

(a) the oral presentation of that disposition information; or

(b) the questioning by the court or Review Board or the cross-examination of any person concerning that disposition information.

(7) No disposition information shall be made available for inspection or disclosed to any person who is not a party to the proceedings

(a) where the disposition information has been withheld from the accused or any other party pursuant to subsection (3) or (5); or

(b) where the court or Review Board is of the opinion that disclosure of the disposition information would be seriously prejudicial to the accused and that, in the circumstances, protection of the accused takes precedence over the public interest in disclosure.

(8) No part of the record of the proceedings in respect of which the accused was excluded pursuant to subparagraph 672.5(10)(b)(ii) or (iii) shall be made available for inspection to the accused or to any person who is not a party to the proceedings.

(9) Notwithstanding subsections (7) and (8), the court or Review Board may make any disposition information, or a copy of it, available on request to any person or member of a class of persons

(a) that has a valid interest in the information for research or statistical purposes, where the court or Review Board is satisfied that disclosure is in the public interest;

(b) that has a valid interest in the information for the purposes of the proper administration of justice; or

(c) that the accused requests or authorizes in writing to inspect it, where the court or Review Board is satisfied that the person will not disclose or give to the accused a copy of any disposition information withheld from the accused pursuant to subsection (3) or (5), or any part of the record of proceedings referred to in subsection (8), or that the reasons for withholding that information from the accused no longer exist.

(10) A person to whom the court or Review Board makes disposition information available under paragraph (9)(a) may disclose it for research or statistical purposes, but not in any form or manner that could reasonably be expected to identify any person to whom it relates.

(11) No person shall publish in any newspaper within the meaning of section 297 or broadcast

(a) any disposition information that is prohibited from being disclosed pursuant to subsection (7); or

(b) any part of the record of the proceedings in respect of which the accused was excluded pursuant to subparagraph 672.5(10)(b)(ii) or (iii).

(12) Except as otherwise provided in this section, nothing in this section limits the powers that a court may exercise apart from this section. 1991, c. 43, s. 4.



**CROSS-REFERENCES**

“Newspaper” is defined in s. 297. The terms “accused”, “court”, “disposition” and “Review Board” are defined in s. 672.1 of the *Criminal Code*. Pursuant to s. 672.5(10)(b)(ii) and (iii), an accused may be excluded from the court if failure to do so would endanger the life or safety of another person, impair the treatment or recovery of the accused or to hear submissions and witnesses as to the grounds which exist for removing the accused. Information obtained during these hearings may not be released to the accused. For further cross-references respecting disposition hearings, see references under s. 672.45.

**SYNOPSIS**

This provision sets out the circumstances in which “disposition information” may be disclosed to or withheld from parties to the disposition hearing as well as non-parties. Section 672.51(1) broadly defines “disposition information” to include all or part of any assessment and any other written information that is before the court or Review Board and is relevant to making a disposition.

The provision entrenches the general principle that any party or counsel representing the accused is entitled to a copy of all disposition information. Pursuant to s. 672.51(3), information may be withheld from the accused in one of two circumstances: (1) where disclosure would endanger the life or safety of another person; or (2) where disclosure would seriously impair either the treatment or recovery of the accused. The discretion to withhold disposition information, however, is subject to s. 672.51(4) which mandates the disclosure of the information notwithstanding subsec. (3) where the interests of justice make disclosure necessary. Nonetheless, evidence of proceedings pursuant to s. 672.5(10)(b)(ii) or (iii) relating to the exclusion of the accused from the hearing may not be disclosed to either the accused or any non-party.

Where disclosure is to a party who is not the accused or the Attorney General, the provision set out a different test. Pursuant to s. 672.51(5), disposition information may be withheld where disclosure is not necessary and would be prejudicial to the accused.

In determining the issue of disclosure, the court or review board must exclude either the accused or other party while hearing evidence relating to the disposition information in question.

A non-party is not entitled to any disposition information either where the disposition information has been withheld from the accused or another party, where the disclosure would be seriously prejudicial to the accused and in the circumstances, protection of the accused takes precedence over public interest in disclosure. No person is entitled to publish in any newspaper or broadcast any disposition information that is withheld or any part of the record of the proceedings in relation to the exclusion of the accused from the hearing pursuant to s. 672.5(10)(b)(ii) or (iii). Notwithstanding the general prohibition on disclosure of disposition information to non-parties, the court or Review Board has the discretion to disclose the information to persons performing research or statistical work where disclosure is in the public interest, to individuals having a valid interest in the information for the purpose of the proper administration of justice, and to persons authorized or requested by the accused to inspect the information where the court or Review Board is satisfied that the person will not disclose or give the accused a copy of the information withheld from the accused.

Pursuant to s. 672.51(12), the power of the court is not limited in the disclosure of information beyond the provisions of this section.

**RECORD OF PROCEEDINGS / Transmittal of transcript to Review Board / Reasons for disposition and copies to be provided.**

**672.52. (1) The court or Review Board shall cause a record of the proceedings of its disposition hearings to be kept, and include in the record any assessment report submitted.**

(2) Where a court makes a disposition, it shall send without delay a transcript of the disposition hearing, any document or information relating thereto in the possession of the court, and all exhibits filed with the court or copies of these exhibits, to the Review Board that has jurisdiction in respect of the matter.

(3) The court or Review Board shall state its reasons for making a disposition in the record of the proceedings, and shall provide every party with a copy of the disposition and those reasons. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms "court", "party" and "Review Board" are defined in s. 672.1. As to the material to be filed on appeal of a disposition or placement decision of the court or Review Board, see s. 672.73 requiring that an appeal is to be based on a transcript of proceedings. As to the review of dispositions by the Review Board, see ss. 672.81 to 672.85. For further references respecting disposition hearings, see references under s. 672.45.

#### SYNOPSIS

This provision establishes several requirements on the court or Review Board with respect to the preservation of a record for appeal purposes. Pursuant to subsec. (1), the court or Review Board must ensure that a record of the proceedings including any assessment report is kept. Where the court makes a disposition, a transcript of the hearing and any other relevant documentation including exhibits must be forwarded to the Review Board that has jurisdiction [s. 672.52(2)].

In addition, there is a requirement that the court or Review Board provide reasons for the disposition on the record and provide each party with a copy of those reasons [s. 672.52(3)].

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#### PROCEEDINGS NOT INVALID.

**672.53.** Any procedural irregularity in relation to a disposition hearing does not affect the validity of the hearing unless it causes the accused substantial prejudice. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

As to the procedures to be followed at a disposition hearing, see s. 672.5. For further cross-references respecting disposition hearings, see s. 672.45.

#### SYNOPSIS

Minor procedural irregularities do not vitiate the hearing unless the breach has caused the accused *substantial* prejudice.

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## *Dispositions by a Court or Review Board*

### **Terms of Dispositions**

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#### DISPOSITIONS THAT MAY BE MADE.

**672.54.** Where a court or Review Board makes a disposition pursuant to subsection 672.45(2) or section 672.47, it shall, taking into consideration the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, make one of the following dispositions that is the least onerous and least restrictive to the accused:

- (a) where a verdict of not criminally responsible on account of mental disorder has been rendered in respect of the accused and, in the opinion of the court or

- Review Board, the accused is not a significant threat to the safety of the public, by order, direct that the accused be discharged absolutely;**
- (b) by order, direct that the accused be discharged subject to such conditions as the court or Review Board considers appropriate; or**
- (c) by order, direct that the accused be detained in custody in a hospital, subject to such conditions as the court or Review Board considers appropriate. 1991, c. 43, s. 4.**

#### CROSS-REFERENCES

The terms “mental disorder”, “prosecutor” and “unfit to stand trial” are defined in s. 2 of the Criminal Code. The terms “accused”, “court”, “disposition”, “hospital”, “Review Board” and “verdict of not criminally responsible on account of mental disorder” are defined in s. 672.1.

A disposition under s. 672.54 cannot include a requirement that the accused submit to treatment subject to s. 672.58 which allows the court to order that the accused submit to such treatment as is not excluded by s. 672.61 where doing so is likely to render the accused fit. See also ss. 672.59 and 672.6 which define the conditions under which such a disposition can be made. A disposition comes into force the day it is made or any later day that the court or Review Board specifies and shall remain in force until the day it expires. A court cannot order a disposition requiring the accused to be detained in custody or in a hospital pursuant to s. 672.54 for more than 90 days after which the Review Board must hold a hearing and make a disposition in respect of the accused by virtue of s. 672.47. Where the court chooses not to hold a disposition hearing, the Review Board must hold a hearing within 45 days subject to the court’s discretion to extend this time period for not more than 90 days (ss. 672.45 and 672.46). A disposition detaining the accused requires the Review Board to issue a warrant of committal which may be in Form 49 (s. 672.57). Reference should also be made to s. 672.56 which allows the Review Board to make a disposition which delegates a person in charge of the hospital authorized to increase or decrease the liberty of the accused. Where increased restrictions on the accused’s liberty exceed seven days, the Review Board must be notified and pursuant to s. 672.81(2)(b), the Review Board must hold a hearing to review the disposition of the accused.

As to appeals from a decision of the Review Board, see ss. 672.72 to 672.8 and as to the review of dispositions of a court or Review Board, see ss. 672.81 to 672.85. For further cross-references with respect to disposition hearings, see references under s. 672.45.

#### SYNOPSIS

This provision establishes both the test for a disposition and the forms of dispositions which may be issued by a court or Review Board.

In making a disposition, the court is required to operate on the principle that the least restrictive and onerous alternative to the accused should be pursued, having considered the following factors: (1) the need to protect the public; (2) mental condition of the accused; (3) reintegration of the accused into society; and (4) other needs of the accused.

The Review Board may either discharge the accused with respect to such conditions as are appropriate, detain the accused in a hospital or, where the verdict of not criminally responsible on account of mental disorder is rendered and the accused is not a significant threat to the safety of the public, discharge the accused absolutely. The court has similar powers, except that the detention order continues in force for no longer than 90 days [s. 672.55].

#### ANNOTATIONS

If, after considering the factors in this section, the Board is undecided on whether the accused is a significant threat, then it may properly decline to order an absolute discharge under para. (a), and it may proceed to decide what other disposition it should make. The accused is entitled to an absolute discharge only where the Board has made an affirmative finding that the accused is not a significant threat. Thus, if the Board were of the opinion that the accused, while not a significant threat if he continues his medica-



tion, may become a significant threat if he does not take his medication, then the Board cannot be said to have an affirmative opinion that the accused is not a significant threat. However, there is a distinction between a threat and a significant threat: *Orlowski v. British Columbia (Attorney General)*; *Alexander v. British Columbia (Attorney General)*; *Humphreys v. British Columbia (Attorney General)* (1992), 75 C.C.C. (3d) 138, 94 D.L.R. (4th) 541 (B.C.C.A.).

Except in cases where an adverse finding under para. (a) can be necessarily inferred from the reasons for disposition, the Board should make an express finding as to whether it is of the opinion that the accused is not a significant threat. This finding may merely be that the Board is not of the opinion that the accused is entitled to an absolute discharge but explanatory reasons should be given in almost all cases: *Orlowski v. British Columbia (Attorney General)*; *Alexander v. British Columbia (Attorney General)*; *Humphreys v. British Columbia (Attorney General)*, *supra*.

Proceedings before the Board under this section are not adversarial nor penal in purpose or effect. The task of the Board is to balance the protection of society on the one hand and the right of the accused to his liberty, unless deprived of it in accordance with the principles of fundamental justice. There is no burden on the Crown or the hospital to prove beyond a reasonable doubt that the accused is not a significant risk to the public and s. 7 of the Charter does not require that the statutory scheme be interpreted so as to impose such a burden: *Davidson v. British Columbia (Attorney General)* (1994), 87 C.C.C. (3d) 269, 50 W.A.C. 111 (B.C.C.A.); similarly, *Peckham v. Ontario (Attorney General)*, (1994) 93 C.C.C. (3d) 443, 34 C.R. (4th) 227, 19 O.R. (3d) 766 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vi, 37 C.R. (4th) 399n.

It was not open to the Board to accept the recommendation of the hospital and order that the accused be released unconditionally where his basic condition was untreatable and it was clear that, since he had consistently refused treatment, the accused's problems remained unresolved. The accused was a nuisance and the administrators of the hospital sought to get rid of him either by proposing that he be sent to some other institution or that he be released unconditionally so that when he ran afoul of the law, as it was conceded that he would, he could be dealt with by the criminal justice system. The question the review board should have asked itself was how it could effectively supervise a reintegration of the accused into society when he wilfully refused to abide by the conditions of release that were imposed earlier. For the accused to be discharged absolutely, the Board had to form the opinion that the accused was not a significant threat to the safety of the public: *R. v. Jones* (1994), 87 C.C.C. (3d) 350, 27 C.R. (4th) 238, 17 O.R. (3d) 26 (C.A.).

In considering the "mental condition" of the accused, the Board is required to consider the accused's mental condition at the time of the hearing. There is nothing in this section suggesting that the Board must first decide whether the mental condition which first led to the finding that the accused is not criminally responsible still exists: *Peckham v. Ontario (Attorney General)* (1994), 93 C.C.C. (3d) 443, 34 C.R. (4th) 227, 19 O.R. (3d) 766, 74 O.A.C. 121 *sub nom. R. v. Peckham* (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vi, 37 C.R. (4th) 399n.

Only three dispositions are possible under this section, and consideration of the least onerous and least restrictive disposition is required only with respect to a determination as to whether the accused should be absolutely discharged, discharged subject to conditions, or detained in a hospital subject to conditions. Once that determination was made, it was not necessary that the Board, in imposing conditions, consider whether the type of hospital or the conditions contemplated would be the least onerous and least restrictive. However, once the Board determines the appropriate type of facility in which to detain an accused, it must make a disposition in conformity with that determination: *Pinet v. Ontario* (1995), 100 C.C.C. (3d) 343, 40 C.R. (4th) 113, 23 O.R. (3d) 97 (C.A.).

**TREATMENT NOT A CONDITION / Effective period of disposition.**

**672.55. (1) No disposition made under section 672.54 shall direct that any psychiatric or other treatment of the accused be carried out or that the accused submit to such treatment.**

**(2) No disposition made under paragraph 672.54(c) by a court shall continue in force for more than ninety days after the day that it is made. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

Pursuant to s. 672.58, the court can issue an order directing that the accused submit to treatment for a period of not more than 90 days, where a verdict of unfit to stand trial has been rendered and the treatment is rendered for the purpose of making the accused fit. Section 672.59 outlines the necessary evidence required to obtain a treatment order and s. 672.61 precludes the use of electro-convulsive therapy or psychosurgery as part of the treatment order. “Electro-convulsive therapy” and “psychosurgery” are defined in s. 672.61(2). The term “unfit to stand trial” is defined in s. 2 of the Criminal Code.

**SYNOPSIS**

The power of the court or Review Board cannot encompass an order for psychiatric or other treatment of the accused or an order requiring the accused to submit to such treatment. This provision also limits the period for which an accused may be detained in custody in a hospital, pursuant to a court ordered disposition, to a period not exceeding 90 days.

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**DELEGATED AUTHORITY TO VARY RESTRICTIONS ON LIBERTY OF ACCUSED / Notice to accused and Review Board of increase in restrictions.**

**672.56. (1) A Review Board that makes a disposition in respect of an accused under paragraph 672.54(b) or (c) may delegate to the person in charge of the hospital authority to direct that the restrictions on the liberty of the accused be increased or decreased within any limits and subject to any conditions set out in that disposition, and any direction so made is deemed for the purposes of this Act to be a disposition made by the Review Board.**

**(2) A person who increases the restrictions on the liberty of the accused significantly pursuant to authority delegated to the person by a Review Board shall**

- (a) make a record of the increased restrictions on the file of the accused; and**
- (b) give notice of the increase as soon as is practicable to the accused and, if the increased restrictions remain in force for a period exceeding seven days, to the Review Board. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The terms “accused”, “disposition”, “hospital” and “Review Board” are defined in s. 672.1. Where the Review Board receives notice of increased restrictions on the accused’s liberty for a period of more than seven days, s. 672.81(2)(a) requires the board to hold a hearing to review the disposition. For further cross-references as to dispositions, see references under s. 672.54.

**SYNOPSIS**

The Review Board may direct that the restrictions on the liberty of the accused be increased or decreased where the accused is discharged with conditions or detained in a hospital. Although the facility has the discretion to increase the restrictions on the accused’s liberty, these increased restrictions must be recorded and notice must be given to the accused. Where the restrictions remain in force for a period of more than seven days, notice must be provided to the Review Board which, by virtue of s. 672.81(2)(a), will be required to hold a review hearing.

**WARRANT OF COMMITTAL.**

**672.57.** Where the court or Review Board makes a disposition under paragraph 672.54(c), it shall issue a warrant of committal of the accused, which may be in Form 49. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

For further references with respect to dispositions, see references under s. 672.54.

**SYNOPSIS**

This provision requires the issuance of a warrant of committal which may be in Form 49 where the accused is detained in custody by order of the Review Board in a hospital pursuant to s. 672.54(c).

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**TREATMENT DISPOSITION.**

**672.58.** Where a verdict of unfit to stand trial is rendered and the court has not made a disposition under section 672.54 in respect of an accused, the court may, on application by the prosecutor, by order, direct that treatment of the accused be carried out for a specified period not exceeding sixty days, subject to such conditions as the court considers appropriate and, where the accused is not detained in custody, direct that the accused submit to that treatment by the person or at the hospital specified. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The term "unfit to stand trial" and "prosecutor" are defined in s. 2 of the Criminal Code. The terms "accused", "court", "disposition" and "hospital" are defined in s. 672.1. A treatment order requires the consent of the person in charge of the hospital treating the accused and the person assigned to treat the accused but does not require the consent of the accused or a person authorized to consent to treatment on the accused's behalf (s. 672.62). The prosecutor must give the accused notice of the application and the accused must be allowed to adduce evidence challenging the application (s. 672.6). The test which must be met and the type of evidence adduced for the court to issue a treatment order is set out in s. 672.59 and requires a medical doctor to have assessed the accused and concluded that: (1) at the time of the assessment, the accused was unfit; (2) the medical or psychiatric treatment will render the accused fit within 60 days; (3) the risk of harm to the accused from the treatment is not disproportionate to the expected benefit; and (4) the treatment is the least restrictive and intrusive method available to render the accused fit to stand trial. The treatment order cannot include the performance of psychosurgery or electro-convulsive therapy which are defined in s. 672.61(2). For further references as to fitness to stand trial, see references under s. 672.23.

**SYNOPSIS**

Where the issue is the fitness of the accused, the prosecutor may apply to the court for an order directing that the accused submit to treatment for a period not exceeding 60 days whether the accused is or is not in custody. The application for a treatment order must be made subsequent to a verdict of unfit to stand trial but prior to the court making a disposition in the matter.

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**CRITERIA FOR DISPOSITION / Evidence required.**

**672.59.** (1) No disposition may be made under section 672.58 unless the court is satisfied, on the basis of the testimony of a medical practitioner, that a specific treatment should be administered to the accused for the purpose of making the accused fit to stand trial.

(2) The testimony required by the court for the purposes of subsection (1) shall



include a statement that the medical practitioner has made an assessment of the accused and is of the opinion, based on the grounds specified, that

- (a) the accused, at the time of the assessment, was unfit to stand trial;
- (b) the psychiatric treatment and any other related medical treatment specified by the medical practitioner will likely make the accused fit to stand trial within a period not exceeding sixty days and that without that treatment the accused is likely to remain unfit to stand trial;
- (c) the risk of harm to the accused from the psychiatric and other related medical treatment specified is not disproportionate to the benefit anticipated to be derived from it; and
- (d) the psychiatric and other related medical treatment specified is the least restrictive and least intrusive treatment that could, in the circumstances, be specified for the purpose referred to in subsection (1), considering the opinions referred to in paragraphs (b) and (c). 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The term “unfit to stand trial” and “prosecutor” are defined in s. 2 of the Criminal Code. The terms “accused”, “court”, “disposition” and “hospital” are defined in s. 672.1. The application must be brought by the prosecutor and served upon the accused and cannot extend for a period of more than 60 days, see s. 672.58 and 672.6. In addition, a treatment order cannot include electro-convulsive therapy or psychosurgery as defined in s. 672.61(2).

#### SYNOPSIS

The court may not make a treatment order unless it is satisfied on the basis of medical testimony that the treatment is required to render the accused fit to stand trial. The medical doctor must have assessed the accused and concluded that: (1) at the time of the assessment, the accused was unfit; (2) the medical or psychiatric treatment will render the accused fit within 60 days; (3) the risk of harm to the accused from the treatment is not disproportionate to the expected benefit; and (4) the treatment is the least restrictive and intrusive available to render the accused fit to stand trial.

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#### NOTICE REQUIRED / Challenge by accused.

**672.6. (1)** The court shall not make a disposition under section 672.58 unless the prosecutor notifies the accused of the application, within the time and in the manner prescribed.

**(2)** On receiving the notice referred to in subsection (1), the accused may challenge the application and adduce evidence for that purpose. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

As to the application for a treatment order, the prescribed requirements, see ss. 672.58 and 672.59. As to prohibited treatments, see s. 672.61. The court may not issue a treatment order without the consent of the person in charge of the hospital where the accused is to be treated and the person treating the accused, but the accused’s consent to treatment is not required. See s. 672.62.

#### SYNOPSIS

This provision requires that the accused be given notice by the prosecutor of the treatment application and allowed the opportunity to adduce evidence challenging the application.

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#### EXCEPTION / Definitions / “electro-convulsive therapy” / “psychosurgery”.

**672.61. (1)** The court shall not direct, and no disposition made under section 672.58 shall include, the performance of psychosurgery or electro-convulsive therapy or any other prohibited treatment that is prescribed.

**(2) In this section,**

**“electro-convulsive therapy”** means a procedure for the treatment of certain mental disorders that induces, by electrical stimulation of the brain, a series of generalized convulsions;

**“psychosurgery”** means any procedure that by direct or indirect access to the brain removes, destroys or interrupts the continuity of histologically normal brain tissue, or inserts indwelling electrodes for pulsed electrical stimulation for the purpose of altering behaviour or treating psychiatric illness, but does not include neurological procedures used to diagnose or treat intractable physical pain, organic brain conditions, or epilepsy, where any of those conditions is clearly demonstrable. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

As to the application for a treatment order and the prescribed requirements, see ss. 672.58 and 672.59. The court may not issue a treatment order without the consent of the person in charge of the hospital where the accused is to be treated and the person treating the accused, but the accused's consent to treatment is not required. See. s. 672.62.

**SYNOPSIS**

This provision outlines the boundaries of a treatment order. The order may not include psychosurgery or electro-convulsive therapy as defined in subsec. (2).

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**CONSENT OF HOSPITAL REQUIRED FOR TREATMENT / Consent of accused not required for treatment.**

**672.62. (1)** No court shall make a disposition under section 672.58 without the consent of

- (a) the person in charge of the hospital where the accused is to be treated; or
- (b) the person to whom responsibility for the treatment of the accused is assigned by the court.

**(2)** The court may direct that treatment of an accused be carried out pursuant to a disposition made under section 672.58 without the consent of the accused or a person who, according to the laws of the province where the disposition is made, is authorized to consent for the accused. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

Although the accused's consent is not required, the prosecutor is required to notify the accused of the application and the accused is entitled to challenge the application and adduce evidence to this effect (s. 672.6). Reference should be made to ss. 672.58 and 672.59 which set out the test required to obtain a treatment order. Section 672.61 defines the prohibited treatments of “electro-convulsive therapy” and “psychosurgery”.

**SYNOPSIS**

Treatment orders require the consent of the person in charge of the hospital treating the accused and the person assigned by the court who is responsible for the treatment.

In addition, subsec. (2) clarifies the power of the court to make a treatment order pursuant to s. 672.58 without the consent of the accused or a person authorized to consent to the treatment on behalf of the accused.

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**EFFECTIVE DATE OF DISPOSITION.**

**672.63.** A disposition shall come into force on the day that it is made or on any later day that the court or Review Board specifies in it, and shall remain in force until the

date of expiration that the disposition specifies or until the Review Board holds a hearing pursuant to section 672.47 or 672.81. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms “disposition” and “Review Board” are defined in s. 672.1. Where no disposition is made by the court, the Review Board must hold a disposition hearing not more than 45 days after the verdict, although the court can extend the time period to a maximum of 90 days. See s. 672.47(1) and (2). Pursuant to s. 672.47(3), a court ordered disposition made under s. 672.54 cannot remain in effect for more than 90 days after which the Review Board is required to hold a hearing to review the disposition. As to review hearings, see ss. 672.81 to 672.85.

#### SYNOPSIS

A disposition is effective as of the date it is made or any later day that the court or Review Board specifies. The disposition remains in force until the expiration of the order or until the Review Board holds a review hearing pursuant to s. 672.81.

**Note:** The unproclaimed text of ss. 672.64 to 672.66 is printed in *lightface italics*.

### *Capping of Dispositions*

*DEFINITIONS / “designated offence” / “cap” / Additional designated offences under the National Defence Act / Cap for various offences / Longest cap applies where two or more offences / Offence committed while subject to previous disposition.*

672.64. (1) *In this section, section 672.65, 672.79 and 672.8,*

*“designated offence” means an offence included in the schedule to this Part, an offence under the National Defence Act referred to in subsection (2), or any conspiracy or attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, such an offence;*

*“cap” means the maximum period during which an accused is subject to one or more dispositions in respect of an offence, beginning at the time when the verdict is rendered.*

(2) *An offence contrary to any of the following sections of the National Defence Act is a designated offence if it is committed in the circumstances described:*

- (a) *section 73 (offences by commanders when in action), where the accused person acted from cowardice;*
- (b) *section 74 (offences by any person in presence of enemy), 75 (offences related to security) or 76 (offences related to prisoners of war), where the accused person acted otherwise than traitorously;*
- (c) *section 77 (offences related to operations), where the accused person committed the offence on active service;*
- (d) *section 107 (wrongful acts in relation to aircraft or aircraft material) or 127 (injurious or destructive handling of dangerous substances), where the accused person acted wilfully;*
- (e) *section 130 (service trial of civil offences), where the civil offence is included in the schedule to this Part; and*
- (f) *section 132 (offences under law applicable outside Canada), where a court martial determines that the offence is substantially similar to an offence included in the schedule to this Part.*

(3) *Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused, the cap is*

- (a) *life, where the offence is*
  - (i) *high treason under subsection 47(1) or first or second degree murder under section 229,*
  - (ii) *an offence under section 73 (offences by commanders when in action), section 74 (of-*



fences by any person in presence of enemy), section 75 (offences related to security) or section 76 (offences related to prisoners of war) of the National Defence Act, if the accused person acted traitorously, or first or second degree murder punishable under section 130 of that Act,

(iii) any other offence under any Act of Parliament for which a minimum punishment of imprisonment for life is provided by law;

(b) ten years, or the maximum period during which the accused is liable to imprisonment in respect of the offence, whichever is shorter, where the offence is a designated offence that is prosecuted by indictment; or

(c) two years, or the maximum period during which the accused is liable to imprisonment in respect of the offence, whichever is shorter, where the offence is an offence under this Act or any other Act of Parliament, other than an offence referred to in paragraph (a) or (b).

(4) Subject to subsection (5), where an accused is subject to a verdict in relation to two or more offences, even if they arise from the same transaction, the offence with the longest maximum period of imprisonment as a punishment shall be used to determine the cap that applies to the accused in respect of all the offences.

(5) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of an accused who is subject to a disposition other than an absolute discharge in respect of a previous offence, the court may order that any disposition that it makes in respect of the offence be consecutive to the previous disposition, even if the duration of all the dispositions exceeds the cap for the offences determined pursuant to subsections (3) and (4).

## *Dangerous Mentally Disordered Accused*

**DEFINITION OF "SERIOUS PERSONAL INJURY OFFENCE"** / Application for a finding that accused is a dangerous mentally disordered accused / Grounds for finding / Court may increase duration of disposition.

672.65. (1) In this section, "serious personal injury offence" means

(a) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault); or

(b) any designated offence prosecuted by indictment involving

(i) the use or attempted use of violence against another person, or

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person,

and for which the accused is liable to imprisonment for ten years or more.

(2) Where a verdict of not criminally responsible on account of mental disorder is rendered in respect of an accused, the prosecutor may, before any disposition is made, apply to the court that rendered the verdict or to a superior court of criminal jurisdiction for a finding that the accused is a dangerous mentally disordered accused.

(3) On an application made under this section, the court may find the accused to be a dangerous mentally disordered accused where it is satisfied that

(a) the offence that resulted in the verdict is a serious personal injury offence described in paragraph (1)(b), and the accused constitutes a threat to the life, safety, physical or mental well-being of other persons on the basis of evidence establishing

(i) a pattern of repetitive behaviour by the accused, of which the offence that resulted in the verdict is a part, that shows a failure to exercise behavioural restraint and a likelihood that the accused will cause death or injury to other persons or inflict severe psychological damage on other persons, through failure in the future to exercise restraint,

- (ii) *a pattern of persistent aggressive behaviour by the accused, of which the offence that resulted in the verdict is a part, or*
- (iii) *any behaviour by the accused, associate with the offence that resulted in the verdict, that is of such a brutal nature as to compel the conclusion that the behaviour of the accused in future is unlikely to be inhibited by normal standards of behavioural restraint; or*
- (b) *the offence that resulted in the verdict is a serious personal injury offence described in paragraph (1)(a), and the accused, by conduct in any sexual matter including the conduct in the commission of the offence that resulted in the verdict, has shown a failure to control sexual impulses and a likelihood that the accused will cause injury, pain or other harm to other persons through failure in the future to control such impulses.*
- (4) *Where the court finds the accused to be a dangerous mentally disordered accused under this section, it may increase the cap in respect of the offence to a maximum of life.*

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**SECTIONS 754 TO 758 APPLY / Transmittal of transcript to Review Board.**

672.66. (1) *Sections 754 to 758 apply, with such modifications as the circumstances require, to an application under section 672.65 as if it were made under Part XXIV and the accused were an offender.*

(2) *Where a court makes a finding that the accused is a dangerous mentally disordered accused, it shall send without delay to the Review Board that has jurisdiction in respect of the matter a transcript of the hearing of the application, any document or information relating to it in the possession of the court, and all exhibits filed with the court or copies of them.*

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## **Dual Status Offenders**

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**WHERE COURT IMPOSES A SENTENCE / Custodial disposition by court.**

672.67. (1) **Where a court imposes a sentence of imprisonment on an offender who is, or thereby becomes, a dual status offender, that sentence takes precedence over any prior custodial disposition, pending any placement decision by the Review Board.**

(2) **Where a court imposes a custodial disposition on an accused who is, or thereby becomes, a dual status offender, the disposition takes precedence over any prior sentence of imprisonment except a hospital order, as defined in section 736.1, pending any placement decision by the Review Board. 1991, c. 43, s. 4.**

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736.1 with s. 747.

**CROSS-REFERENCES**

Section 672.1 defines “dual status offender”, “court”, “hospital”, “placement decision”, and “Review Board”. Note that, at this time, the provisions for making a hospital order are not yet in force.

**SYNOPSIS**

This section and the following provisions deal with so-called “dual status” offenders being prisoners who are or become subject to sentences of imprisonment as well as custodial dispositions under s. 672.54(c) [i.e. detention in a hospital upon a finding of unfitness or a verdict of not criminally responsible]. The effect of this section is that the last disposition be it a sentence of imprisonment or a custodial disposition takes precedence until the Review Board has the opportunity to make the appropriate placement decision under s. 672.68.

**DEFINITION OF "MINISTER" / Placement decision by Review Board / Idem / Time for making placement decision / Effects of placement decision.**

**672.68. (1)** In this section and in sections 672.69 and 672.7, "Minister" means the Solicitor General of Canada or the Minister responsible for correctional services of the province to which a dual status offender may be sent pursuant to a sentence of imprisonment.

**(2)** On application by the Minister or of its own motion, where the Review Board is of the opinion that the place of custody of a dual status offender pursuant to a sentence or custodial disposition made by the court is inappropriate to meet the mental health needs of the offender or to safeguard the well-being of other persons, the Review Board shall, after giving the offender and the Minister reasonable notice, decide whether to place the offender in custody in a hospital or in a prison.

**(3)** In making a placement decision, the Review Board shall take into consideration

- (a)** the need to protect the public from dangerous persons;
- (b)** the treatment needs of the offender and the availability of suitable treatment resources to address those needs;
- (c)** whether the offender would consent to or is a suitable candidate for treatment;
- (d)** any submissions made to the Review Board by the offender or any other party to the proceedings and any assessment report submitted in writing to the Review Board; and
- (e)** any other factors that the Review Board considers relevant.

**(4)** The Review Board shall make its placement decision as soon as practicable but not later than thirty days after receiving an application from, or giving notice to, the Minister under subsection (2), unless the Review Board and the Minister agree to a longer period not exceeding sixty days.

**(5)** Where the offender is detained in a prison pursuant to the placement decision of the Review Board, the Minister is responsible for the supervision and control of the offender. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms "court", "disposition", "dual status offender" and "Review Board" are defined in s. 672.1. Reference should be made to s. 672.69 which authorizes the Review Board to conduct a review of the placement decision on application of the Minister, the dual status offender or on its own motion where there has been a change in circumstances. Note that, although the Minister is responsible for the supervision of the offender while he is detained in prison pursuant to the placement decision of the Review Board, s. 672.69(1) entitles the Review Board to access to any dual status offender for the purpose of conducting a review of the disposition. In addition, the Minister is automatically a party in any proceedings relating to the placement of a dual status offender. See s. 672.69(4).

#### SYNOPSIS

On application by the Minister or of its own motion, the Review Board has the discretion to make a placement decision where it is of the opinion that the sentence or custodial disposition will not protect the mental health needs of the offender or safeguard other persons. "Minister" is defined to mean any Solicitor General of Canada or the Minister responsible for correctional services in the province in which the dual status offender may be sent pursuant to a sentence of imprisonment [s. 672.68(1)].

The Review Board must consider the following factors in making a placement decision: (1) need to protect the public from dangerous persons; (2) treatment and availability of treatment to the offender; (3) consent of the offender to treatment; (4) whether the offender is a suitable candidate for treatment; (5) submissions by the offender; (6) submissions by other parties; (7) any written assessment report submitted to the board; (8)



any other relevant factors. Notice must be provided to the offender and the Minister. The decision is to be rendered within 30 days after receiving the application, although this may be extended to a maximum of 60 days with the consent of the Review Board and the Minister. In addition, subsec. (5) clarifies that the Minister is responsible for the dual status offender while he is detained in prison pursuant to a Review Board placement decision.

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**MINISTER AND REVIEW BOARD ENTITLED TO ACCESS / Review of placement decisions / *Idem* / Minister shall be a party.**

**672.69. (1)** The Minister and the Review Board are entitled to have access to any dual status offender in respect of whom a placement decision has been made, for the purpose of conducting a review of the sentence or disposition imposed.

**(2)** The Review Board shall hold a hearing as soon as is practicable to review a placement decision, on application by the Minister or the dual status offender who is the subject of the decision, where the Review Board is satisfied that a significant change in circumstances requires it.

**(3)** The Review Board may of its own motion hold a hearing to review a placement decision after giving the Minister and the dual status offender who is subject to it reasonable notice.

**(4)** The Minister shall be a party in any proceedings relating to the placement of a dual status offender. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “dual status offender” and “Review Board” are defined in s. 672.1. “Minister” is defined in s. 672.68(1). Reference should be made to s. 672.68 as to the relevant considerations with respect to a placement decision. For further cross-references with respect to dual status offenders, see references under s. 672.68. Placement decisions are also appealable under s. 672.72 *et seq.*

**SYNOPSIS**

A placement decision may be reviewed on application by the Minister or the offender where the Review Board is satisfied that there has been a significant change in circumstances. In addition, the Review Board may choose to review the placement decision on its own motion provided that notice is given to the Minister and the dual status offender. Note that the Minister is automatically a party to any proceedings relating to the placement of a dual status offender. The Minister and the Review Board are entitled to access to the dual status offender in order to review the placement decision. The provision does not prescribe any substantive or procedural requirements for the exercise of the Review Board’s discretion apart from requiring that the review be conducted “as soon as practicable”.

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**NOTICE OF DISCHARGE / Warrant of committal.**

**672.7. (1)** Where the Minister or the Review Board intends to discharge a dual status offender from custody, each shall give written notice to the other indicating the time, place and conditions of the discharge.

**(2)** A Review Board that makes a placement decision shall issue a warrant of committal of the accused, which may be in Form 50. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The terms “dual status offender” and “Review Board” are defined in s. 672.1. “Minister” is defined in s. 672.68(1). For further cross-references with respect to dual status offenders, see references under s. 672.68.

**SYNOPSIS**

This provision requires notice to be given to the Minister or the Review Board where either party wishes to discharge the dual status offender from custody.

A warrant of committal must be issued which may be in Form 50 by the Review Board once a placement decision is determined.

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**DETENTION TO COUNT AS SERVICE OF TERM / Disposition takes precedence over probation orders.**

**672.71. (1)** Each day of detention of a dual status offender pursuant to a placement decision or a custodial disposition shall be treated as a day of service of the term of imprisonment, and the accused shall be deemed, for all purposes, to be lawfully confined in a prison.

**(2)** When a dual status offender is convicted or discharged on the conditions set out in a probation order made under section 736 in respect of an offence but is not sentenced to a term of imprisonment, the custodial disposition in respect of the accused comes into force and, notwithstanding subsection 738(1), takes precedence over any probation order made in respect of the offence. 1991, c. 43, s. 4.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the references to ss. 736 and 738(1) with ss. 730 and 732.2(1).

**CROSS-REFERENCES**

The terms "accused", "disposition" and "dual status offender" are defined in s. 672.1. Reference should be made to s. 672.67 which states that in the case of a dual status offender, the latter disposition, whether it be a sentence or a custodial disposition pursuant to s. 672.54(c) prevails pending any placement decision by the Review Board. For further cross-references pertaining to dual status offenders, see references under s. 672.68.

**SYNOPSIS**

Where a dual status offender is detained pursuant either to a placement decision or custodial disposition, each day served in the facility is treated as a day served of the term of imprisonment. If a dual status offender is given a conditional discharge or a suspended sentence, the custodial disposition takes precedence and the probation order is deemed to come into effect after the custodial disposition is completed notwithstanding s. 738(1) which states that a probation order comes into force on the date that the order is made.

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**Appeals**

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**GROUND FOR APPEAL / Limitation period for appeal / Appeal to be heard expeditiously.**

**672.72. (1)** Any party may appeal against a disposition or placement decision made by a court or Review Board to the court of appeal of the province where the disposition or placement decision was made on any ground of appeal that raises a question of law or fact alone or of mixed law and fact.

**(2)** Notice of an appeal against a disposition or placement decision shall be given in the manner directed by the applicable rules of court within fifteen days after the day on which the parties are provided with a copy of the placement decision or disposition and the reasons for it or within any further time that the court of appeal, or a judge of that court, may direct.

**(3)** The court of appeal shall hear an appeal against a disposition or placement deci-

**sion in or out of the regular sessions of the court, as soon as practicable after the day on which the notice of appeal is given, within any period that may be fixed by the court of appeal, a judge of the court of appeal, or the rules of that court. 1991, c. 43, s. 4.**

#### CROSS-REFERENCES

The term “court of appeal” is defined in s. 2 of the Criminal Code. See s. 672.1 for definition of “disposition”, “party” and “Review Board”.

Rights of appeal are conferred by the Criminal Code which also defines the authority of the court to hear and determine the appeal from a disposition or placement decision by a court or Review Board under s. 672.78. The powers of the court of appeal in respect of disposition or placement orders are defined in s. 672.76. An appeal shall be determined based on the transcript subject to the power of the court to admit any other evidence pursuant to s. 683(1). See s. 672.73. Note also that upon receiving the notice of the appeal, the clerk of the court must notify the court or Review Board responsible for the decision so that all exhibits and other materials are forwarded to the court of appeal. See s. 672.74. In addition to the rights of appeal contained in s. 672.72, the Attorney General has a right of appeal against the dismissal of an application to find the accused is a dangerous mentally disordered accused on a ground of law alone. See s. 672.8. The accused may appeal from a finding that the accused is a dangerous mentally disordered accused and increasing the cap on a question of law, fact or mixed fact and law. See 672.79.

Reference should be made to ss. 672.75 to 672.77 which outline the powers of the court of appeal with respect to the accused pending appeal. Upon filing of the notice of appeal, an absolute discharge or treatment order is automatically stayed subject to the court of appeal’s authority to require that the discharge or treatment order be carried out pending the determination of the appeal. See s. 672.75. Where the order is not automatically stayed, any party may apply to the court to stay or enforce a disposition order or placement decision pending the appeal and the court of appeal may require the order to be carried out, suspended and make any other disposition which is appropriate. See s. 672.76. Note that, if the court of appeal simply suspends the disposition or placement order, any disposition, interim release or detention order, that was in place prior to the disposition or placement decision appealed from took effect, is in force. See s. 672.77.

Reference should also be made to s. 672.82 which allows the accused or other party to request that the Review Board review a disposition, however, such a request is deemed to be an abandonment of any appeal against disposition pursuant to s. 672.72. There are no analogous provisions with respect to placement decisions.

#### SYNOPSIS

Subsection (1) creates a right of appeal from a disposition or placement order by a court or Review Board for *any party* on a question of law, fact or mixed fact and law to the court of appeal. A notice of appeal must be filed within 15 days from the date when the parties are provided with reasons for the disposition. This period may be extended by the court of appeal or a judge of the court of appeal. The provision requires that the court of appeal must hear the appeal as soon as practicable within any period that is fixed by the court, a judge of the court of appeal or the rules of that court. The effect of this section is that all appeals from dispositions of placement decisions are to the court of appeal, even those made in respect of summary conviction matters. Appeals in respect of the verdict of not criminally responsible and the finding of unfitness, however, follow the normal appeal routes under Parts XXI and XXVII, as the case may be.

#### ANNOTATIONS

No appeal lies from the decision of the Review Board refusing to make a recommendation for transfer of the accused out of the province pursuant to s. 672.86: *Krueger v. Ontario (Criminal Code Review Board)* (1994), 95 C.C.C. (3d) 88, 73 O.A.C. 390 (C.A.).

#### APPEAL ON THE TRANSCRIPT / Additional evidence.

**672.73. (1) An appeal against a disposition by a court or Review Board or placement**



decision by a Review Board shall be based on a transcript of the proceedings and any other evidence that the court of appeal finds necessary to admit in the interests of justice.

(2) For the purpose of admitting additional evidence under this section, subsections 683(1) and (2) apply, with such modifications as the circumstances require. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

"Court of appeal" is defined in s. 2 of the Criminal Code. The terms "court" and "Review Board" are defined in s. 672.1. As to the powers of the court of appeal to admit evidence other than the transcripts, see s. 683(1) and (2). For further cross-references with respect to appeals, see references under s. 672.72.

#### SYNOPSIS

In most instances, the court will make the determination of the appeal based on the transcript of the proceedings. Note that the appellant must provide the court of appeal and the respondent with a transcript by virtue of s. 672.74(4). The court of appeal, however, has the discretion pursuant to s. 683(1) of the Criminal Code to admit any other evidence which is necessary in the interests of justice.

**NOTICE OF APPEAL TO BE GIVEN TO COURT OR REVIEW BOARD /** Transmission of records to court of appeal / Record to be kept by court of appeal / Appellant to provide transcript of evidence / Saving.

**672.74.** (1) The clerk of the court of appeal, on receiving notice of an appeal against a disposition or placement decision, shall notify the court or Review Board that made the disposition.

(2) On receipt of notification under subsection (1), the court or Review Board shall transmit to the court of appeal, before the time that the appeal is to be heard or within any time that the court of appeal or a judge of that court may direct,

- (a) a copy of the disposition or placement decision;
- (b) all exhibits filed with the court or Review Board or a copy of them; and
- (c) all other material in its possession respecting the hearing.

(3) The clerk of the court of appeal shall keep the material referred to in subsection (2) with the records of the court of appeal.

(4) Unless it is contrary to an order of the court of appeal or any applicable rules of court, the appellant shall provide the court of appeal and the respondent with a transcript of any evidence taken before a court or Review Board by a stenographer or a sound recording apparatus, certified by the stenographer or in accordance with subsection 540(6), as the case may be.

(5) An appeal shall not be dismissed by the court of appeal by reasons only that a person other than the appellant failed to comply with this section. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

For further cross-references with respect to appeals, see references under s. 672.72.

#### SYNOPSIS

Upon receiving the notice of appeal, the clerk of the court of appeal must notify the court or Review Board responsible for the decision and upon receipt of the notice, the court or Review Board shall forward to the court of appeal a copy of the decision, exhibits and other material with respect to the hearing. The appellant must provide the court

of appeal and the respondent with a transcript of the evidence. Non-compliance by a person other than an appellant is not grounds for dismissing the appeal.

#### **AUTOMATIC SUSPENSION OF CERTAIN DISPOSITIONS.**

**672.75.** The filing of a notice of appeal against a disposition made under paragraph 672.54(a) or section 672.58 suspends the application of the disposition pending the determination of the appeal. 1991, c. 43, s. 4.

#### **CROSS-REFERENCES**

“Court of appeal” is defined in s. 2. “Court”, “disposition” and “Review Board” are defined in s. 672.1. Reference should also be had to s. 672.76 allowing any party to apply to the court to stay or enforce a disposition order or placement disposition pending an appeal. In addition, where a disposition or placement decision is suspended, any pre-existing dispositions, detention orders or interim release orders are deemed to be in effect by virtue of s. 672.77. For further cross-references respecting appeals, see references under s. 672.72.

#### **SYNOPSIS**

An absolute discharge subsequent to a finding of not criminally responsible on account of mental disorder pursuant to s. 672.54 or a treatment order pursuant to s. 672.58 is automatically stayed upon filing of a notice of appeal. Notwithstanding this provision, however, the court of appeal has the authority pursuant to s. 672.76(2)(a) to require that the discharge or treatment order be carried out pending the determination of the appeal.

#### **APPLICATION RESPECTING DISPOSITIONS UNDER APPEAL / Discretionary powers respecting suspension of dispositions / Copy of order to parties.**

**672.76. (1)** Any party who gives notice to each of the other parties, within the time and in the manner prescribed, may apply to a judge of the court of appeal for an order under this section respecting a disposition or placement decision that is under appeal.

**(2)** On receipt of an application made pursuant to subsection (1) a judge of the court of appeal may, if satisfied that the mental condition of the accused justifies it,

- (a)** by order, direct that a disposition made under paragraph 672.54(a) or section 672.58 be carried out pending the determination of the appeal, notwithstanding section 672.75;
- (b)** by order, direct that the application of a placement decision or a disposition made under paragraph 672.54(b) or (c) be suspended pending the determination of the appeal;
- (c)** where the application of a disposition is suspended pursuant to section 672.75 or paragraph (b), make any other disposition in respect of the accused that is appropriate in the circumstances, other than a disposition under paragraph 672.54(a) or section 672.58, pending the determination of the appeal;
- (d)** where the application of a placement decision is suspended pursuant to an order made under paragraph (b), make any other placement decision that is appropriate in the circumstances, pending the determination of the appeal; and
- (e)** give any directions that the judge considers necessary for expediting the appeal.

**(3)** A judge of the court of appeal who makes an order under this section shall send a copy of the order to each of the parties without delay. 1991, c. 43, s. 4.

#### **CROSS-REFERENCES**

“Court” and “disposition” defined in s. 672.1. Reference should be made to s. 672.75 providing for an automatic stay of an absolute discharge subsequent to a verdict of not criminally responsible on

account of mental disorder or a treatment order. For further cross-references respecting appeals, see references under s. 672.72.

### SYNOPSIS

Where the order is not automatically stayed pursuant to s. 672.75, any party may apply to a judge of the court of appeal to stay of enforcement of a disposition order or placement decision pending appeal. The judge may, if satisfied that the mental condition of the accused so justifies, do any of the following: (1) order that a disposition made under s. 672.54(a) or s. 672.58 be carried out notwithstanding s. 672.75; (2) suspend a placement decision or a disposition made under s. 672.54(b) or (c) until the determination of the appeal; (3) make any other disposition or placement decision [with some exceptions] where the disposition or placement decision is suspended pending appeal; (4) give directions expediting the appeal. Copies of the order must be given to all parties without delay.

### EFFECT OF SUSPENSION OF DISPOSITION.

**672.77.** Where the application of a disposition or placement decision appealed from is suspended, a disposition, or in the absence of a disposition any order for the interim release or detention of the accused, that was in effect immediately before the disposition or placement decision appealed from took effect, shall be in force pending the determination of the appeal, subject to any disposition made under paragraph 672.76(2)(c). 1991, c. 43, s. 4.

### CROSS-REFERENCES

For further cross-references relating to appeals, see references under s. 672.72.

### SYNOPSIS

Where a disposition or placement decision is suspended and no order for the interim release or detention of the accused is issued by the court of appeal, any disposition, interim release or detention order, that was in place prior to the disposition or placement decision appealed from took effect, is in force.

### POWERS OF COURT OF APPEAL / *Idem* / Orders that the court may make.

**672.78.** (1) The court of appeal may allow an appeal against a disposition or placement decision and set aside an order made by the court or Review Board, where the court of appeal is of the opinion that

- (a) it is unreasonable or cannot be supported by the evidence;
- (b) it is based on a wrong decision on a question of law; or
- (c) there was a miscarriage of justice.

(2) The court of appeal may dismiss an appeal against a disposition or placement decision where the court is of the opinion

- (a) that paragraphs (1)(a), (b) and (c) do not apply; or
- (b) that paragraph (1)(b) may apply, but the court finds that no substantial wrong or miscarriage of justice has occurred.

(3) Where the court of appeal allows an appeal against a disposition or placement decision, it may

- (a) make any disposition under section 672.54 or any placement decision that the court or Review Board could have made;
- (b) refer the matter back to the court or Review Board for rehearing, in whole or in part, in accordance with any directions that the court of appeal considers appropriate; or
- (c) make any other order that justice requires. 1991, c. 43, s. 4.



**CROSS-REFERENCES**

“Court of appeal” is defined in s. 2. The terms “court”, “disposition” and “Review Board” are defined in s. 672.1. For further cross-references respecting appeals, see references under s. 672.72.

**SYNOPSIS**

This provision sets out the powers of the court of appeal with respect to a disposition or placement decision and incorporates the appeal powers contained in the Criminal Code. The court may set aside the order on the grounds that it is unreasonable and cannot be supported by evidence, is based on a mistake of law or there was a miscarriage of justice. Alternatively, the court may dismiss the appeal where these conditions are not met or where there is no substantial wrong or miscarriage of justice. If the court allows the appeal, it may make any disposition or placement decision that is appropriate, order a new hearing in the court or Review Board or make any other order that justice requires.

**ANNOTATIONS**

In determining whether a disposition by the Board is unreasonable, the Court of Appeal must recognize that the Board enjoys several advantages not available on appellate review especially as a result of the Board’s special medical expertise and knowledge of the various facilities available within the mental health system *Peckham v. Ontario (Attorney General)* (1994), 93 C.C.C. (3d) 443, 34 C.R. (4th) 227, 19 O.R. (3d) 766 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vi, 37 C.R. (4th) 399n.

**APPEAL BY DANGEROUS MENTALLY DISORDERED ACCUSED / Disposition of appeal.**

**672.79. (1) Where a court finds an accused to be a dangerous mentally disordered accused and increases the cap applicable to the accused pursuant to section 672.65, the accused may appeal to the court of appeal against the increase in the cap on any ground of law or fact or mixed law and fact.**

- (2) On an appeal by an accused under subsection (1), the court of appeal may**  
**(a) quash any increase in the cap and impose any other cap that might have been imposed in respect of the offence, or order a new hearing; or**  
**(b) dismiss the appeal. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

“Attorney General” defined in s. 2. “Capping of dispositions” defined in s. 672.64. “Dangerous mentally disordered accused” defined in s. 672.65. Pursuant to s. 672.8(3), the procedures contained in Part XXI of the Criminal Code apply to appeals under this provision.

**SYNOPSIS**

This provision provides a right of appeal from a finding that the accused is a dangerous mentally disordered accused increasing the cap. The accused may appeal on a question of law, fact or mixed fact and law. The court of appeal may quash the increase in the cap, impose any other cap or dismiss the appeal.

**APPEAL BY ATTORNEY GENERAL / Disposition of appeal / Part XXI applies to appeal.**

**672.8. (1) The Attorney General may appeal against the dismissal of an application for a finding that the accused is a dangerous mentally disordered accused on any ground of law.**

- (2) On an appeal by the Attorney General under subsection (1), the court of appeal may**  
**(a) allow the appeal, designate the accused as a dangerous mentally disordered**

accused, and increase the cap in respect of the offence to a maximum of life, or order a new hearing; or

(b) dismiss the appeal.

(3) The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section or section 672.79. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

"Attorney General" defined in s. 2. "Capping of dispositions defined in s. 672.64. "Dangerous mentally disordered accused" defined in s. 672.65. Reference should be made to Part XXI of the Criminal Code as to procedures to be followed.

#### SYNOPSIS

The Attorney General has a right of appeal against the dismissal of an application for a finding that the accused is a dangerous mentally disordered accused on a ground of law alone. The court of appeal may allow the appeal and so designate the accused and increase the cap or dismiss the appeal.

The procedures on appeals contained in Part XXI apply to appeals under this section with such modifications as are necessary.

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## *Review of Dispositions*

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**MANDATORY REVIEW OF DISPOSITIONS / Additional mandatory reviews in custody cases / Idem.**

**672.81. (1)** A Review Board shall hold a hearing not later than twelve months after making a disposition and every twelve months thereafter for as long as the disposition remains in force, to review any disposition that it has made in respect of an accused, other than an absolute discharge under paragraph 672.54(a).

(2) The Review Board shall hold a hearing to review any disposition made under paragraph 672.54(b) or (c) as soon as is practicable after receiving notice that the person in charge of the place where the accused is detained or directed to attend

(a) has increased the restrictions on the liberty of the accused significantly for a period exceeding seven days; or

(b) requests a review of the disposition.

(3) Where an accused is detained in custody pursuant to a disposition made under paragraph 672.54(c) and a sentence of imprisonment is subsequently imposed on the accused in respect of another offence, the Review Board shall hold a hearing to review the disposition as soon as is practicable after receiving notice of that sentence. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms "disposition", "dual status offender" and "Review Board" are defined in s. 672.71. Reference should be made to s. 672.93 which requires the Review Board to review the disposition where the accused has been arrested as a result of a breach of a disposition or any condition of the disposition. The Review Board sitting in review of a prior disposition is empowered to make any other disposition or variation that is considered appropriate. See s. 672.83. The procedural rules for disposition hearings contained in s. 672.5 apply to review hearings. Note that, although any party may request the review of a disposition, the request is deemed to be an abandonment of any pending appeal by the party against the disposition. See s. 672.82.

**SYNOPSIS**

Section 672.81 deals with the review of dispositions. Pursuant to subsec. (1), the Review Board must conduct a review hearing every 12 months that the disposition remains in force subject to an absolute discharge. In addition, the Review Board is required to hold a review hearing as soon as is practicable subsequent to receiving notice in the following three circumstances: (1) where the place that the accused is detained has significantly increased restrictions on the liberty of the accused for more than seven days; (2) where the hospital requests a review; and (3) where the accused is detained in a hospital or in custody and becomes a dual status offender.

**ANNOTATIONS**

Any disposition made under this section must be made applying the criteria and scheme created by s. 672.54: *Pinet v. Ontario* (1995), 100 C.C.C. (3d) 343, 40 C.R. (4th) 113, 23 O.R. (3d) 97 (C.A.).

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**DISCRETIONARY REVIEW ON REQUEST / Review cancels appeal.**

**672.82. (1) A Review Board may hold a hearing to review any of its dispositions at any time, at the request of the accused or any other party.**

**(2) Where a party requests a review of a disposition under this section, the party is deemed to abandon any appeal against the disposition taken under section 672.72. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The terms “accused”, “disposition”, “party” and “Review Board” are defined in s. 672.1. As to appeals from dispositions, see s. 672.72. For further cross-references respecting review hearings, see references under s. 672.81.

**SYNOPSIS**

An accused or other party may request that the Review Board review the disposition at any time. A request for a review of a disposition, however, is deemed to be an abandonment of any appeal against disposition pursuant to s. 672.72.

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**DISPOSITION BY REVIEW BOARD / Idem.**

**672.83. (1) At a hearing held pursuant to section 672.81 or 672.82, the Review Board shall, except where a determination is made under subsection 672.48(1) that the accused is fit to stand trial, review the disposition made in respect of the accused and make any other disposition that the Review Board considers to be appropriate in the circumstances.**

**(2) Subsection 672.52(2), and sections 672.64 and 672.71 to 672.82 apply to a disposition made under this section, with such modifications as the circumstances require. 1991, c. 43, s. 4.**

**CROSS-REFERENCES**

The term “unfit to stand trial” is defined in s. 2. The terms “Review Board” and “disposition” are defined in s. 672.1. Reference should be made to ss. 672.52(2), 672.64, 672.71 and 672.82. Reference should also be made to s. 672.48(1) which requires a Review Board which holds a hearing to review a disposition in respect of an accused who has been found unfit to stand trial to determine whether the accused is not fit. Where the accused is found fit to stand trial, the accused shall be sent back to court to try the issue.

**SYNOPSIS**

Except where the accused is determined to be fit to stand trial, the Review Board sitting



in review of a prior disposition is empowered to make any other disposition or variation that is considered appropriate.

#### ANNOTATIONS

In holding a hearing under this section, the Board should apply the test set out under s. 672.54: *Peckham v. Ontario (Attorney-General)* (1994), 93 C.C.C. (3d) 443, 34 C.R. (4th) 227, 19 O.R. (3d) 766 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vi, 37 C.R. (4th) 399n.

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#### PROCEDURE FOR REVIEW.

**672.84.** The Review Board shall hold a hearing to review a disposition under section 672.81 or 672.82 in accordance with the procedures described in section 672.5. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The term "Review Board" is defined in s. 672.1. Refer to s. 672.5 as to procedures to be followed by Review Board in conducting hearings.

#### SYNOPSIS

The procedural rules for disposition hearings contained in s. 672.5 apply to review hearings.

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#### BRINGING ACCUSED BEFORE REVIEW BOARD.

**672.85.** For the purpose of bringing the accused in respect of whom a hearing under section 672.81 is to be held before the Review Board, the chairperson

- (a) shall order the person having custody of the accused to bring the accused to the hearing at the time and place fixed for it; or
- (b) may issue a summons or warrant to compel the accused to appear at the time and place fixed for the hearing, if the accused is not in custody. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

The terms "accused", "chairperson" and "Review Board" are defined in s. 672.1. For further cross-references as to review of dispositions, see references under s. 672.81.

#### SYNOPSIS

The chairperson of the Review Board must compel the accused to attend court either by ordering the person having custody of the accused to bring the accused forth or by issuing a summons or warrant to the accused where the accused is not in custody.

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## *Interprovincial Transfers*

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**INTERPROVINCIAL TRANSFERS /** Transfer where accused in custody / Transfer where accused not in custody.

**672.86.** (1) An accused who is detained in custody or directed to attend at a hospital pursuant to a disposition made by a court or Review Board under paragraph 672.54(c) or a court under section 672.58 may be transferred to any other place in Canada where

- (a) the Review Board of the province where the accused is detained or directed to attend recommends a transfer for the purpose of the reintegration of the accused into society or the recovery, treatment or custody of the accused; and

(b) the Attorney General of the provinces to and from which the accused is to be transferred give their consent.

(2) Where an accused who is detained in custody is to be transferred, an officer authorized by the Attorney General of the province where the accused is being detained shall sign a warrant specifying the place in Canada to which the accused is to be transferred.

(3) Where an accused who is not detained in custody is to be transferred, the Review Board of the province where the accused is directed to attend shall, by order,

(a) direct that the accused be taken into custody and transferred pursuant to a warrant described in subsection (2); or

(b) direct the accused to attend at a specified place in Canada, subject to any conditions that the Review Board considers appropriate. 1991, c. 43, s. 4.

#### CROSS-REFERENCES

“Attorney General” is defined in s. 2. The terms “accused”, “court”, “hospital”, and “Review Board” are defined in s. 672.1. As to inter-provincial jurisdiction of the Review Boards over the accused, the Attorneys General of the two provinces may enter an agreement allowing the Review Board of the province from which the accused has been transferred to retain jurisdiction. In addition, where the accused is transferred to another province other than by virtue of s. 672.86, such as where the accused is a dual status offender and offences occurred in different provinces, the Review Board from which the accused is transferred has exclusive jurisdiction over the accused. See s. 672.89. Similar to s. 672.88, the Attorneys General may derogate from this provision by agreement. Pursuant to s. 672.87, a warrant signed by the Attorney General constitutes sufficient authority for the person in charge of the accused to transfer the accused and for the person specified in the warrant to take charge of the accused.

#### SYNOPSIS

An accused who is directed to attend at a hospital for treatment or detention may be transferred to another province on the recommendation of the Review Board where the transfer is necessary for the purpose of the accused’s reintegration into society, recovery, treatment or custody of the accused. The transfer requires, however, the consent of the Attorneys General of both the province from which and to which the accused is being transferred. The Attorney General in the province from where the accused is to be transferred must sign a warrant specifying the place of transfer where the accused is in custody. If the accused is not in custody, the Review Board will direct that the accused be taken into custody and transferred or direct the accused to attend at the specified place subject to any conditions that are appropriate.

#### DELIVERY AND DETENTION OF ACCUSED.

**672.87. A warrant described in subsection 672.86(2) is sufficient authority**

(a) for any person who is responsible for the custody of an accused to have the accused taken into custody and conveyed to the person in charge of the place specified in the warrant; and

(b) for the person specified in the warrant to detain the accused in accordance with any disposition made in respect of the accused under paragraph 672.54(c). 1991, c. 43, s. 4.

#### CROSS-REFERENCES

“Attorney General” is defined in s. 2. The terms “accused”, “court”, “hospital”, and “Review Board” are defined in s. 672.1. As to further cross-references respecting interprovincial transfers, see references under s. 672.86.

**SYNOPSIS**

A warrant signed by the Attorney General constitutes sufficient authority for the person in charge of the accused's custody to convey the accused to the person in charge of the place specified in the warrant and for the person specified in the warrant to detain the accused in accordance with any disposition outstanding against the accused.

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**REVIEW BOARD OF RECEIVING PROVINCE HAS JURISDICTION OVER TRANSFEREE / Agreement.**

**672.88. (1)** The Review Board of the province to which an accused is transferred pursuant to section 672.86 has exclusive jurisdiction over the accused, and may exercise the powers and shall perform the duties mentioned in sections 672.5 and 672.81 to 672.83 as if that Review Board had made the disposition in respect of the accused.

**(2)** Notwithstanding subsection (1), the Attorney General of the province to which an accused is transferred may enter into an agreement subject to this Act with the Attorney General of the province from which the accused is transferred, enabling the Review Board of that province to exercise the powers and perform the duties referred to in subsection (1) in respect of the accused, in the circumstances and subject to the terms and conditions set out in the agreement. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

"Attorney General" is defined in s. 2. The terms "accused", "court", "hospital", and "Review Board" are defined in s. 672.1. Note that where the accused is transferred to another province other than by virtue of s. 672.86, for example, where the accused is a dual status offender and the offences occurred in different provinces, the Review Board from which the accused is transferred has exclusive jurisdiction over the accused. The Attorneys General may, however, enter into an agreement to transfer jurisdiction to the receiving Review Board. As to further cross-references respecting interprovincial transfers, see references under s. 672.86.

**SYNOPSIS**

This provision confers exclusive jurisdiction over the accused to the Review Board of the province to which the accused has been transferred. This general power, however, may be superseded by the agreement of the Attorney General of the province to which the accused has been transferred and the Attorney General from which the accused has been transferred. The Attorneys General may enter into an agreement authorizing the Review Board from which the accused has been transferred to retain jurisdiction over the accused.

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**OTHER INTERPROVINCIAL TRANSFERS / Agreement.**

**672.89. (1)** Where an accused who is detained in custody pursuant to a disposition made by a Review Board is transferred to another province otherwise than pursuant to section 672.86, the Review Board of the province from which the accused is transferred has exclusive jurisdiction over the accused and may continue to exercise the powers and shall continue to perform the duties mentioned in sections 672.5 and 672.81 to 672.83.

**(2)** Notwithstanding subsection (1), the Attorneys General of the provinces to and from which the accused is to be transferred as described in that subsection may, after the transfer is made, enter into an agreement subject to this Act, enabling the Review Board of the province to which an accused is transferred to exercise the powers and perform the duties referred to in subsection (1) in respect of the accused, subject to the terms and conditions and in the circumstances set out in the agreement. 1991, c. 43, s. 4.



**CROSS-REFERENCES**

“Attorney General” is defined in s. 2. The terms “accused”, “court”, “hospital”, and “Review Board” are defined in s. 672.1. Note that where the accused is transferred pursuant to s. 672.86, the Review Board in the province to which the accused is transferred retains exclusive jurisdiction over the accused. The Attorneys General may enter into an agreement to require that the Review Board of the province from which the accused is transferred retains exclusive jurisdiction over the accused. See s. 672.88. As to further cross-references respecting interprovincial transfers, see references under s. 672.86.

**SYNOPSIS**

Where the accused is transferred to another province other than by virtue of s. 672.86, for example where the accused is a dual status offender and the offences occurred in different provinces, the Review Board from which the accused is transferred has exclusive jurisdiction over the accused. Notwithstanding this provision, however, the Attorneys General of the respective provinces may enter into an agreement enabling the Review Board of the province to which the accused has been transferred to obtain jurisdiction over the accused.

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***Enforcement of Orders and Regulations***

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**EXECUTION OF WARRANT ANYWHERE IN CANADA.**

**672.9.** Any warrant or process issued in relation to an assessment order or disposition made in respect of an accused may be executed or served in any place in Canada outside the province where the order or disposition was made as if it had been executed or served in that province. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

Reference should be made to s. 672.92 which authorizes a peace officer to make a warrantless arrest anywhere in Canada where there are reasonable and probable grounds that the accused has failed to comply with a disposition or a condition thereof or is about to commit a breach. Upon arrest, the accused must be taken before a justice within 24 hours or as soon as practicable and the accused must be released unless the justice has grounds to believe that the accused did in fact contravene the disposition. See ss. 672.92 and 672.93. Upon notice of the detention, the Review Board must hold a hearing to review the disposition in accordance with s. 672.5. See s. 672.94.

**SYNOPSIS**

A warrant or process issued in relation to an assessment or disposition order is valid anywhere in Canada outside the province in which the order or disposition had been made.

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**ARREST WITHOUT WARRANT FOR CONTRAVENTION OF DISPOSITION.**

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**672.91.** A peace officer may arrest an accused without a warrant at any place in Canada if the peace officer has reasonable grounds to believe that the accused has contravened or wilfully failed to comply with the disposition or any condition of it, or is about to do so. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

The term “peace officer” is defined in s. 2. Reference should be made to s. 672.92 which requires the accused to be taken before a justice within 24 hours of the arrest or as soon as practicable and the accused may not be detained unless the justice is satisfied that the accused has contravened or failed to comply with a disposition. See ss. 672.92 and 672.93. Reference should also be made to the following arrest provisions contained in the Criminal Code. Section 28 protects the peace officer in case of arrest of the wrong person when executing a warrant. Section 29(1) requires the person exe-

cuting the warrant to have it with him where feasible and to produce it upon request and s. 29(2) imposes a duty on a person making an arrest to give notice of the warrant under which he makes the arrest and the reason for the arrest.

### SYNOPSIS

Section 672.91 provides peace officers with broad arrest powers, including the power to make a warrantless arrest anywhere in Canada where there are reasonable and probable grounds that the accused has failed to comply with a disposition or a condition of the disposition or is about to commit a breach.

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### ACCUSED TO BE BROUGHT BEFORE JUSTICE / *Idem*.

**672.92. (1) An accused who is arrested pursuant to section 672.91 shall be taken before a justice having jurisdiction in the territorial division in which the accused is arrested, without unreasonable delay and in any event within twenty-four hours after the arrest.**

**(2) If a justice described in subsection (1) is not available within twenty-four hours after the arrest, the accused shall be taken before a justice as soon as is practicable. 1991, c. 43, s. 4.**

### CROSS-REFERENCES

The terms "peace officer" and "justice" are defined in s. 2. An accused may be detained by the justice pursuant to s. 672.93 where the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition. Where the accused is detained, notice must be given to the Review Board pursuant to s. 672.93(2). Upon receipt of notice of detention, the Review Board must hold a review hearing pursuant to ss. 672.81 and 672.83.

### SYNOPSIS

An accused who is arrested as a result of a breach or impending breach of a disposition or assessment order must be taken within 24 hours before a justice in the jurisdiction in which the accused was arrested or as soon as practicable where a justice is unavailable.

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### WHERE JUSTICE TO RELEASE ACCUSED / Order of justice pending decision of Review Board.

**672.93. (1) A justice shall release an accused who is brought before the justice pursuant to section 672.92 unless the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition.**

**(2) If the justice is satisfied that there are reasonable grounds to believe that the accused has contravened or failed to comply with a disposition, the justice may make an order that is appropriate in the circumstances in relation to the accused, pending a hearing of the Review Board of the province where the disposition was made, and shall cause notice of that order to be given to that Review Board. 1991, c. 43, s. 4.**

### CROSS-REFERENCES

"Justice" is defined in s. 2 of the Criminal Code. Pursuant to s. 672.94, upon receipt of notice of detention, a Review Board may exercise its powers under s. 672.

### SYNOPSIS

This provision requires that the accused be released unless the justice is satisfied that the accused has contravened or failed to comply with a disposition. Where there are reasonable grounds to believe that the accused has contravened or failed to comply with the disposition, the justice may detain the accused pending a Review Board hearing and issue notice of the order to the Review Board.

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**POWERS OF REVIEW BOARD.**

**672.94.** Where a Review Board receives a notice given pursuant to subsection 672.93(2), it may exercise the powers and shall perform the duties mentioned in sections 672.5 and 672.81 to 672.83 as if the Review Board were reviewing a disposition. 1991, c. 43, s. 4.

**CROSS-REFERENCES**

“Review Board” is defined in s. 672.1. Reference should be made to s. 672.5 and the cross-references contained therein with respect to the procedures followed at a Review Board hearing. Reference should also be had to ss. 672.81 and 672.83 which outline the powers which the board may exercise in the review of any disposition.

**SYNOPSIS**

Upon receiving notice of detention, the Review Board must hold a hearing in accordance with the provisions of s. 672.5 in order to review the disposition as prescribed by s. 672.81 or 672.83.

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**REGULATIONS.**

**672.95.** The Governor in Council may make regulations

- (a) prescribing anything that may be prescribed under this Part; and
- (b) generally to carry out the purposes and provisions of this Part. 1991, c. 43, s. 4.

**SYNOPSIS**

This provision permits the Governor in Council to make any regulations regarding Part XX.1 of the Criminal Code.

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**SCHEDULE TO PART XX.1**

(Subsection 672.64(1))

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**DESIGNATED OFFENCES****CRIMINAL CODE**

1. *Section 49 – acts intended to alarm Her Majesty or break public peace*
2. *Section 50 – assisting alien enemy to leave Canada, or omitting to prevent treason*
3. *Section 51 – intimidating Parliament or legislature*
4. *Section 52 – sabotage*
5. *Section 53 – inciting to mutiny*
6. *Section 75 – piratical acts*
7. *Section 76 – hijacking*
8. *Section 77 – endangering safety of aircraft*
9. *Section 78 – offensive weapons and explosive substances*
10. *Section 80 – breach of duty (explosive substances)*
11. *Section 81 – using explosives*
12. *Section 82 – possession of explosives without lawful excuse*
13. *Section 85 – use of firearm during commission of offence, etc.*
14. *Paragraph 86(1)(a) – pointing a firearm*
15. *Subsection 86(2) – careless use of firearm*
16. *Section 87 – possession of weapon or imitation*

**NOTE:** Items 13 to 16 replaced 1995, c. 39, s. 154 (to come into force by order of the



Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

13. Subsection 85(1) - *using firearm in commission of offence*
- 13.1 Subsection 85(2) - *using imitation firearm in commission of offence*
14. Subsection 86(1) - *careless use of firearm, etc.*
15. Subsection 87(1) - *pointing a firearm*
16. Subsection 88(1) - *possession of weapon for dangerous purpose*
17. Section 151 - *sexual interference*
18. Section 152 - *invitation to sexual touching*
19. Section 153 - *sexual exploitation*
20. Section 155 - *incest*
21. Section 159 - *anal intercourse*
22. Section 160(2) - *compelling commission of bestiality*
23. Subsection 160(3) - *bestiality in presence of child or inciting child to commit bestiality*
24. Section 220 - *causing death by criminal negligence*
25. Section 221 - *causing bodily harm by criminal negligence*
26. Section 223 - *causing injury to child before or during birth*
27. Section 236 - *manslaughter*
28. Section 238 - *killing unborn child in act of birth*
29. Section 239 - *attempt to commit murder*
30. Section 241 - *counselling or aiding suicide*
31. Section 244 - *causing bodily harm with intent*
32. Paragraph 245(a) - *administering noxious thing with intent to endanger life or cause bodily harm*
33. Section 246 - *overcoming resistance to commission of offence*
34. Section 247 - *setting traps likely to cause death or bodily harm*
35. Section 248 - *interfering with transportation facilities*
36. Subsection 249(3) - *dangerous operation of motor vehicles, vessels and aircraft causing bodily harm*
37. Subsection 249(4) - *dangerous operation of motor vehicles, vessels and aircraft causing death*
38. Subsection 255(2) - *impaired driving causing bodily harm*
39. Subsection 255(3) - *impaired driving causing death*
40. Section 262 - *impeding attempt to save life*
41. Paragraph 265(1)(a) - *assault*
42. Section 267 - *assault with a weapon or causing bodily harm*
43. Section 268 - *aggravated assault*
44. Section 269 - *unlawfully causing bodily harm*
45. Subsection 269.1(1) - *torture*
46. Paragraph 271(1)(a) - *sexual assault*
47. Section 272 - *sexual assault with a weapon, threats to a third party or causing bodily harm*
48. Section 273 - *aggravated sexual assault*
49. Subsection 279(1) - *kidnapping*
50. Subsection 279(2) - *forcible confinement*
51. Section 279.1 - *hostage taking*
52. Section 280 - *abduction of person under sixteen*
53. Section 281 - *abduction of person under fourteen*
54. Paragraph 282(a) - *abduction in contravention of custody order*
55. Paragraph 283(1)(a) - *abduction where no custody order*
56. Section 344 - *robbery*
57. Section 345 - *stopping mail with intent*

- 58. *Section 346 – extortion*
- 59. *Section 348 – breaking and entering with intent, committing offence or breaking out*
- 60. *Subsection 349(1) – being unlawfully in dwelling-house*
- 61. *Subsection 430(2) – mischief that causes actual danger to life*
- 62. *Section 431 – attack on premises, etc., of internationally protected person*
- 63. *Section 433 – arson (disregard for human life)*
- 64. *Section 434 – arson (damage to property)*
- 65. *Section 434.1 – arson (own property)*
- 66. *Section 435 – arson for fraudulent purpose*

#### ATOMIC ENERGY CONTROL ACT

- 67. *Section 20 – offence and punishment*

#### EMERGENCIES ACT

- 68. *Subparagraph 8(1)(j)(ii) – contravention of public welfare emergency regulation*
- 69. *Subparagraph 19(1)(e)(ii) – contravention of public order emergency regulation*
- 70. *Subparagraph 30(1)(1)(ii) – contravention of international emergency regulation*
- 71. *Paragraph 40(3)(b) – contravention of war emergency regulation*

#### CANADIAN ENVIRONMENTAL PROTECTION ACT

- 72. *Section 115 – damage to environment and death or harm to persons*

#### FOOD AND DRUGS ACT

- 73. *Paragraph 39(3)(b) – trafficking*
- 74. *Paragraph 48(3)(b) – trafficking*

#### NARCOTIC CONTROL ACT

- 75. *Paragraph 3(2)(b) – possession*
- 76. *Section 4 – trafficking*
- 77. *Section 5 – importing and exporting*

**NOTE:** Items 73 to 77 (with heading preceding item 73) replaced 1996, Bill C-8, s. 73 (to come into force by order of the Governor in Council) by items 73 to 76 (with heading). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

#### CONTROLLED DRUGS AND SUBSTANCES ACT

- 73. *Subsections 4(3) and (4) – possession*
- 74. *Subsections 5(3) and (4) – trafficking*
- 75. *Subsection 6(3) – importing and exporting*
- 76. *Subsection 7(2) – production*

#### NATIONAL DEFENCE ACT

- 78. *Section 78 – offence of being spy*
- 79. *Section 79 – mutiny with violence*
- 80. *Section 80 – mutiny without violence*
- 81. *Section 81 – offences related to mutiny*
- 82. *Section 82 – advocating governmental change by force*
- 83. *Section 83 – disobedience of lawful command*
- 84. *Section 84 – striking or offering violence to a superior officer*
- 85. *Section 88 – desertion*
- 86. *Paragraph 98(c) – maiming or injuring self or another person*
- 87. *Section 105 – offences in relation to convoys*

88. *Section 106 – disobedience of captain's orders – ships*  
89. *Section 110 – disobedience of captain's orders – aircraft*  
90. *Section 128 – conspiracy*

**OFFICIAL SECRETS ACT**

91. *Section 3 – spying*  
92. *Section 4 – wrongful communication, etc., of information*  
93. *Section 5 – unauthorized use of uniforms, falsification of reports, etc.*

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**Part XXI / APPEALS – INDICTABLE OFFENCES**

***Interpretation***

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**DEFINITIONS / “court of appeal” / “indictment” / “registrar” / “sentence” / “trial court”.**

**673. In this Part**

“court of appeal” means the court of appeal, as defined by the definition “court of appeal” in section 2, for the province or territory in which the trial of a person by indictment is held;

“indictment” includes an information or charge in respect of which a person has been tried for an indictable offence under Part XIX;

“registrar” means the registrar or clerk of the court of appeal;

“sentence” includes

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 100(1) or (2), section 161, subsection 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2), section 725, 726 or 727.9, subsection 736(1), 736.11(1) or section 744, and
- (c) a disposition made under subsection 737(1) or 738(3) or (4);

**Note:** The definition “sentence” re-enacted by 1991, c. 43, s. 5 (to come into force by order of the Governor in Council), however, 1991, c. 43, s. 5 itself repealed by 1995, c. 22, s. 12 (to come into force by order of the Governor in Council). The unproclaimed text printed in *lightface italics* reads as follows:

“sentence” includes

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 100(1) or (2), 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2), section 725, 726 or 727.9, subsection 736(1) or 736.11(1) or section 744, and
- (c) a disposition made under subsection 737(1) or 738(3) or (4);
- (d) an order made under subsection 16(1) of the *Controlled Drugs and Substances Act*;

**Note:** Para. (b) of the definition “sentence” re-enacted 1993, c. 45, ss. 16 and 19 (to come into force on the coming into force of 1991, c. 43, s. 5). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

- (b) an order made under subsection 100(1) or (2), section 161, subsection 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2), section 725, 726 or 727.9, subsection 736(1) or 736.11(1) or section 744, and

**Editor's note:** It appears that 1993, c. 45, s. 19 duplicates the amendment made by s. 16.

**NOTE:** The definition “sentence” replaced by 1995, c. 22, s. 5(1) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996), and further, the



re-enactment of the definition “sentence” by 1991, c. 43, s. 5 amended 1996, Bill C-8, s. 74(2) (to come into force by order of the Governor in Council) by striking out the word “and” at the end of para. (b), by adding the word “and” at the end of para. (c) and by adding new para. (d). The texts of paras. (a) to (c) as enacted by 1991, c. 43, s. 5 and of new para. (d) whose text may change before receiving Royal Assent, which are not yet in force, are therefore printed in *lightface italics*, and read as follows:

“sentence” includes

- (a) *a declaration made under subsection 199(3).*
- (b) *an order made under subsection 100(1) or (2), 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2) or 730(1) or section 737, 738, 739, 742.3 or 745.2, and*
- (c) *a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.4(3) or 742.6(9);*

**NOTE:** Paragraph (b) of the definition “sentence” replaced by 1995, c. 22, s. 5(2) (to come into force when s. 747.1 as enacted by 1995, c. 22, s. 6 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *an order made under subsection 100(1) or (2), 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2) or 730(1), section 737, 738, 739, 742.3 or 745.2 or subsection 747.1(1), and*

**NOTE:** Paragraph (b) of the definition “sentence” replaced 1995, c. 39, s. 155 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *an order made under subsection 109(1) or 110(1), section 161, subsection 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2), section 725, 726 or 727.9, subsection 736(1) or section 744, and*

**NOTE:** Paragraph (b) of the definition “sentence” replaced 1995, c. 39, s. 190(a) (to come into force on the later of the day on which 1995, c. 22, s. 5(1) comes into force and the day on which 1995, c. 39, s. 155 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *an order made under subsection 109(1) or 110(1), section 161, subsection 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2) or 730(1) or section 737, 738, 739, 742.3 or 745.2, and*

**NOTE:** Paragraph (b) of the definition “sentence” replaced 1995, c. 39, s. 190(b) (to come into force on the later of the day on which 1995, c. 22, s. 5(2) comes into force and the day on which 1995, c. 39, s. 155 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *an order made under subsection 109(1) or 110(1), section 161, subsection 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2) or 730(1), section 737, 738, 739, 742.3 or 745.2 or subsection 747.1(1), and*

**NOTE:** The definition “sentence” amended 1996, Bill C-8, s. 74(1) (to come into force by order of the Governor in Council, but not in force as of May 15, 1996) by striking out the word “and” at the end of para. (b), by adding the word “and” at the end of para. (c) and by adding new para. (d). The text of para. (d), which is not yet in force and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

- (d) *an order made under subsection 16(1) of the Controlled Drugs and Substances Act;*

“trial court” means the court by which an accused was tried and includes a judge or a provincial court judge acting under Part XIX. R.S., c. C-34, s. 601; 1972, c. 13, s. 52; 1973-74, c. 38, s. 6.1, c. 50, s. 3; 1974-75-76, c. 93, s. 72; 1976-77, c. 53, s. 4; R.S.C. 1985, c. 27 (1st Supp.), s. 138; c. C23 (4th Supp.), s. 4; c. 42 (4th Supp.), s. 4; 1992, c. 1, s. 58; 1993, c. 45, s. 10.

**CROSS-REFERENCES**

See s. 2 for the general definition section of the Criminal Code and references cited thereunder for other sources of definitions of words and phrases used in the Code.

**SYNOPSIS**

By reason of the definition of "sentence", appeals are available in indictable matters from not only the imposition of jail terms, fines, etc., but also from: (a) firearms prohibition orders (s. 100(1), (2)); (b) punitive damages awarded following conviction for unlawful interception or disclosure of information in respect of private communications (s. 194(1)); (c) forfeiture orders with respect to seized property (s. 199(3)); (d) driving prohibitions (s. 259(1), (2), 261); (e) forfeiture orders with respect to the proceeds of crime (s. 462.37); (f) orders for the restitution or forfeiture of property obtained by crime (s. 491.1(2)); (g) restitution orders (s. 725); (h) compensation to bona fide purchasers (s. 726); (i) victim fine surcharges; (j) conditional and absolute discharges (s. 736(1)); (k) probation orders (ss. 737(1), 738(3), (4)); and (l) parole ineligibility (s. 744).

**ANNOTATIONS**

**"Sentence"** – The decision of a trial Judge refusing to make an order forfeiting a motor vehicle pursuant to s. 16(2) of the Narcotic Control Act (Can.) is not within the ordinary meaning of sentence, nor is it included in the extended definition under this section. Accordingly, the decision is not appealable by the Crown on an appeal against sentence: *R. v. Pope* (1980), 52 C.C.C. (2d) 538 (B.C.C.A.).

An order setting the period of parole ineligibility under s. 741.2 may be appealed as part of the sentence pursuant to s. 675(1)(b): *R. v. Chaisson*, [1995] 2 S.C.R. 1118, 99 C.C.C. (3d) 289, 41 C.R. (4th) 193.

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**Right of Appeal**

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**PROCEDURE ABOLISHED.**

**674.** No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences. **R.S., c. C-34, s. 602.**

**CROSS-REFERENCES**

See ss. 812 to 839 of Part XXVII "Summary Convictions" for appeals in summary convictions proceedings. Sections 675 to 676 contain rights of appeal in proceedings by indictment and ss. 678 to 685 govern procedure on appeals. Sections 686 to 689 prescribe powers of a court of appeal. Sections 691 to 696 govern appeals to the Supreme Court of Canada.

Appellate rights in respect of an appeal from a disposition or placement decision or a finding that the accused is a dangerous mentally disordered accused made under Part XX.1 are contained in ss. 672.72 to 672.78.

Recourse to the extraordinary remedies of Part XXVI is restricted to matters involving jurisdictional error.

**ANNOTATIONS**

In *R. v. Loba*, [1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360 the Court of Appeal allowed the Crown's appeal from a stay of proceedings entered when the trial judge held the provision under which the accused was charged was of no force and effect. However, the Court of Appeal held that a portion of the provision was still unconstitutional. While no appeal lay to the Supreme Court at the instance of the Crown under this Act, it was open to the Crown to apply for leave to appeal under s. 40 of the

Supreme Court Act. An appeal against a ruling on the constitutionality of a law that cannot be piggy backed onto any proceedings set out in the Criminal Code is a judgment of the highest court of final resort in a province in which judgment can be had in the particular case for the purposes of s. 40(1). Also see: *R. v. Keegstra* (1995), 98 C.C.C. (3d) 1, 124 D.L.R. (4th) 289, 180 N.R. 120 (S.C.C.).

For a third party, such as the media, who have been affected by a publication ban, where the ban has been imposed by a provincial court judge then the third party may apply to the superior court by way of *certiorari* and may then follow the appellate routes prescribed in the Criminal Code. When the order has been made by a superior court judge, then the third party may apply for leave to appeal to the Supreme Court of Canada under s. 40 of the Supreme Court Act: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 94 C.C.C. (3d) 289, 34 C.R. (4th) 269.

See also *R. v. Beharriell* (1995), 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 130 D.L.R. (4th) 422 (S.C.C.) where it was held that a complainant and sexual assault victim organization had a right to apply for leave to appeal from an order compelling production pursuant to s. 40(1) of the Supreme Court Act.

**RIGHT OF APPEAL OF PERSON CONVICTED / Appeal against absolute term in excess of ten years / Appeal against s. 741.2 order / Appeals against verdicts based on mental disorder / Where application for leave to appeal refused by judge.**

**675. (1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal**

**(a) against his conviction**

- (i) on any ground of appeal that involves a question of law alone,
- (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
- (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or

**(b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.**

**(2) A person who has been convicted of second degree murder and sentenced to imprisonment for life without eligibility for parole for a specified number of years in excess of ten may appeal to the court of appeal against the number of years in excess of ten of his imprisonment without eligibility for parole.**

**(2.1) A person against whom an order under section 741.2 has been made may appeal to the court of appeal against the order.**

**(3) Where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial is rendered in respect of a person, that person may appeal to the court of appeal against that verdict on any ground of appeal, mentioned in subparagraph (1)(a)(i), (ii) or (iii) and subject to the conditions described therein.**

**(4) Where a judge of the court of appeal refuses leave to appeal under this section otherwise than under paragraph (1)(b), the appellant may, by filing notice in writing with the court of appeal within seven days after the refusal, have the application for leave to appeal determined by the court of appeal. R.S., c. C-34, s. 603; 1974-75-76, c. 105, s. 13; 1991, c. 43, s. 9; 1995, c. 42, s. 73.**

#### CROSS-REFERENCES

See s. 673 for definition of “court of appeal”, “indictment”, “sentence” and “trial court”. See s. 672.1 for definition of “verdict of not criminally responsible on account of mental disorder” and s. 2 for definition of “unfit to stand trial”.



Rights of appeal are conferred by the Criminal Code, which also defines the authority of the court to hear and determine the appeal under ss. 686 to 687. Under s. 482(1), appeal procedure is governed by rules of the court established by a majority of the judges of the court of appeal which vary from one jurisdiction to another. Sections 676 and 696 govern rights of appeal of the Attorney General from dispositions made in proceedings by indictment. Section 759 confers rights of appeal in dangerous offender proceedings and s. 784 applies to applications for the extraordinary remedies of *mandamus*, *habeas corpus*, *certiorari* and prohibition.

Appellate rights are determined by the nature of proceedings in the trial court, not the nature of the conviction or the level of the trial court. Where proceedings must be or have been taken by indictment before a provincial court judge or judge alone under Part XIX or a court composed of judge and jury under Part XX, upon indictment or information, Part XXI is applicable.

Appellate rights in respect of an appeal from a disposition or placement decision or a finding that the accused is a dangerous mentally disordered accused made under Part XX.1 are contained in ss. 672.72 to 672.79.

## SYNOPSIS

This section sets out the matters which an accused convicted of an indictable offence may appeal to the court of appeal.

A conviction may be appealed on: (a) grounds of law alone; (b) grounds of fact or mixed law and fact, with leave of the court of appeal or a judge thereof or with a certificate of the trial judge; and (c) any other ground, with leave of the court of appeal (subsec. (1)(a)).

The trial judge's certificate is now virtually never used as a means of bringing an appeal. Local practice will dictate whether the question of leave needs to be spoken to independently of the appeal itself. In some jurisdictions grounds which technically require leave are simply argued as part of the appeal.

An accused may also appeal a "sentence" (see s. 673) unless the same is fixed by law. Leave of a judge or the court is required (subsec. (1)(b)). Local practice will again determine whether a separate leave hearing will be held.

A person convicted of second degree murder may appeal against the period of parole ineligibility, in excess of the mandatory 10 years (subsec. (2)).

Findings of unfitness, or not criminally responsible on account of mental disorder, may be appealed (subsec. (3)).

With the exception of sentence appeals, the refusal of leave to appeal by a single judge may be appealed to the court of appeal within seven days of the dismissal of the original application (subsec. (4)).

## ANNOTATIONS

**Application of provisions** – It is not the nature of the conviction but the nature of the proceedings that determines the forum for appeal. Thus in *R. v. Yaworski* (1959), 124 C.C.C.151, 31 C.R.55 (Man.C.A.), an accused convicted of a summary conviction offence in proceedings originally charging an indictable offence may only appeal under Part XXI of the Code.

In *R. v. Rowe* (1955), 39 Cr.App.R.57, [1955] 2 All E.R.234 (C.C.A.), it was held that an appeal on behalf of a deceased prisoner may only be brought by his personal representative and only if the penalty was monetary, for otherwise no one other than the prisoner was affected by his conviction.

An application to the trial judge for a certificate should be on notice to the Crown and a proper record kept of the submissions made: *R. v. Green*, [1987] 3 W.W.R. 173, 80 A.R. 236 (C.A.).

**Guilty plea / Withdrawal of guilty plea [Also see notes under s. 606]** – In *Colligan v. The Queen* (1955), 113 C.C.C.168, 21 C.R.120 (Que. C.A.), leave to appeal from a conviction for manslaughter upon plea of guilty was refused (3:2), the majority holding that in the absence of any misunderstanding on his part or inducement by anyone in author-

ity, especially where he allowed his counsel to offer the plea, the pressure of his co-accused upon him to enter such a plea was not a sufficient ground.

The heavy onus upon an appellant seeking leave to change his plea and requesting a new trial was met where it was shown that after arrest and during investigation legal advice was actively and deliberately denied to him by the police: *R. v. Ballegeer*, [1969] 3 C.C.C.353, 1 D.L.R. (3d) 74 (Man. C.A.).

Where on the sound and faithful advice of counsel, who was retained by one accused, two co-accused pleaded guilty an appearance of unfairness exists: *R. v. Stork and Toews* (1975), 24 C.C.C. (2d) 210, 31 C.R.N.S. 395 (B.C.C.A.).

It was not a basis for permitting the accused to withdraw his guilty plea that his former co-accused was subsequently acquitted following trial, where the conviction of the accused could be upheld on the basis that he was a principal in the offence and not a mere party to the co-accused's conviction: *R. v. Hick* (1991), 67 C.C.C. (3d) 573, 7 C.R. (4th) 297, 130 N.R. 267 (S.C.C.).

**Sentence appeal** [*Also see notes under s. 687*] – In *R. v. Clifford*, [1969] 2 C.C.C.363, [1969] 1 O.R. 76 (C.A.), it was held that an appellant may abandon his appeal before it comes on for hearing and the Crown, although having submitted in its factum that the sentence should be varied upwards, not having proceeded by its own notice of appeal, cannot contest the abandonment, which prevented the hearing of the sentence appeal. However, in *R. v. Mahon*, [1969] 2 C.C.C.179 (B.C.C.A.), the accused appealed the quantum of a sentence illegally imposed as concurrent rather than consecutive to his unexpired parole term and the Court, holding that the disposition of a sentence appeal was in its hands, and not in the control of the appellant, refused to allow him to abandon and corrected the illegality of sentence.

As part of its jurisdiction over sentence appeals an appellate court has the power to adjudicate upon a trial Judge's decision either granting or refusing a discharge: *R. v. Christman* (1973), 11 C.C.C. (2d) 245, [1973] 3 W.W.R. 475 (Alta.S.C.App.Div.). *Folld*: *R. v. Fallowfield* (1973), 22 C.R.N.S. 342, [1973] 6 W.W.R. 472 (B.C.C.A.).

Since a conviction includes an adjudication of guilt and sentence a Court's decision not to grant a discharge may be the subject of an appeal against sentence: *R. v. McInnis* (1973), 13 C.C.C. (2d) 471, 23 C.R.N.S. 152 (Ont. C.A.).

No appeal lies to the Court of Appeal from the determination of the jury under s. 745 refusing to reduce the period of years of parole ineligibility: *R. v. Vaillancourt* (1989), 49 C.C.C. (3d) 544, 71 C.R. (3d) 43, 33 O.A.C. 234 (C.A.), leave to appeal to S.C.C. refused January 18, 1990.

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**RIGHT OF ATTORNEY GENERAL TO APPEAL / Acquittal / Appeal against verdict of unfit to stand trial / Appeal against ineligible parole period / Appeal against decision not to make s. 741.2 order.**

**676. (1)** The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

- (a) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;
- (b) against an order of a superior court of criminal jurisdiction that quashes an indictment or in any manner refuses or fails to exercise jurisdiction on an indictment;
- (c) against an order of a trial court that stays proceedings on an indictment or quashes an indictment; or
- (d) with leave of the court of appeal or a judge thereof, against the sentence passed by a trial court in proceedings by indictment, unless that sentence is one fixed by law.

**(2)** For the purposes of this section, a judgment or verdict of acquittal includes an

acquittal in respect of an offence specifically charged where the accused has, on the trial thereof, been convicted or discharged under section 736 of any other offence.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

(3) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against a verdict that an accused is unfit to stand trial, on any ground of appeal that involves a question of law alone.

(4) The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal in respect of a conviction for second degree murder, against the number of years of imprisonment without eligibility for parole, being less than twenty-five, that has been imposed as a result of that conviction.

(5) The Attorney General or counsel instructed by the Attorney General for the purpose may appeal to the court of appeal against the decision of the court not to make an order under section 741.2. R.S., c. C-34, s. 605; 1974-75-76, c. 105, s. 15; R.S.C. 1985, c. 27 (1st Supp.), s. 139; 1991, c. 43, s. 9; 1995, c. 42, s. 74.

#### CROSS-REFERENCES

The Attorney General of Canada has equivalent rights of appeal under s. 696, in proceedings instituted by the Government of Canada and conducted by or on behalf of the government, as has the Attorney General of the province under Part XXI.

Appellate rights in respect of an appeal from a disposition or placement decision made under Part XX.1 are contained in ss. 672.72 to 672.78. The right of appeal by the Attorney General from dismissal of an application for a finding that the accused is a dangerous mentally disordered accused is provided for in s. 672.8.

See s. 2 for definitions of "Attorney General" and "unfit to stand trial". Definition of Attorney General includes his lawful deputy for the purposes of s. 676.

A number of provisions deem certain determinations by a judge to be questions of law, including the decision as to admissibility of sexual conduct evidence in the trial of a sexual offence [s. 276.5] and whether or not to permit an amendment to an information or indictment [s. 601(6)].

See also references cited under s. 675.

#### SYNOPSIS

This section sets out what the Crown may appeal to the court of appeal in respect of indictable matters. These are: (a) grounds of law alone (grounds of fact or mixed law and fact are not open to the Crown); (b) an order of a superior court quashing an indictment or refusing to exercise jurisdiction; (c) an order by a trial judge staying or quashing an indictment; and (d) sentence (with leave of a judge or the court), unless the punishment is fixed by law (subsec. (1)).

An appeal may be taken where the accused, although acquitted of the offence charged, has been found guilty of an included offence (subsec. (2)).

A finding that the accused is unfit to stand trial may be appealed on grounds of law alone (subsec. (3)).

In cases of second degree murder the Crown can appeal the length of the parole ineligibility period if it is less than the maximum 25 years (subsec. (4)).

#### ANNOTATIONS

**Constitutional considerations** – The right of the Crown to appeal against an acquittal as provided by this subsection does not offend the guarantee against double jeopardy in s. 11(h) of the Canadian Charter of Rights and Freedoms: *R. v. Morgentaler, Smoling and Scott* (1988), 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1.



**Exercise of Crown right to appeal** – Duties of an Attorney-General may be exercised under his authority by a responsible subordinate official who may instruct counsel to appeal: *R. v. Harrison* (1976), 28 C.C.C. (2d) 279, 66 D.L.R. (3d) 660, [1977] 1 S.C.R. 238 (9:0).

A notice of appeal signed by a person as “agent” of the Attorney-General is proper: *R. v. Baldall et al.* (1974), 17 C.C.C. (2d) 420, 47 D.L.R. (3d) 478, [1975] 2 S.C.R. 503 (9:0).

**Verdict of acquittal** – The question of law, to be appealable, must be directly and concretely related to the acquittal: *R. v. Huot*, [1969] 1 C.C.C. 256, 70 D.L.R. (2d) 703 (2:1) (Man. C.A.).

The right of the Attorney General to appeal under this section includes the right to appeal against the special verdict of not criminally responsible on account of mental disorder: *R. v. Sullivan* (1995), 96 C.C.C. (3d) 135, 37 C.R. (4th) 333, 88 W.A.C. 241 (B.C.C.A.). See also *R. v. Skrzydlewski* (1995), 103 C.C.C. (3d) 467, 87 O.A.C. 174 (C.A.).

An order declaring a mistrial is not a judgment or verdict of acquittal giving the Crown a right of appeal: *R. v. Holliday* (1973), 12 C.C.C. (2d) 56, 26 C.R.N.S. 279, [1973] 5 W.W.R. 363 (Alta. C.A.).

Dismissal of an information upon the plea of *autrefois acquit* is appealable by the Crown: *R. v. Suleyman Sanver* (1973), 12 C.C.C. (2d) 105, 28 C.R.N.S. 10, 6 N.B.R. (2d) 192 (S.C. App. Div.).

A trial judge’s quashing of an indictment on his interpretation of the governing substantive offence section, rather than for some procedural or technical defect, such as duplicity, misjoinder or omission of an essential ingredient in the indictment, is tantamount to a judgment of acquittal to permit the Attorney-General to appeal under subsec. (1)(a): *R. v. Sheets* (1971), 1 C.C.C. (2d) 508, 15 C.R.N.S. 232, [1971] S.C.R. 614 (9:0).

Where after plea the defendant successfully argued that the offence was not known to law and the trial Judge then ruled that he did not have jurisdiction, that result amounted to a verdict of acquittal: *Cheyenne Realty Ltd. v. Thompson* (1974), 15 C.C.C. (2d) 49, 42 D.L.R. (3d) 733, [1975] 1 S.C.R. 87 (5:0).

A finding by the trial judge prior to plea that the charge is a nullity because the federal enactment under which it was laid is *ultra vires* Parliament is tantamount to an acquittal under subsec. (1)(a): *R. v. Kripps Pharmacy Ltd. And Kripps* (1981), 60 C.C.C. (2d) 332, [1981] 5 W.W.R. 190 *sub nom. Canada (Attorney General) v. Wetmore Co. Ct. J.* (B.C.C.A.), leave to appeal to S.C.C. refused 38 N.R. 180 *sub nom. R. v. Wetmore*.

It was held, prior to the recent amendment of this section which added para. (1)(c), that quashing an indictment is tantamount to an acquittal where (a) the decision to quash is not based on defects in the indictment or technical procedural irregularities, and (b) the decision is a final decision resting on a question of law alone, such that if the accused were charged subsequently with the same offence he or she could plead *autrefois acquit*. Similarly, if the order of the court, whatever the terminology used, effectively brings the proceedings to a final conclusion in favour of the accused, then it is tantamount to a judgment or verdict of acquittal. This would include a stay of proceedings ordered after a plea of not guilty upon the basis of a successful “defence” of entrapment: *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, [1985] 2 S.C.R. 128 (7:0).

The Crown and the affected witnesses had a right to appeal an order of a chambers judge requiring that the witnesses attend to be questioned by defence counsel. The order was made because the Attorney General had preferred a direct indictment but was made without notice to the witnesses. The right of appeal exists either under provincial statute or through application of the doctrine of *ex debito justitiae*: *R. v. Sterling* (1993), 84 C.C.C. (3d) 65, [1993] 8 W.W.R. 623, 17 C.R.R. (2d) 122 (Sask. C.A.).

**Question of law / Generally** – Even though the reasons for acquittal were couched in terms of reasonable doubt, where the trial Judge sitting alone has misdirected himself as

to the legal effect of facts found by him, an appeal on a question of law is open to the Crown: *R. v. Davis and Sokoloski* (1973), 14 C.C.C. (2d) 517 (Ont. C.A.), affd 33 C.C.C. (2d) 496, [1977] 2 S.C.R. 523 (5:4).

Where a Crown appeal appears by its form to be a question of law, but upon examination the question is not rooted in the factual situation at trial or upon scrutiny it proves to be a question of fact rather than law, then the appeal is invalid: *R. v. Odeon Morton Theatres Ltd. and United Artists Corp.* (1974), 16 C.C.C. (2d) 185, [1974] 3 W.W.R. 304 (Man. C.A.) (3:2).

An error of law by a trial judge in assessing the facts as they apply to the law so as to found a Crown appeal may arise in three ways: (1) the trial judge finds all the facts necessary to reach a conclusion in law but the court of appeal disagrees with the conclusion reached, the disagreement being with respect to the law not the facts nor the inferences to be drawn from the facts; (2) failure by the trial judge to appreciate the evidence, provided that failure is based on a misapprehension of some legal principle; (3) where the reasons of the trial judge demonstrate a failure to consider all of the evidence in relation to the ultimate issue [however, the mere failure by the trial judge to record the fact of having taken into account all of the evidence is not a proper basis for concluding that there was an error of law in this last respect]: *R. v. Morin* (1992), 76 C.C.C. (3d) 193, [1992] 3 S.C.R. 286, 16 C.R. (4th) 291 (8:0).

**Question of law / Exclusion of evidence** – The absence of legal justification for excluding evidence at trial involves a question of law alone: *R. v. Dshaies*, [1966] 3 C.C.C. 176, 45 C.R. 49 (Que. C.A.).

A finding by a trial judge that the Crown had failed to prove that a confession was voluntary is essentially a finding of fact and not appealable by the Crown unless the trial judge had misdirected himself as to the governing principles or his reasons for judgment disclose that he failed to appreciate, or disregarded, relevant evidence: *R. v. Moreau* (1986), 26 C.C.C. (3d) 359, 51 C.R. (3d) 209 (Ont. C.A.).

**No evidence to support acquittal** – While a finding of fact that is made in the absence of any supportive evidence is an error of law, such an error will occur with respect to an acquittal only if there has been a transfer to the accused by law of the burden of proof of the given fact. Absent a shifting of the burden of proof upon the accused there is always some evidence upon which to make a finding of fact favourable to the accused, and such a finding, if an error, is an error of fact: *Schuldt v. The Queen* (1985), 23 C.C.C. (3d) 225, 49 C.R. (3d) 136, [1985] 2 S.C.R. 592 (7:0).

The finding of a trial judge that an inference cannot be drawn because its foundation has not been proven is not a question of law alone: *R. v. Weir*, [1970] 3 C.C.C. 254, 71 W.W.R. 309 (B.C.C.A.).

In *Sunbeam Corp. (Canada) Ltd. v. The Queen*, [1969] 2 C.C.C. 189, 1 D.L.R. (3d) 161, [1969] S.C.R. 221, it was held (4:3) that “a question of law” does not include whether the trial verdict was unreasonable or could not be supported by the evidence. The matter of sufficiency of proof is a question of fact for the trial Judge and not a question of law.

**Finding of lack of intent** – In *Lampard v. The Queen*, [1969] 3 C.C.C. 249, 6 C.R.N.S. 157, [1969] S.C.R. 373, the full Court (9:0) followed *Sunbeam, supra*, holding that an inquiry as to the commission of certain acts with a certain intent involved a question of fact.

The failure of the trial Judge to draw the appropriate inference of intent from the facts found by him is an error of fact, not law: *R. v. Sorrell and Bondett* (1978), 41 C.C.C. (2d) 9 (Ont. C.A.).

**Charter violation** – It is a question of law whether the trial judge has drawn the correct conclusion from the facts found by him that there has been a breach of s. 11(b) of the

Charter of Rights and Freedoms: *R. v. Heaslip et al.* (1983), 9 C.C.C. (3d) 480, 36 C.R. (3d) 309 (Ont. C.A.).

Similarly it is a question of law whether based on the facts found by the trial judge the accused's right to be informed of his right to counsel as guaranteed by s. 10(b) of the Charter has been infringed: *R. v. Anderson* (1984), 10 C.C.C. (3d) 417, 39 C.R. (3d) 193, 45 O.R. (2d) 225 (C.A.). *R. v. Baig* (1985), 20 C.C.C. (3d) 515, 46 C.R. (3d) 222 (Ont. C.A.).

It is a question of law whether evidence should be excluded pursuant to s. 24(2) of the Charter of Rights: *R. v. Genest* (1986), 32 C.C.C. (3d) 8, 54 C.R. (3d) 246, [1986] R.J.Q. 2944 (Que. C.A.).

**Other issues** – The determination of jurisdiction of a provincial court questioned under s. 478(1), involving a consideration of the evidence is not a question of law alone: *R. v. Philips Appliances Ltd.*, [1969] 2 C.C.C. 328, [1969] 1 O.R. 386 (C.A.).

**Right of accused to uphold acquittal on other grounds** – On a Crown appeal against acquittal, while the Crown is restricted to questions of law alone, the accused, in an effort to uphold the acquittal, may raise error of fact allegedly made by the trial judge which if properly decided would have resulted in an acquittal notwithstanding the errors of law relied upon by the Crown: *R. v. Atlantic Sugar Refineries Co. Ltd. et al.* (1978), 41 C.C.C. (2d) 209, 91 D.L.R. (3d) 618 (Que. C.A.).

**Crown appeal against sentence generally** – The Attorney-General may appeal against a disposition of a discharge as of right on a question of law alone or with leave of the Court of Appeal as a sentence appeal under this subsection: *Hunt v. The Queen* (1979), 45 C.C.C. (2d) 257, [1979] 2 S.C.R. 73, 7 C.R. (3d) S-38.

In view of the definition of "sentence" in s. 673, the Attorney General may appeal from the decision of a trial judge refusing to make an order of forfeiture under s. 462.37(1): *R. v. Pawlyk* (1991), 65 C.C.C. (3d) 63, 4 C.R. (4th) 388, 72 Man. R. (2d) 1 (C.A.).

On a Crown appeal against sentence it will not be permitted to introduce new evidence unless there is something which trial counsel could not have reasonably been expected to introduce, or, perhaps in a case where the accused constitutes a real danger to the public: *R. v. Irwin* (1979), 48 C.C.C. (2d) 423, 10 C.R. (3d) S-33 (Alta. S.C. App. Div.).

Similarly, in *R. v. Hogan* (1979), 50 C.C.C. (2d) 439, 34 N.S.R. (2d) 641 (S.C. App. Div.), the Crown was refused leave to introduce fresh evidence as to aggravating circumstances of the offence as it would be unfair to the accused and not in the interests of the proper administration of justice.

Where the sentence originally imposed has already been served the Court of Appeal will not allow a Crown appeal against that sentence which would have the effect of sending or returning the accused to jail unless it is satisfied that the sentence is so manifestly wrong that it must intervene in the interests of justice: *R. v. Richards* (1979), 49 C.C.C. (2d) 517, 11 C.R. (3d) 193 (Ont. C.A.); *R. v. Bartkow* (1978), 1 C.R. (3d) S-36, 24 N.S.R. (2d) 518 (S.C. App. Div.).

**Intervention by third party** – A third party will not be given leave to intervene in a Crown appeal to raise a ground of appeal not being raised by the Attorney-General in his appeal: *Re Regina and Morgentaler, Smoling and Scott* (1985), 19 C.C.C. (3d) 573, 44 C.R. (3d) 189 (Ont. C.A.).

## SPECIFYING GROUNDS OF DISSENT.

**677.** Where a judge of the court of appeal expresses an opinion dissenting from the judgment of the court, the judgment of the court shall specify any grounds in law on which the dissent, in whole or in part, is based. R.S., c. C-34, s. 606; 1994, c. 44, s. 67.



**CROSS-REFERENCES**

Under ss. 691(1)(a), 692(3)(a) and 693(1)(a), a dissent on a question of law may found an appeal to the Supreme Court of Canada, as of right.

**ANNOTATIONS**

The irregularity of the formal judgment in not formally specifying the grounds for dissent will not be fatal to the appellant's right of appeal under s. 691(1)(a) particularly as the points of law upon which the minority Judge dissented were clearly set out in his reasons for judgment: *Warkentin, Hanson and Brown v. The Queen* (1976), 30 C.C.C. (2d) 1, 35 C.R.N.S. 21 (S.C.C.) (5:4).

**Procedure on Appeals****NOTICE OF APPEAL / Extension of time.**

**678. (1)** An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.

**(2)** The court of appeal or a judge thereof may at any time extend the time within which notice of appeal or notice of an application for leave to appeal may be given. R.S., c. C-34, s. 607; 1972, c. 13, s. 53; 1974-75-76, c. 105, s. 16.

**CROSS-REFERENCES**

The court of appeal may make rules relating to criminal appeals which are consistent with the Code. Under s. 678.1, substitutional service of a notice of appeal or notice of application for leave to appeal may be made on a respondent who has not been located after reasonable efforts.

See also references cited under s. 675.

**SYNOPSIS**

This section provides that an appellant shall give notice of appeal, or apply for leave to appeal, according to the rules of court. The court of appeal or a judge of that court may extend the time for notice.

**ANNOTATIONS**

**Service of notice of appeal** – In *Re Kipnes and A.-G. Alta. et al.*, [1966] 4 C.C.C.387 (Alta. C.A.), it was held (2:1), that in the absence of a specific rule under the Alberta Rules of Court, the rule governing civil matters would apply for service of a notice of appeal under this section.

Trial counsel in filing a notice of appeal to preserve the accused's appeal rights cannot be required to proceed with the appeal at his own expense where Legal Aid is subsequently refused and in such circumstances he should be permitted to withdraw from the case: *R. v. Dorion* (1978), 40 C.C.C. (2d) 549 (Man. C.A.).

**Reopening Appeal** – An application may not be made after an accused's appeal has been dismissed to re-open the appeal on the ground of the discovery of new evidence: *Liscomb v. The Queen* (1961), 131 C.C.C. 418, 37 C.R. 7 (Alta. C.A.).

An accused may in Quebec invoke the civil rules of procedure and apply to revoke the order dismissing his appeal, even where the appeal was originally dismissed on other merits following an appeal to the Court of Appeal. However, the conditions for revoking the original order are similar to the conditions which would apply in the case of a civil appeal and the accused must show that such an order is necessary to remedy a serious

injustice not due to the gross negligence of the affected party or that there are exceptional circumstances: *R. v. Vaudry* (1989), 51 C.C.C. (3d) 410 (Que. C.A.).

However, in a subsequent case, *R. v. Tenorio* (1991), 66 C.C.C. (3d) 429 (Que. C.A.), leave to appeal to S.C.C. refused 67 C.C.C. (3d) vi, 47 Q.A.C. 163n, 142 N.R. 80n the court held that it would not revoke a judgment which had been dismissed on the merits where there was some other useful recourse available, such as an application to the Minister of Justice under s. 690.

The dismissal of an appeal by an appellate court upon receipt of an appellant's notice of abandonment is not an adjudication upon the merits and thus the court is entitled upon his subsequent application to rescind its order and extend the time within which to appeal: *R. v. Watson* (1975), 23 C.C.C. (2d) 366 (Ont. C.A.).

Similarly, the court may set aside an order dismissing the appeal for want of prosecution for failure of counsel to provide the necessary transcripts: *R. v. Blaker* (1983), 6 C.C.C. (3d) 385, 46 B.C.L.R. 344 (C.A.).

**Extension of time / Application of subsection** – In *R. v. Stokes and Stevenson* (1966), 49 C.R.97, 57 W.W.R.62 (Man. C.A.), it was held that this subsection does not empower the Registrar to make an order extending the time for appeal.

**Grounds for granting extension of time** – In *R. v. Grover*, [1967] 3 C.C.C.387, 1 C.R.N.S.129 (Ont. C.A., in Chambers), Laskin, J.A., made an order for extension of time for a Crown appeal against a suspension of the passing of sentence, which was clearly contrary to the provisions of s. 737, on the basis that the respondent had not yet been lawfully sentenced for his offence.

Where the Crown has demonstrated a *bona fide* intention to appeal within the appeal period, has exercised reasonable diligence in attempting to locate the accused for service of the notice of appeal and has shown there are arguable grounds for appeal, then the extension of time should be granted. Moreover, the Crown is not required to establish that the appeal would probably succeed: *R. v. Gruener* (1979), 46 C.C.C. (2d) 88 (Ont. C.A. in Chambers). This case is also of note because the Crown also applied, unsuccessfully, for an order permitting substitutional service because the accused could not be found for personal service. [On this latter issue now see s. 678.1.]

It is a cardinal principle that the party seeking the extension must have displayed a *bona fide* intention to appeal within the time limit. The Crown was refused an extension of time where although it was clear that the Crown intended to continue the prosecution against the accused there was no intention to do so by appealing the decision dismissing the charges, within the statutory time. In this case the Crown had originally proceeded by relaying the information but these informations were stayed as an abuse of process: *R. v. Scheller* (No. 2) (1976), 32 C.C.C. (2d) 286, 37 C.R.N.S. 349 (Ont. C.A. in Chambers).

However, in *R. v. Hetsberger* (1979), 47 C.C.C. (2d) 154 (Ont. C.A. in Chambers), an extension of time was granted notwithstanding the absence of an intention to appeal within the time limit where the consequences of the conviction (deportation) were out of all proportion to the penalty imposed and it was arguable that in law no offence was committed.

In *R. v. Valiquette* (1988), 62 C.R. (3d) 363 (Que. C.A.), the court allowed an extension of time to appeal a sentence imposed pursuant to s. 5(2) of the Narcotic Control Act following a decision of the Supreme Court of Canada holding the minimum sentence of imprisonment prescribed by that section unconstitutional.

Subsection (2) gives the judge a very full discretionary power to grant an extension of time and there are no absolute rules for when the application should be granted. However, some of the criteria applied are whether the applicant has shown a *bona fide* intention to appeal within the appeal period, whether the applicant has accounted for the delay and has shown that the other side was not seriously prejudiced, that the applicant has not taken the benefits of the judgment he seeks to appeal and that the appeal has a

reasonable chance of success. The relevance and relative importance of each of these criteria are for the judge to determine. It is also incumbent on the applicant to provide the judge with sufficient material upon which he can exercise his discretion. Facts accounting for the delay would ordinarily be placed before the judge by way of affidavit evidence. Facts concerning the merits of the appeal could be by way of affidavit or through counsel's statement to the court, except that if there is any disagreement between counsel as to what the record will contain then it should be resolved by evidence as to what occurred in the court below: *R. v. Henry* (1989), 52 C.C.C. (3d) 470, [1990] 2 W.W.R. 470 (Man. C.A.).

**Extension of time where prisoner has executed waiver** – In *Charest v. The Queen* (1957), 119 C.C.C. 197, 26 C.R. 250 (Que. C.A.), Montgomery, J., held that the signing of a waiver of appeal by the accused so that he could be removed to the penitentiary to commence serving his sentence does not constitute an absolute bar against the delayed application for leave to appeal.

However, such a waiver should not be treated lightly. The exercise of the Court's discretion to relieve against its effect will depend on the special circumstances of each case. Where there does not appear to be much merit in the accused's appeal and the accused has served a previous penitentiary sentence at which time he had also taken advantage of an early transfer to the penitentiary so that he could hardly plead ignorance of the clear effect of a waiver, the application for relief should be dismissed: *R. v. Kelly* (1976), 33 C.C.C. (2d) 248 (Ont. C.A.).

**Jurisdiction to rescind order refusing extension** – A Court of Appeal has jurisdiction to rescind a previous order, even one made by a full Court of three Judges, refusing an extension of time to appeal where the interests of justice so require: *R. v. Audy (No. 1)* (1977), 34 C.C.C. (2d) 228 (Ont. C.A.).

Further, a single Judge of the Court of Appeal has jurisdiction to rescind his own order previously made refusing an extension of time: *R. v. Dunbrook* (1978), 44 C.C.C. (2d) 264 (Ont. C.A. in Chambers).

An application for an extension of time, previously refused by a single Judge, may be reviewed before the full Court where conditions have changed since the initial refusal: *R. v. Walker* (1978), 46 C.C.C. (2d) 124 (Que. C.A.), or there are other special circumstances: *R. v. Coulombe* (1988), 64 C.R. (3d) 58 (Que. C.A.).

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## **SERVICE WHERE RESPONDENT CANNOT BE FOUND.**

**678.1** Where a respondent cannot be found after reasonable efforts have been made to serve the respondent with a notice of appeal or notice of an application for leave to appeal, service of the notice of appeal or the notice of the application for leave to appeal may be effected substitutionally in the manner and within the period directed by a judge of the court of appeal. R.S.C. 1985, c. 27 (1st Supp.), s. 140.

### **CROSS-REFERENCES**

An order for substitutional service should include the date of hearing and determination of the appeal and should attempt to ensure receipt of notification by the respondent.

### **SYNOPSIS**

This section allows for substituted service on a respondent of notice of appeal, or application for leave to appeal, as directed by a judge of the court of appeal.

### **ANNOTATIONS**

In *R. v. Gruener* (1979), 46 C.C.C. (2d) 88 (Ont. C.A. in Chambers), a case decided prior to the enactment of this section, the Judge, while prepared to assume that there was jurisdiction to make an order for substitutional service under the rules of the court, held that the order should only be made where personal service upon the accused is



demonstrably not possible through no fault of the Crown authorities and where if such an order is made it will, in all probability, if not certainly, be effective to bring notice to the accused. A relevant factor in deciding whether to make the order is whether the accused dropped out of sight to avoid service because he was aware of a firm intention by the Crown to appeal the acquittal.

**RELEASE PENDING DETERMINATION OF APPEAL / Notice of application for release / Circumstances in which appellant may be released / Idem / Conditions of order / Application of certain provisions of s. 525 / Release or detention pending new trial, new hearing or hearing of reference / Application to appeals on summary conviction proceedings / Form of undertaking or recognizance / Directions for expediting appeal, new trial, etc.**

**679. (1)** A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

- (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678;
- (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or
- (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

**(2)** Where an appellant applies to a judge of the court of appeal to be released pending the determination of his appeal, he shall give written notice of the application to the prosecutor or to such other person as a judge of the court of appeal directs.

**(3)** In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that

- (a) the appeal or application for leave to appeal is not frivolous;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

**(4)** In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that

- (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
- (b) he will surrender himself into custody in accordance with the terms of the order; and
- (c) his detention is not necessary in the public interest.

**(5)** Where the judge of the court of appeal does not refuse the application of the appellant, he shall order that the appellant be released

- (a) on his giving an undertaking to the judge, without conditions or with such conditions as the judge directs, to surrender himself into custody in accordance with the order, or
- (b) on his entering into a recognizance
  - (i) with one or more sureties,
  - (ii) with deposit of money or other valuable security,
  - (iii) with both sureties and deposit, or
  - (iv) with neither sureties nor deposit,

in such amount, subject to such conditions, if any, and before such justice as the judge directs,  
and the person having the custody of the appellant shall, where the appellant complies with the order, forthwith release the appellant.

(6) The provisions of subsections 525(5), (6) and (7) apply with such modifications as the circumstances require in respect of a person who has been released from custody under subsection (5) of this section.

(7) Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial or new hearing or the Minister of Justice gives a direction or makes a reference under section 690, this section applies to the release or detention of that person pending the new trial or new hearing or the hearing and determination of the reference, as the case may be, as though that person were an appellant in an appeal described in paragraph (1)(a).

(8) This section applies to applications for leave to appeal and appeals to the Supreme Court of Canada in summary conviction proceedings.

(9) An undertaking under this section may be in Form 12 and a recognizance under this section may be in Form 32.

(10) A judge of the court of appeal, where on the application of an appellant he does not make an order under subsection (5) or where he cancels an order previously made under this section, or a judge of the Supreme Court of Canada on application by an appellant in the case of an appeal to that Court, may give such directions as he thinks necessary for expediting the hearing of the appellant's appeal or for expediting the new trial or new hearing or the hearing of the reference, as the case may be. R.S., c. C-34, s. 608; R.S., c. 2 (2nd Supp.), s. 12; R.S.C. 1985, c. 27 (1st Supp.), s. 141.

#### CROSS-REFERENCES

Authority for the review of a decision of a judge of the court of appeal under s. 679 may be found in s. 680. An undertaking and a recognizance may be in Forms 12 and 32 respectively. A release order will usually include terms governing the appellant's conduct pending the appeal, breach of which may result in dismissal of the appeal. Also, liability under s. 145(2) and (3) may be attracted by a breach of a term of the undertaking or recognizance.

Note that s. 672.1 defines "court" for the purposes of Part XX.1 [Mental Disorder] to include a judge of the court of appeal and, thus, a judge of the court of appeal may make the various orders provided for in that Part including an assessment order under s. 672.11. Under s. 672.17, no order may be made under this section during the period that an assessment order of an accused is in force. The assessment may, however, be varied under s. 672.18.

#### SYNOPSIS

This section provides for the granting of bail pending an appeal to the court of appeal or the Supreme Court of Canada.

A judge of the court of appeal may make an order releasing an appellant from custody where: (a) an appeal from conviction/application for leave has been filed; (b) leave to appeal sentence has been granted; or (c) in the case of appeals to the Supreme Court, the notice of appeal or application for leave to appeal has been filed and served (subsec. (1)).

Notice must be given to the Crown (subsec. (2)).

On applications relating to conviction appeals to the court of appeal or appeals/applications to the Supreme Court the appellant must establish that: (a) the appeal is not frivolous (*i.e.*, it is arguable); (b) he or she will surrender into custody as and when required; and (c) detention is not necessary in the public interest (subsec. (3)).

On applications relating to sentence appeals the appellant, having obtained leave, must establish that: (a) the appeal has sufficient merit that hardship would result if bail was not granted (*e.g.*, the sentence would be served before the appeal could be heard);

(b) the appellant will surrender into custody as and when required; and (c) detention is not necessary in the public interest (subsec. (4)).

The order for release may require that the appellant give an undertaking, or enter into a recognizance, with such terms and conditions as the judge sees fit to impose (subsec. (5)).

An appellant who breaches his or her bail may be arrested, with or without warrant, and dealt with in the same way as an accused who is awaiting trial (subsec. (6)).

A judge of the court of appeal also has jurisdiction to grant bail where a new trial or hearing has been ordered by either the court of appeal or the Supreme Court of Canada, or where the Minister of Justice directs a new trial or hearing. In such cases the application shall proceed as if the appellant was appealing a conviction (subsec. (7)).

Bail may also be granted in connection with summary conviction matters before the Supreme Court of Canada (see Supreme Court Act, s. 40) (subsec. (8)).

Where bail is refused a judge of the court of appeal may give directions for expediting the hearing of the appeal, new trial, etc. Where the appeal is to the Supreme Court of Canada a judge of that court may give similar directions (subsec. (10)).

## ANNOTATIONS

**Jurisdiction to order release** – The court of appeal has jurisdiction to grant release pending appeal of an accused who has been convicted and has filed a notice of appeal against conviction, though the accused had not yet been sentenced and was remanded into custody for sentencing: *R. v. Smale* (1979), 51 C.C.C. (2d) 126 (Ont. C.A.).

However, the order for release can only apply to the custody to which the accused is then subject and must provide that it expires at the time of sentencing or the disposition of the appeal, whichever is earlier: *Re Morris and The Queen* (1985), 21 C.C.C. (3d) 242 (Ont. C.A.).

**Burden of proof** – The appellant has the burden of establishing or proving on a balance of probabilities the requirements of this subsection: *R. v. Ponak and Gunn*, [1972] 4 W.W.R. 316 (B.C.C.A. in Chambers).

**Grounds for granting release** – The public interest is the public's confidence in and respect for the Court in its administration of the criminal law: *R. v. Demyen* (1975), 26 C.C.C. (2d) 324 (Sask. C.A. in Chambers).

An appellant is to be released if it is safe to do so and by a preponderance of evidence and argument his appeal is shown not to be frivolous: *R. v. Davis* (1976), 32 C.C.C. (2d) 526 (Alta. S.C. App. Div. in Chambers).

The "public interest" ground in subsec. (3)(c) for detention pending appeal is not unconstitutional. In the context of bail pending appeal, the public interest provides a clear standard relating both to the protection and safety of the public and to the need to maintain a balance between the competing dictates of enforceability of judgments and reviewability for correction of errors. Thus, there will be cases where the hearing of the appeal will be so delayed and the probability of success so strong that it would be contrary to the public interest to refuse release even for a serious offence. On the other hand, the public interest may require that a person convicted of a very serious offence, particularly a repeat offender who is advancing grounds of appeal that are arguable but weak, be denied bail: *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32, 25 C.R. (4th) 350, 109 D.L.R. (4th) 97 (Ont. C.A.). Similarly: *R. v. Branco* (1993), 87 C.C.C. (3d) 71, 25 C.R. (4th) 370, 57 W.A.C. 201 (B.C.C.A.), leave to appeal to S.C.C. refused 90 C.C.C. (3d) vi, 22 C.R.R. (2d) 192n. Also see: *R. v. Parsons* (1994), 30 C.R. (4th) 169, 117 Nfld. & P.E.I.R. 69 (Nfld. C.A., Marshall J.A.) [affirmed 30 C.R. (4th) 189, 117 Nfld. & P.E.I.R. 69] where, however, the constitutional issue was not raised.

**Naming sureties** – It was held in *R. v. Martin* (No. 2) (1980), 57 C.C.C. (2d) 31 (Ont. C.A. in chambers) that a judge of the Court of Appeal has no power to give directions to a justice that certain persons should be accepted as sufficient sureties. However, that



decision should probably now be read in light of the subsequently enacted s. 515(2.1). Unlike the provisions of s. 515, which deal with release pending trial, this section does not set out in detail the type of conditions which may be attached to the release order. However, there is no reason to believe that the jurisdiction of a judge of the Court of Appeal is any narrower than that of a justice and, in particular, note s. 515(2.1) which permits a "justice, judge or court" that orders the release of a person upon a recognizance with sureties to name particular persons as sureties in the order.

**Revocation of release order [subsec. (6)]** – There is no power to issue a warrant under s. 525(5) where the violation of the appellant's release order was not discovered until after that order had expired and the appellant was released on a new order. However, where the new order was obtained by fraud, by reason of the false assertion in the material in support of the application for the new order that the appellant had not violated the terms of his previous release order, then the court has an inherent power to set aside the new order and any subsequent release order. A warrant may therefore issue for the arrest of the appellant. The appellant will then be dealt with pursuant to s. 525(7): *R. v. Stoltz* (1993), 84 C.C.C. (3d) 422, 53 W.A.C. 147 (B.C.C.A.).

**Release pending new trial** – Once the accused's conviction has been set aside, he is now a person charged with an offence and awaiting trial and, as such, is entitled to the benefits of s. 11(d) and (e) of the Charter. Subsection (7) must accordingly be held to be constitutionally invalid to the extent that it applies to such a person. The accused's continued detention therefore falls to be determined as if he were a person charged with an offence in accordance with s. 522 and 515. Those provisions entitle the judge to take into account the protection or safety of the public in determining release: *R. v. Sutherland* (1994), 90 C.C.C. (3d) 376, 30 C.R. (4th) 265, 120 Sask. R. 94 (Sask. C.A.).

Where a new trial is ordered following a successful Crown appeal a judge of the trial court has jurisdiction to deal with release of the accused pending that new trial: *Re Graham and The Queen* (1986), 30 C.C.C. (3d) 176 (Ont. H.C.J.).

**Release pending appeal to Supreme Court of Canada** – A judge of the Court of Appeal has jurisdiction to order the release of an accused pending his application for leave to appeal to the Supreme Court, where a notice of motion for leave to appeal has been filed with the court, even if all the documents necessary to perfect the leave application have not yet been filed: *R. v. Zundel* (1990), 54 C.C.C. (3d) 400, 38 O.A.C. 51 (C.A.).

On an application to review a release order made by a judge of the court of appeal, the reviewing court has the authority to substitute its opinion for that of the single judge after considering the record, the principles that govern the grant of bail and the conclusions and findings made by the judge. The nature of the review is correctness, not reasonableness. The court may also receive and consider additional evidence that bears upon the application, provided the evidence is relevant and arose subsequent to the time the bail order was granted. While a judge has a wide discretion in determining what the public interest is, that discretion does not extend to exclude the public interest as a criterion of equal weight and importance with the other two criteria of merit of the appeal and likelihood of surrender into custody. In determining whether it is contrary to the public interest to release the accused, the court should consider a number of factors including the nature of the offence, the age of the victim, the circumstances surrounding the commission of the offence and the public attitude to such an offence: *R. v. Benson* (1992), 73 C.C.C. (3d) 303, 14 C.R. (4th) 245, 112 N.S.R. (2d) 423 *sub nom.* *R. v. B. (F.F.)* (C.A.).

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**REVIEW BY COURT OF APPEAL / Single judge acting / Enforcement of decision.**

**680.** (1) A decision made by a judge under section 522 or subsection 524(4) or (5) or a decision made by a judge of the court of appeal under section 261 or 679 may, on

the direction of the chief justice or acting chief justice of the court of appeal, be reviewed by that court and that court may, if it does not confirm the decision,

(a) vary the decision; or

(b) substitute such other decision as, in its opinion, should have been made.

(2) On consent of the parties, the powers of the court of appeal under subsection (1) may be exercised by a judge of that court.

(3) A decision as varied or substituted under this section shall have effect and may be enforced in all respects as though it were the decision originally made. R.S., c. 2 (2nd Supp.), s. 12; 1974-75-76, c. 93, s. 73; R.S.C. 1985, c. 27 (1st Supp.), s. 142; 1994, c. 44, s. 68.

#### CROSS-REFERENCES

While misconduct may attract liability under s. 145(2) and (3), there is no express provision authorizing misconduct hearings.

The discretionary substitution authority of s. 680(1)(b) incorporates s. 679(10), thus permitting an order expediting the hearing of an appeal.

#### SYNOPSIS

This section gives the court of appeal jurisdiction to entertain applications to review certain bail decisions.

Where bail has been granted or refused by a Supreme Court judge in connection with an offence listed in s. 469 (*e.g.*, treason, murder) (see ss. 522, 524(4), (5)) or pending appeal, by a judge of the court of appeal (see s. 679), an application can be made to the chief justice of the court of appeal (or acting chief justice) for an order directing the hearing of an appeal from the earlier ruling (subsec. (1)). The similar procedure must be followed where an order is made under s. 261 respecting a stay of a driving prohibition.

The parties can consent to the review being heard by a single judge of the court of appeal (subsec. (2)).

A decision on such a review is treated, for all intents and purposes, as a decision of the court of first instance.

#### ANNOTATIONS

The Chief Justice should direct a review under this section if in his view the appeal Court, properly applying the law, could possibly conclude that the application for release should have been allowed. The review by the Court under this section is a review on the record not a *de novo* hearing: *R. v. Moore* (1979), 49 C.C.C. (2d) 78, 33 N.S.R. (2d) 631 (S.C. App. Div. in Chambers).

A review under this section should take the general form of an ordinary appeal and is not a hearing *de novo* in which either side has the right to submit additional materials. However, the Court, as in appeals, can grant leave in the usual way and upon the usual grounds to a party to produce new evidence: *R. v. West* (1972), 9 C.C.C. (2d) 369, 20 C.R.N.S. 15 (Ont. C.A.).

The duty of the Court under this section is to examine the record below and render the decision that "should have been made" by the Judge below giving proper regard to his findings of fact and the inferences which he has drawn: *R. v. Smith* (1973), 13 C.C.C. (2d) 374, 6 N.B.R. (2d) 494 (N.B.S.C. App.Div.).

After giving due regard to the decision in the first instance the Court of Appeal is entitled to substitute its opinion where, for example, it is of the opinion that the judge at first instance did not give sufficient credence to the public interest: *R. v. Desjarlais* (1984), 14 C.C.C. (3d) 77, 28 Man. R. (2d) 153 (C.A.).

In *R. v. Perron* (1989), 51 C.C.C. (3d) 518, 73 C.R. (3d) 174 (Que. C.A.), the members of the court expressed somewhat different views as to the nature of the review under this section. Malouf J.A. was of the view that the Court of Appeal has a very wide discre-

tion which gives the court the power to substitute its opinion for that of the superior court judge. Tourigny J.A. was of the view that while the court of appeal may substitute its decision for that of the decision of the judge below, the review remains essentially an appeal and the decision of the superior court judge may only be modified where the Court of Appeal comes to the conclusion that the judge did not exercise her discretion judicially in the appreciation of the criteria set out in s. 515(10). Mailhot J.A. held that, while the Court of Appeal is given a broad power, it should generally accept those conclusions of the superior court judge which are based on credibility.

It was held prior to the enactment of subsec. (2) that a single judge had an inherent jurisdiction (apparently not dependent on consent of both parties) to vary a judicial interim release order of another judge of the Court of Appeal provided that he could have made the order, as varied, initially: *R. v. Pappajohn* (1977), 38 C.C.C. (2d) 106 (B.C.C.A. in Chambers); *R. v. Nutbean* (1980), 55 C.C.C. (2d) 235 (Ont. C.A.). It was further held, however, that a new recognizance must be entered into or a new undertaking given before any such amended order becomes effective: *R. v. Nutbean*, *supra*.

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**681. [Repealed. 1991, c. 43, s. 9.]**

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**REPORT BY JUDGE / Transcript of evidence / Notes of proceedings / Copies to interested parties / Copy for Minister of Justice.**

**682. (1)** Where, under this Part, an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with a report on the case or on any matter relating to the case that is specified in the request.

**(2)** A copy or transcript of

(a) the evidence taken at the trial,

(b) the charge to the jury, if any,

(c) the reasons for judgment, if any, and

(d) the addresses of the prosecutor and the accused, if a ground for the appeal is based on either of the addresses,

shall be furnished to the court of appeal, except in so far as it is dispensed with by order of a judge of that court.

**(3)** A copy of the charge to the jury, if any, and any objections that were made to it shall, before the copy or transcript is transmitted to the court of appeal pursuant to subsection (2), be submitted to the judge who presided at the trial, and if the judge refuses to certify that the charge and objections are accurately set out, he shall immediately certify to the court of appeal

(a) the reasons for his refusal; and

(b) the charge that was given to the jury, if any, and any objections that were made to it.

**(4)** A party to an appeal is entitled to receive, on payment of any charges that are fixed by rules of court, a copy or transcript of any material that is prepared under subsections (1) to (3).

**(5)** The Minister of Justice is entitled, on request, to receive a copy or transcript of any material that is prepared under subsections (1) to (3). R.S., c. C-34, s. 609; 1972, c. 13, s. 55; 1974-75-76, c. 105, s. 17; R.S.C. 1985, c. 27 (1st Supp.), s. 143.

**CROSS-REFERENCES**

In most instances, the court of appeal will make a determination based on a transcript, agreed state-



ment of facts, charge to the jury or reasons for judgment and any additional proceedings, together with a report of the trial judge.

## SYNOPSIS

This section deals with some of the material which is required for the purposes of an appeal (see also the court of appeal rules).

Pursuant to subsec. (1) the court of appeal can request a report from the trial judge concerning the proceedings in that forum.

Subsection (2) allows a judge of the court of appeal to dispense with the filing of portions of the trial record which are not needed for the purposes of the appeal.

Subsection (3) directs that the transcript of a jury charge, and any objections thereto, be certified by the trial judge before the same is filed. If the trial judge is of the opinion that the transcript is inaccurate he or she shall so indicate to the court of appeal and shall provide a correct version of the charge and any objections.

Material filed for use on an appeal is available to the parties at a cost specified in the rules of court (subsec. (4)). The same shall be provided to the Minister of Justice upon request (subsec. (5)).

## ANNOTATIONS

**Subsec. (1)** – To a large extent this provision is an historical anachronism. There should not be a standing request from the courts of appeal to trial judges to routinely make a report. The request should only be made in rare cases where something has occurred which is not reflected on the record upon which opposing counsel cannot agree. In those cases, trial counsel ought probably to be afforded an opportunity to appear before the trial judge in order to make submissions with regard to the requested report. When the report is made, copies should be provided to counsel appearing on the appeal. An unsolicited report by the trial judge expressing the opinion that the verdict of the jury was unsafe and indicating that, had he felt entitled to do so the judge would have commented on the testimony of the complainant, should not have been considered by the court of appeal: *R. v. E.(A.W.)*, [1993] 3 S.C.R. 155, 83 C.C.C. (3d) 462, 23 C.R. (4th) 357.

**Subsec. (2)** – Where one ground of appeal is based upon the address of Crown counsel for which no stenographic notes were taken a conviction for non-capital murder was quashed and a new trial ordered: *R. v. Robillard*, [1969] 4 C.C.C.120, [1968] Que. Q.B.255n (Que. C.A.).

Merely because there is a gap in the transcript due to malfunctioning of the recording equipment does not in every case require that there be a new trial, even where a portion of the charge to the jury is missing. As a general rule there must be a serious possibility that there was an error in the missing portion of the charge, or that the omission deprived the appellant of a ground of appeal: *R. v. Hayes* (1989), 49 C.C.C. (3d) 161, 68 C.R. (3d) 245, 89 N.R. 138 (S.C.C.) (4:3).

An indigent appellant has no absolute right guaranteed by the Charter of Rights to have the transcript supplied to him by the state: *R. v. Robinson* (1989), 51 C.C.C. (3d) 452, 63 D.L.R. (4th) 289, 73 C.R. (3d) 81, 70 Alta. L.R. (2d) 31, 100 A.R. 26 (C.A.).

**Subsec. (3)** – Where there is no dispute between the parties as to the accuracy of the transcript of his charge the death of the trial Judge preventing his certification will not affect the hearing of the appeal: *R. v. Johnston* (1975), 28 C.C.C. (2d) 222, 35 C.R.N.S. 164 (N.B.S.C. App. Div.).

**POWERS OF COURT OF APPEAL / Parties entitled to adduce evidence and be heard / Other powers / Execution of process / Power to order suspension / Revocation of suspension order.**

**683. (1)** For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

- (a) order the production of any writing, exhibit, or other thing connected with the proceedings;
- (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
  - (i) to attend and be examined before the court of appeal, or
  - (ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;
- (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);
- (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
- (e) order that any question arising on the appeal that
  - (i) involves prolonged examination of writings or accounts, or scientific or local investigation, and
  - (ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal;
- (f) act on the report of a commissioner who is appointed under paragraph (e) in so far as the court of appeal thinks fit to do so, and
- (g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

(2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(e), are entitled to be present during the inquiry, and to adduce evidence and to be heard.

(3) A court of appeal may exercise, in relation to proceedings in the court, any powers not mentioned in subsection (1) that may be exercised by the court on appeals in civil matters, and may issue any process that is necessary to enforce the orders or sentences of the court, but no costs shall be allowed to the appellant or respondent on the hearing and determination of an appeal or on any proceedings preliminary or incidental thereto.

(4) Any process that is issued by the court of appeal under this section may be executed anywhere in Canada.

(5) Where an appeal or an application for leave to appeal has been filed in the court of appeal, that court may, where it considers it to be in the interests of justice, order that

- (a) any obligation to pay a fine,
- (b) any order of forfeiture or disposition of forfeited property,
- (c) any order to make restitution under section 725 or 726, or

**NOTE:** Subsection (5)(c) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to ss. 725 or 726 with ss. 738 or 739.

(d) any order to pay a victim fine surcharge under section 727.9  
be suspended until the appeal has been determined.

**NOTE:** Subsection (5)(d) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 727.9 with s. 737.

(6) The court of appeal may revoke any order it makes under subsection (5) where it considers such revocation to be in the interests of justice. R.S., c. C-34, s. 610; R.S.C. 1985, c. 27 (1st Supp.), s. 144; c. 23 (4th Supp.), s. 5.

**CROSS-REFERENCES**

Authorization for the determination or disposition of an appeal on its merits may be found in s. 687. Section 695(1) confers similar authority upon the Supreme Court of Canada in an appeal brought under ss. 691 to 694 and 696.

**SYNOPSIS**

This section sets out some of the powers which may be exercised by a court of appeal.

Pursuant to subsec. (1) the court can: (a) order the production of any writing, exhibit, etc., connected with the proceeding; (b) admit “fresh evidence”; (c) refer matters to a special commission for examination; (d) act on the report of a special commissioner; and (e) amend the indictment.

Where witnesses appear, the parties are entitled to examine or cross-examine. In a commissioner’s inquiry the parties are entitled to be present to adduce evidence and to be heard (subsec. (2)).

In addition, the court generally can exercise the incidental powers it has in connection with civil matters. However, no costs are to be awarded (subsec. (3)). Any process issued by the court may be executed anywhere in Canada (subsec. (4)).

The court can stay the payment of a fine, forfeiture order, etc., pending the outcome of an appeal (subsec. (5)). However, it can revoke any such order if the circumstances warrant (subsec. (6)).

**ANNOTATIONS**

**Admission of evidence wrongfully excluded at trial** – Where the trial Judge incorrectly refused to admit a document into evidence, it was accepted upon appeal by the appellate Court and considered in allowing the appeal and entering a verdict of acquittal: *R. v. Partridge* (1973), 15 C.C.C. (2d) 434, 5 Nfld. & P.E.I.R. 420 (P.E.I.S.C.).

Rather than simply ordering a new trial because of the error by the trial judge in refusing to permit access to the sealed packet containing the affidavit used to obtain an authorization to intercept private communications, the court of appeal ordered that the accused be given the affidavit and provided with an opportunity to cross-examine the affiant before a person designated by the Chief Justice. The transcript of the cross-examination would then be filed into the record and the court of appeal would be able to determine whether the error required a new trial: *R. v. Hiscock* (1991), 68 C.C.C. (3d) 182 (Que. C.A.).

**Admission of evidence to complete the record** – Approval was given to an appellate Court receiving *viva voce* evidence of analysts whose certificates had been admitted as evidence at trial: *Kissick et al. v. The King* (1952), 102 C.C.C. 129, 14 C.R. 1 (S.C.C.) (4:1).

Where the trial Judge refused to allow a deceased preliminary inquiry witness’ evidence to be read in because the Crown had overlooked first proving that the accused had been present there, an appellate Court allowed this technical defect to be cured before it: *R. v. Huluszkiw* (1962), 133 C.C.C. 244, 37 C.R. 386 (Ont. C.A.).

Those cases where the Crown has been permitted to tender further evidence are, generally speaking, cases where the appellate court is doing nothing more than what would clearly have happened at trial had the error or omission been noted and rectified at trial. Where, however, it was not clear that the course of the trial would not have been in any respect different if the error had been discovered at trial, then the application by the Crown should be refused: *R. v. Cheung* (1990), 56 C.C.C. (3d) 381 (B.C.C.A.).

**Test for admission of fresh evidence** – If the fresh evidence is considered to be of sufficient strength that it might reasonably affect the verdict of the jury it should not be excluded on the grounds of an earlier failure to exercise reasonable diligence to present it at trial: *McMartin v. The Queen*, [1965] 1 C.C.C. 142, 43 C.R. 403 (S.C.C.) (9:0).

In *Horsburgh v. The Queen*, [1968] 2 C.C.C. 288, 2 C.R.N.S. 228 (S.C.C.), it was held



(4:3) that the fact that two witnesses had testified and been cross-examined at trial is not a valid ground for refusal by the Appeal Court to admit their affidavits retracting and contradicting their own evidence.

The power of an appellate Court to admit new evidence is broad and where this evidence, clearly relevant to the issue of guilt, was known to the accused but unknown to his counsel at trial, then considering the young accused's inexperience and unfamiliarity of the finality of the trial process it should be admitted: *R. v. Taylor* (1975), 22 C.C.C. (2d) 321, [1975] 3 W.W.R. 485 (Alta. S.C. App. Div.).

The Court of Appeal's power under this section is limited to admitting as fresh evidence admissible evidence only and manifestly does not authorize a Court of Appeal to dispense with the law of hearsay evidence: *R. v. O'Brien* (1977), 35 C.C.C. (2d) 209, 76 D.L.R. (3d) 513, [1978] 1 S.C.R. 591 (9:0).

In *Palmer and Palmer v. The Queen* (1979), 50 C.C.C. (2d) 193, [1980] 1 S.C.R. 759, 14 C.R. (3d) 22 (S.C.C.) (9:0) the Court reviewed the principles upon which fresh evidence should be admitted as follows: (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, although this principle is not applied with the same strictness in a criminal trial as in a civil trial; (2) the evidence must be relevant in that it bears upon a decisive or potentially decisive issue; (3) the evidence must be credible; and (4) it must be such that if believed, it could have affected the result. In that case the accused's appeal was dismissed, the Court holding that the Court of Appeal did not err in rejecting the fresh evidence, which concerned the dealings of the chief Crown witness with the Crown and police, on the basis that it was not credible. Also see: *R. v. McAnespie*, [1993] 4 S.C.R. 501, 86 C.C.C. (3d) 191n, 68 O.A.C. 185.

In *R. v. C.(R.)* (1989), 47 C.C.C. (3d) 84, 31 O.A.C. 375 (C.A.), the court considered the difficult problem of reconciling the due diligence requirement with the interests of justice and concluded that, while that requirement should not be watered down, lack of due diligence cannot override accomplishing a just result in a particular case. The answer to this "apparent conundrum" may only be found in the totality of circumstances and a balancing of factors respecting the ends of justice.

The fact that the evidence which is tendered neither confirms nor corroborates the testimony of the accused does not mean that it could not have had an impact on the verdict and thus be capable of constituting fresh evidence: *R. v. D'Amours*, [1990] 1 S.C.R. 115, 107 N.R. 237.

When deciding whether or not to exercise the broad discretion under this section, the overriding consideration is the interests of justice. This discretion should be exercised to permit the adducing of evidence of the fact that, following the trial, the accused was acquitted of a charge which had formed the basis of similar act evidence at the earlier trial. The acquittal was the equivalent of a finding of innocence and there would be a clear miscarriage of justice if allegations of conduct, of which the accused was innocent, played a part in his conviction for other offences: *R. v. G. (K.R.)* (1991), 68 C.C.C. (3d) 268, 5 O.R. (3d) 406 (C.A.).

The traditional criteria for the admission of fresh evidence do not apply, where an accused who has been convicted seeks to place before an appellate court additional material relevant to a factual or legal determination made at trial, where the material sought to be admitted challenges the very validity of the trial process. Where an appellant contends that trial counsel's conduct resulted in a miscarriage of justice, the interests of justice will generally require that the court receive otherwise admissible evidence relevant to that claim, assuming that the material sought to be adduced provides a basis upon which the court could conclude that a miscarriage of justice occurred, and that the opposing party has had adequate notice of the material, an opportunity to challenge it by cross-examination, and an opportunity to offer additional material relevant to the issue: *R. v. W.(W.)* (1995), 100 C.C.C. (3d) 225, 43 C.R. (4th) 26, 25 O.R. (3d) 161 (C.A.). See also *R. v. Strauss* (1995), 100 C.C.C. (3d) 303, 100 W.A.C. 241 (B.C.C.A.).

**Procedure for admission of fresh evidence** – On an application to adduce fresh evi-

dence the motion should be heard and, if not dismissed, then judgment reserved and the appeal heard. The court can then consider the question of the fresh evidence in light of the background of the case and of the other evidence and then dismiss the application; admit the evidence as conclusive of the issues and dispose of the matter immediately; or admit evidence that may have sufficient probative force, if accepted by the trier of fact, to affect the verdict and direct a new trial: *R. v. Stolar* (1988), 40 C.C.C. (3d) 1, [1988] 1 S.C.R. 480, 62 C.R. (3d) 313 (5:0).

The phrase “connected with the proceedings” in subsec. (1)(a) is not wide enough to give the court power to compel production of papers in the possession of the Crown relating to a crime with which the accused was not charged: *R. v. Evans* (1988), 45 C.C.C. (3d) 523 (B.C.C.A.).

Statistical and other statements of social and economic facts proffered by the Crown to justify, under s. 1 of the Charter, a violation of the Charter would not seem to be admissible under subsec. (1)(d). However, provided the other party is given notice of the materials and an opportunity to reply, an appeal court should take notice of relevant matters of social and economic facts, whether or not they have been available to the trial judge: *R. v. Bonin* (1989), 47 C.C.C. (3d) 230, 11 M.V.R. (2d) 31 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi, 102 N.R. 400n.

**Amendment of indictment [subsec. (1)(g)]** – There being reversible error in relation to the accused’s conviction for attempted murder, it was open to the Court of Appeal, with the consent of the Crown, to amend the indictment so that it included the offence contrary to s. 245, and then dismiss the accused’s appeal and substitute a conviction for the s. 245 offence pursuant to s. 686(1)(b)(i) and (3). The accused was in no way prejudiced, since he had originally been charged with the s. 245 offence but that charge had in effect been stayed by reason of the rules against multiple convictions: *R. v. Symes* (1989), 49 C.C.C. (3d) 81, 32 O.A.C. 102 (C.A.).

It is an extraordinary step for an appellate court to amend the charge materially and then to enter a conviction on the basis of the charge as amended. In this case, the court of appeal should not have done so, the accused having conducted their case, including the calling of expert evidence, based on the information as it was initially framed: *R. v. Tremblay*, [1993] 2 S.C.R. 932, 84 C.C.C. (3d) 97, 23 C.R. (4th) 98 (3:2).

**Powers of court of appeal generally [subsec. (3)]** – The court has power to make an order restricting the publication of exhibits, which were entered at the accused’s trial, pending disposition of his appeal: *Re Regina and Lortie* (1985), 21 C.C.C. (3d) 436, 46 C.R. (3d) 322 (Que. C.A.).

Curtailment of public accessibility to the courts, including trial exhibits, is justified where there is a need to protect the innocent. There is a distinction between records produced by the court or pleadings and similar documents, and exhibits which are frequently the property of non-parties. While such exhibits remain in its custody, the court has a duty to entertain any request for access. This duty includes the right to inquire into the use that is to be made of the exhibits, and the court is fully entitled to regulate that use by securing appropriate undertakings and assurances if those be advisable to protect competing interests. An accused who has been acquitted on appeal must be considered to be innocent. In this case, the media sought access to the audio and video tapes of a confession which were admitted at trial but later held to be inadmissible on appeal because the accused’s constitutional rights had been violated. A person, charged and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of the Charter, should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence. His privacy interests, in this case, outweighed the interest in unrestricted access: *Vickery v. Nova Scotia Supreme Court (Prothonotary)* (1991), 64 C.C.C. (3d) 65, 124 N.R. 95 (S.C.C.) (6:3).

The combined operation of subsec. (3) and the relevant civil rules gives the court power to make an order providing for the disposition of documents seized during execu-

tion of a search warrant quashed by the Court of Appeal, even after the formal order allowing the appeal has been entered: *Re Dobney Foundry Ltd. et al. and The Queen* (No. 3) (1986), 29 C.C.C. (3d) 285, [1987] 1 W.W.R. 281, 11 C.P.R. (3d) 285 (B.C.C.A.).

The Court of Appeal has ancillary jurisdiction, not necessarily dependent on this subsection, to make an order necessary to prevent frustration of an appeal pending before it. Thus in this case the court ordered that documents, seized during execution of a search warrant and alleged to be privileged, remain sealed until the appeal against the refusal to quash the warrant had been disposed of. However, since there is no specific statutory basis for exercise of this jurisdiction by a single judge the "court", meaning three members of the Court of Appeal, must make the order: *R. v. Church of Scientology; R. v. Zaharia* (1986), 25 C.C.C. (3d) 149, 6 C.P.C. (2d) 113 (Ont. C.A.).

In considering an interim measure such as an impoundment order preventing the authorities from having access to the seized material until the validity of the underlying law is determined in the face of a challenge under the Charter, a court must consider three factors. The first, is whether a serious question of law is raised. The second, is whether irreparable harm will be occasioned to the applicant if the interim order is refused. The third, requires the court to consider and weigh in the balance the inconveniences caused to the parties by the interim order: *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Québec (Procureur Général)*, [1994] 2 S.C.R. 339, 90 C.C.C. (3d) 1, 31 C.R. (4th) 120.

The court of appeal has no power to suspend the operation of the terms of a probation order pending appeal: *R. v. Banks* (1990), 61 C.C.C. (3d) 189 (B.C.C.A.). *Contra: R. v. Keating* (1991), 66 C.C.C. (3d) 530 (N.S.C.A.).

**Stay of order to pay fine or of forfeiture [subsec. (5)]** – The interests of justice do not refer exclusively to the merits of the appeal and include, *inter alia*, the interests of the state, the public's confidence in and respect for the court in its administration of the criminal law: *R. v. Chek TV Ltd.* (1986), 27 C.C.C. (3d) 380 (B.C.C.A.).

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#### LEGAL ASSISTANCE FOR APPELLANT / Counsel fees and disbursements / Taxation of fees and disbursements.

**684. (1)** A court of appeal or a judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

**(2)** Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

**(3)** Where subsection (2) applies and counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the registrar of the court of appeal and the registrar may tax the disputed fees and disbursements. R.S., c. C-34, s. 611; R.S.C. 1985, c. 34 (3rd Supp.), s. 9.

#### CROSS-REFERENCES

Where the accused is a party to an appeal to the Supreme Court of Canada or related proceedings to such an appeal, s. 694.1 applies with similar effect. No such provision exists at the trial level.

Section 672.24 prescribes the assignment of counsel for an accused who is unrepresented and where an issue of fitness is being directed.

An accused will be afforded the protection of s. 10(b) of the Charter and the right to retain and instruct counsel without delay and to be informed of such right, upon arrest or detention.



## SYNOPSIS

This section provides that the court of appeal, or a judge thereof, can appoint counsel for an appellant or respondent who is without means to retain such assistance independently (subsec. (1)). Such an application will generally be made only after Legal Aid has refused to assist in this connection.

In the absence of Legal Aid funding, costs are paid by the Attorney General who is a party to the appeal (subsec. (2)). In the event of a dispute with respect to fees and disbursements the registrar of the Court of Appeal may tax the account submitted by counsel.

## ANNOTATIONS

The Charter of Rights does not guarantee an indigent accused an absolute right to be provided with legal counsel to argue his appeal. Thus, this section which gives the court a discretion whether or not to assign counsel where it appears desirable in the interests of justice is valid. The court may consider the merit of the proposed appeal in considering whether or not an order should be made under this section: *R. v. Robinson* (1989), 51 C.C.C. (3d) 452, 63 D.L.R. (4th) 289, 73 C.R. (3d) 81, 70 Alta. L.R. (2d) 31, 100 A.R. 26 (C.A.).

## SUMMARY DETERMINATION OF FRIVOLOUS APPEALS.

685. Where it appears to the registrar that a notice of appeal, which purports to be on a ground of appeal that involves a question of law alone, does not show a substantial ground of appeal, the registrar may refer the appeal to the court of appeal for summary determination, and, where an appeal is referred under this section, the court of appeal may, if it considers that the appeal is frivolous or vexatious and can be determined without being adjourned for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the respondent on the hearing. R.S., c. C-34, s. 612.

## CROSS-REFERENCES

This section is probably included in the general incorporation of appellate authority under s. 695(1), without express reference to appeals to the Supreme Court of Canada. The provisions are applicable to summary conviction appeals brought under s. 813, pursuant to s. 822(1).

## SYNOPSIS

This section provides for summary dismissal of appeals where the court of appeal, on the application of the registrar, determines that the appeal is frivolous or vexatious, based on the legal grounds advanced in the notice of appeal. This section only applies where the notice of appeal refers to questions of law alone.

## *Powers of the Court of Appeal*

**POWERS / Order to be made / Substituting verdict / Appeal from acquittal / New trial under Part XIX / Where appeal allowed against verdict of unfit to stand trial / Appeal court may set aside verdict of unfit to stand trial / Additional powers.**

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(a) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

- (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
  - (iii) on any ground there was a miscarriage of justice;
  - (b) may dismiss the appeal where
    - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
    - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
    - (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
    - (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;
  - (c) may refuse to allow the appeal where it is of the opinion that the trial court arrived at a wrong conclusion respecting the effect of a special verdict, may order the conclusion to be recorded that appears to the court to be required by the verdict and may pass a sentence that is warranted in law in substitution for the sentence passed by the trial court, or
  - (d) may set aside a conviction and find the appellant unfit to stand trial or not criminally responsible on account of mental disorder and may exercise any of the powers of the trial court conferred by or referred to in section 672.45 in any manner deemed appropriate to the court of appeal in the circumstances.
- (2) Where a court of appeal allows an appeal under paragraph (1)(a), it shall quash the conviction and
- (a) direct a judgment or verdict of acquittal to be entered; or
  - (b) order a new trial.
- (3) Where a court of appeal dismisses an appeal under subparagraph (1)(b)(i), it may substitute the verdict that in its opinion should have been found and
- (a) affirm the sentence passed by the trial court; or
  - (b) impose a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
- (4) Where an appeal is from an acquittal the court of appeal may
- (a) dismiss the appeal; or
  - (b) allow the appeal, set aside the verdict and
    - (i) order a new trial, or
    - (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
- (5) Where an appeal is taken in respect of proceedings under Part XIX and the court of appeal orders a new trial under this Part, the following provisions apply:
- (a) if the accused, in his notice of appeal or notice of application for leave to appeal, requested that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall be held accordingly;
  - (b) if the accused, in his notice of appeal or notice of application for leave to appeal, did not request that the new trial, if ordered, should be held before a court composed of a judge and jury, the new trial shall, without further election

by the accused, be held before a judge or provincial court judge, as the case may be, acting under Part XIX, other than a judge or provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the judge or provincial court judge who tried the accused in the first instance;

- (c) if the court of appeal orders that the new trial shall be held before a court composed of a judge and jury, the new trial shall be commenced by an indictment in writing setting forth the offence in respect of which the new trial was ordered; and
- (d) notwithstanding paragraph (a), if the conviction against which the accused appealed was for an offence mentioned in section 553 and was made by a provincial court judge, the new trial shall be held before a provincial court judge acting under Part XIX, other than the provincial court judge who tried the accused in the first instance, unless the court of appeal directs that the new trial be held before the provincial court judge who tried the accused in the first instance.

(6) Where a court of appeal allows an appeal against a verdict that the accused is unfit to stand trial, it shall, subject to subsection (7), order a new trial.

(7) Where the verdict that the accused is unfit to stand trial was returned after the close of the case for the prosecution, the court of appeal may, notwithstanding that the verdict is proper, if it is of the opinion that the accused should have been acquitted at the close of the case for the prosecution, allow the appeal, set aside the verdict and direct a judgment or verdict of acquittal to be entered.

(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires. R.S., c. C-34, s. 613; 1974-75-76, c. 93, s. 75; R.S.C. 1985, c. 27 (1st Supp.), s. 145; 1991, c. 43, s. 9.

#### CROSS-REFERENCES

Section 687 authorizes the determination of sentence appeals. Orders for compensation or restitution made at trial may be varied or annulled under the courts plenary authority under s. 689(2). The Supreme Court of Canada may, under s. 695(1), make any order that the court of appeal might have made on an appeal under Part XXII. A summary conviction appeal court has similar authority under s. 822(1) relating to s. 813 appeals.

Part XXI provisions are applicable to appeals from the determination of application for extraordinary remedies under Part XXVI, s. 784(2). The provisions of Part XX also apply, under s. 839(2), to appeals to the court of appeal from decisions in summary conviction proceedings under ss. 822 and 834. The court of appeal has been given broad authority under s. 683 for the purposes of Part XXI appeals.

See s. 672.1 for definition of “verdict of not criminally responsible on account of mental disorder” and s. 2 for definitions of “mental disorder” and “unfit to stand trial”.

#### SYNOPSIS

This section sets out the orders which may be made by the court of appeal in disposing of an appeal.

Subsection (1) relates to appeals by an accused from conviction, a finding of unfitness, or a verdict of not guilty on account of insanity. Such appeals may succeed where it is shown that (a) the verdict is not reasonably supported by the evidence, (b) an error of law was made by the trial judge, or (c) there has been a miscarriage of justice (subsec. (1)(a)). An appeal may be dismissed where (a) the accused was properly convicted on part of the indictment (e.g., an included offence), (b) the grounds raised have not been made out, (c) any error of law did not occasion a substantial wrong or miscarriage of jus-



tice (*i.e.*, the verdict would necessarily have been the same), or (d) the error at trial was a procedural irregularity which did not prejudice the accused (subsec. (1)(b)).

The court can dismiss an appeal and sentence the accused where it concludes that the trial court erred by arriving at a wrong conclusion respecting the effect of a special verdict (subsec. (1)(c)).

If the court finds that the appellant was insane at the time of the commission of the offence it may set aside the conviction and remand the appellant into the custody of the lieutenant governor (subsec. (1)(d)). Similarly, the accused may be remanded if the court finds that he was unfit to stand trial (subsec. (1)(e)).

Where a conviction appeal is allowed the court can, depending on the circumstances, enter an acquittal or order a new trial (subsec. (2)). However, where an acquittal is not appropriate the court is under no obligation to order a retrial and can set aside the conviction without making any other order.

Where the court is of the opinion that the appellant was properly convicted on part of the indictment it can either affirm the sentence imposed at trial, impose a new sentence, or remit the matter to the trial judge for a hearing on the matter (subsec. (3)).

On an appeal by the Crown from acquittal the court, if it does not dismiss the appeal can (a) order a new trial, or (b) except where the case was tried by a jury, enter a conviction and either impose sentence or refer that issue to the trial judge. If the trial was with a jury the court is limited to ordering a new trial (subsec. (4)).

Subsection (5) permits an accused appealing a conviction in proceedings before a judge sitting alone (other than for an offence within the absolute jurisdiction of the provincial court: see s. 553) to request that a new trial be with a jury. Normally a retrial in a case heard by a judge alone will be before other than the original judge unless the court of appeal specifically directs otherwise.

Where a verdict of unfit to stand trial or not criminally responsible on account of mental disorder is rendered, the court of appeal will order a new trial. However, if no defence evidence was called and the court is of the opinion that the accused should have been acquitted at the close of the prosecution case, a judgment to that effect will be entered (subsecs. (6), (7)).

Pursuant to subsec. (8) the court of appeal may, in disposing of an appeal, make any ancillary order which it feels justice requires.

## ANNOTATIONS

**Stare decisis** – A provincial appellate Court is not obliged as a matter of either law or practice to follow a decision of another provincial appellate court unless it is persuaded that it should do so on its merits or for other independent reasons. The only required uniformity among provincial appellate courts is that which is the result of the decisions of the Supreme Court of Canada: *Wolf v. The Queen* (1974), 17 C.C.C. (2d) 425, 27 C.R.N.S.150 (S.C.C.) (9:0).

Where the Supreme Court of Canada rules on a point, although it was not absolutely necessary to do so in order to dispose of the appeal, the lower Courts are bound to follow that ruling: *Sellars v. The Queen* (1980), 52 C.C.C. (2d) 345, [1980] 1 S.C.R. 527, 110 D.L.R. (3d) 629 (7:0).

The Court of Appeal is not bound by one of its previous decisions where the liberty of the subject is in issue and the Court is convinced that the prior decision is wrong: *R. v. Santeramo* (1976), 32 C.C.C. (2d) 35, 36 C.R.N.S. 1 (Ont. C.A.).

**Unreasonable or unsafe verdict [subsec. (1)(a)(i)]** – The test to be applied under this paragraph is whether the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. The Court of Appeal's function goes beyond merely finding that there is evidence to support a conviction. While the Court of Appeal must not merely substitute its view for that of the jury, in order to apply the test the court must re-examine and to some extent reweigh and consider the effect of the evidence:

*Yeboes v. The Queen* (1987), 36 C.C.C. (3d) 417, 59 C.R. (3d) 108, [1987] 2 S.C.R. 168 (6:0).

The test to be applied by a court of appeal in considering an allegation that the verdict was unreasonable is whether the trier of fact could reasonably have reached the conclusion that the accused was guilty beyond a reasonable doubt. In making this determination, the court of appeal must re-examine, and to some extent at least, reweigh and consider the effect of the evidence. This rule applies to verdicts based on findings of credibility except that, in applying the test, the court of appeal should show great deference to findings of credibility made at trial. An appellate court does, however, have the power to overturn verdicts based on findings of credibility where, after considering all of the evidence and having due regard to the advantages afforded to the trial judge, it concluded that the verdict is unreasonable: *R. v. W. (R.)* (1992), 74 C.C.C. (3d) 134, 13 C.R. (4th) 257, [1992] 2 S.C.R. 122. Consequently, this provision is applicable where the assessment of credibility made at trial is not supported by the evidence: *R. v. Burke* (unreported, March 21, 1996, S.C.C.) [096/085/066-35 pp.].

There are special difficulties where the basis for the allegation that the verdict is unreasonable is that the testimony is so incredible that a verdict founded upon that testimony must be unreasonable. This basis for review is particularly problematic where the challenge to credibility is based on the witness' alleged lack of truthfulness and sincerity rather than other aspects of credibility such as the witness' ability to perceive the events. In determining credibility in such cases, the jury must not only consider the significance of any alleged inconsistencies or motives for concoction, which may be susceptible of reasoned review by a court of appeal, but also the demeanour of the witness and the common sense of the jury, which cannot be assessed by the court of appeal. The appellate court cannot infer from the mere presence of contradictory details or motives to concoct that the jury's verdict is unreasonable: *R. v. Francois*, [1994] 2 S.C.R. 827, 91 C.C.C. (3d) 289, 31 C.R. (4th) 201.

In considering the reasonableness of the verdict the Court of Appeal may, where applicable, take into account the accused's failure to testify and thus the absence of a denial or explanation: *R. v. B. (J.N.)* (1989), 48 C.C.C. (3d) 71, 68 C.R. (3d) 145 (Man. C.A.).

Failure of the trial judge to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under subsec. (1)(a). A trial judge does not err merely because he does not give reasons for deciding one way or the other on problematic points and the judge is not required to demonstrate knowledge of the law or that he has considered all aspects of the evidence. If the trial judge states his reasons in brief compass, and his conclusions are supported by the evidence, then the verdict should not be overturned merely because the judge failed to discuss collateral aspects of the case: *R. v. Burns*, [1994] 1 S.C.R. 656, 89 C.C.C. (3d) 193, 29 C.R. (4th) 113 *sub nom. R. v. (R.H.)*.

While a trial judge's misapprehension of evidence and failure to appreciate relevant evidence may not be errors of law, they are errors of fact or mixed fact and law and, if they deprive the accused of a fair trial, may result in a miscarriage of justice within the meaning of this subsection. An accused whose conviction rests on findings tainted by error has been denied a fair trial: *R. v. G. (G.)* (1995), 97 C.C.C. (3d) 362, 80 O.A.C. 12 (C.A.); *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193, 38 C.R. (4th) 4, 22 O.R. (3d) 514.

**Inconsistent verdicts [subsec. (1)(a)(i)]** – Where the offences were related and pertained to one incident but their essential elements were not identical, the onus is upon the accused to satisfy the appellate Court that a guilty verdict on one offence cannot stand with his acquittal on the other two counts. Inconsistent verdicts will not *per se* quash a conviction unless the verdicts are violently at odds and the same basic ingredients are common to both charges: *R. v. McLaughlin* (1974), 15 C.C.C. (2d) 562, 25 C.R.N.S.362 (Ont.C.A.).

**Miscarriage of justice [subsec. (1)(a)(iii)]** – While counsel's failure to object to the Judge's charge to the jury does not preclude the allegation of error on appeal it is a circumstance which the appellate Court will consider particularly where the complaint is the trial Judge's failure to place before the jury matters which the party alleges were essential matters to be included in the charge: *R. v. Imrich* (1977), 34 C.C.C. (2d) 143, 75 D.L.R. (3d) 243 (S.C.C.) (8:1).

If the court considered that there was a real possibility that a miscarriage of justice occurred due to the flagrant incompetence of counsel then the Court of Appeal would intervene under this paragraph. It would appear that the test to be applied is whether there was a reasonable probability that but for counsel's unprofessional errors the result of the trial would have been different: *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.).

In *R. v. Silvini* (1991), 68 C.C.C. (3d) 251, 5 O.R. (3d) 545 (C.A.) the court applied this test and ordered a new trial where trial counsel failed to apply for a severance so that he could call the co-accused as a witness to support the defence of the appellant. Counsel was representing both accused at the trial and was in a conflict of interest by reason of this joint representation. He was aware of the crucial need for the co-accused's testimony and, had the application for severance been made, the trial judge probably would have felt obliged to grant the application to avoid a miscarriage of justice.

Where improper contact with the jury during its deliberations, which is discovered after the verdict, is such as to taint the administration of justice, then a miscarriage of justice has occurred and there is no need for the accused to prove any actual prejudice. Confidence in the administration of justice is equally as shaken by the appearance as by the fact of an unfair trial: *R. v. Cameron* (1991), 64 C.C.C. (3d) 96, 2 O.R. (3d) 633, 44 O.A.C. 278 (C.A.).

**Dismissal of appeal where conviction proper in part [subsecs. (1)(b)(i) and (3)]** – Where the Court is of the view that the conviction for the full offence cannot stand but that it should substitute a conviction for an included offence, the proper procedure is to dismiss the appeal and substitute such a verdict: *R. v. Nantais*, [1966] 4 C.C.C. 108, 48 C.R. 186 (Ont. C.A.).

An appellate court dismissing an appeal pursuant to subsec. (1)(b)(i) has the power to amend the conviction to conform with the evidence: *R. v. Lake*, [1969] 2 C.C.C. 224, 1 D.L.R. (3d) 322 (S.C.C.).

Thus the court was entitled to amend an indictment charging possession of *cannabis* marihuana for the purpose of trafficking to conform to the evidence showing the narcotic to be *cannabis* resin, by deleting the word "marihuana", inserting the word "resin" and dismissing the appeal: *R. v. Morozuk* (1985), 24 C.C.C. (3d) 257, [1986] 2 W.W.R. 385, 50 C.R. (3d) 179 (S.C.C.) (7:0).

It was held in *R. v. Kent, Sinclair and Gode* (1986), 27 C.C.C. (3d) 405, 21 C.R.R. 372 (Man. C.A.), that by reason of the combined operation of subsec. (3) and subsec. (1)(b)(i) it is open to the court to substitute a conviction for an included offence, even in the case of misdirection below in respect of the conviction under appeal, where it is of the opinion that no properly instructed jury acting reasonably could have reached a conclusion more favourable to the accused than that he was guilty of the lesser included offence. To the contrary are *R. v. Popoff* (1960), 129 C.C.C. 250, 34 C.R. 230, 33 W.W.R. 400 (B.C.C.A.) and *R. v. Morris* (1975), 29 C.C.C. (2d) 540, 12 N.B.R. (2d) 568 (C.A.), where it was held that subsec. (3) is not available where the appeal is based on grounds of misdirection and it cannot be said that a conviction for the full offence ought not to have been found on the evidence.

And in *R. v. Wigman* (1987), 33 C.C.C. (3d) 97, 56 C.R. (3d) 289, [1987] 1 S.C.R. 246 (6:0), the court substituted a conviction for an included offence where there had been misdirection in relation to the offence of which the accused was convicted. The Crown however was not seeking a new trial if the conviction for the full offence could not be maintained.



If the Court, after substituting the conviction, merely affirms the original sentence then that sentence runs from the date of its imposition by the trial Judge. If, however, the Court imposes a new sentence it may provide that the sentence runs from the date of its imposition by the Court of Appeal or, *semble*, from the date of imposition of the original sentence: *R. v. Boyd* (1979), 47 C.C.C. (2d) 369 (Ont. C.A.).

Where the Court of Appeal exercises its jurisdiction under subsec. (3) and substitutes a conviction for second degree murder it may also set the period of parole non-eligibility, which period may exceed the minimum 10 years: *R. v. Kjeldsen* (1980), 53 C.C.C. (2d) 55, [1980] 3 W.W.R. 411 (Alta. C.A.).

**Application of rule precluding multiple convictions** – Although the trial judge has purported to enter an acquittal on a lesser charge by reason of the doctrine precluding multiple convictions, the Court of Appeal may deal with that charge on the accused's appeal from conviction, even in the absence of a Crown appeal from that acquittal. Where the Court of Appeal allows the accused's appeal from conviction and enters an acquittal, the court may then make an order in respect of the charge upon which the accused was acquitted. However, rather than entering a conviction on that charge, the appropriate order is to remit the matter back to the trial judge to enter a conviction and sentence the accused. This then preserves the accused's right to launch an appeal from that conviction if he so desires: *R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417, 70 C.R. (3d) 315, [1989] 5 W.W.R. 97 (S.C.C.) (5:0).

To a similar effect, see: *R. v. Pringle* (1989), 48 C.C.C. (3d) 449, [1989] 1 S.C.R. 1645, 70 C.R. (3d) 305 (5:0).

**Dismissal of appeal as no substantial wrong or miscarriage of justice [subsec. (1)(b)(iii)]** – The test under this subsection has been expressed as whether the verdict would necessarily have been the same if the error had not occurred or whether there is any possibility that, if the error had not been committed, a judge or properly instructed jury would have acquitted the accused. Under either approach, the task of the appellate court is to determine whether “there is any reasonable possibility that the verdict would have been different had the error at issue not been made”: *R. v. Bevan*, [1993] 2 S.C.R. 599, 82 C.C.C. (3d) 310, 21 C.R. (4th) 277.

There is no appearance of unfairness amounting to a miscarriage of justice so as to preclude resort to subsec. (1)(b)(iii) where, although inadmissible evidence was improperly admitted, the trial judge in his reasons for conviction expressly arrives at his conclusion without reliance on such evidence: *R. v. Leaney* (1989), 50 C.C.C. (3d) 289, [1989] 2 S.C.R. 393, 71 C.R. (3d) 325 (4:1).

When the error of law is the exclusion of exculpatory evidence then the determination of whether the verdict would necessarily have been the same if the error had not been made must be made having regard to the entirety of the evidence, the exculpatory evidence having been included, and in the light of the effect the excluded evidence could, within reason, possibly have had on the evidence that did go to the jury. Any reasonable effect that the excluded evidence could have had on the jury should, in applying this paragraph, enure to the benefit of the accused. *Wildman v. The Queen* (1984), 14 C.C.C. (3d) 321, 12 D.L.R. (4th) 641, [1984] 2 S.C.R. 311 (7:0).

The court of appeal, having found an error of law by the trial judge in the admission of evidence, was obliged to allow the appeal unless, on a consideration of the admissible evidence, the court was able to conclude that a conviction was inevitable. The court of appeal is not to substitute itself for the trial judge and determine the guilt or innocence of the accused. The appropriate inquiry was not whether this particular trial judge would have convicted but whether there was any possibility that a trial judge would have a reasonable doubt on the admissible evidence: *R. v. S. (P.L.)* (1991), 64 C.C.C. (3d) 193, 5 C.R. (4th) 351, 122 N.R. 321 (S.C.C.) (4:3).

This paragraph could not be invoked where the Crown had improperly split its case and was wrongly permitted to lead reply evidence to contradict its own witness. The

effect of the evidence on a juror's mind would likely be serious and the appellate court cannot, with anything approaching reality, retry the case to assess the worth of the residual evidence after the improperly adduced evidence has been extracted from the record. The appellate court does not have the advantage of seeing the witnesses and was not entitled to replace the jury: *John v. The Queen* (1985), 23 C.C.C. (3d) 326, 49 C.R. (3d) 57 (S.C.C.) (7:0).

Notwithstanding the jury was properly charged as to the mental state required for murder, a new trial following conviction for murder was required where there was clearly evidence to support the accused's liability as a party to manslaughter and the basis for manslaughter had not been properly explained to the jury. A person charged with murder has the right to have the issue of manslaughter left to the jury if there is any evidence upon which such a verdict can be found and it cannot be said that no miscarriage of justice results from the failure to do so: *R. v. Jackson*, [1993] 4 S.C.R. 573, 86 C.C.C. (3d) 385, 26 C.R. (4th) 178, affg 68 C.C.C. (3d) 385 (Ont. C.A.).

In considering the application of this subsection, the findings of the jury may be a factor. However, where an included offence has erroneously not been left with the jury, a conviction for the more serious offence cannot generally be relied on since the verdict may have been a reaction against a complete acquittal: *R. v. Haughton*, [1994] 3 S.C.R. 516, 93 C.C.C. (3d) 99, 34 C.R. (4th) 22.

This paragraph can only relieve against issues of law and where the court finds that by reason of an error of mixed fact and law the accused has been unfairly prejudiced then the appeal must be allowed under para. (1)(a)(iii): *Fanjoy v. The Queen* (1985), 21 C.C.C. (3d) 312, 48 C.R. (3d) 113 (S.C.C.) (7:0).

It was held in *R. v. Nygaard and Schimmens* (1989), 51 C.C.C. (3d) 417, [1989] 2 S.C.R. 1074, 72 C.R. (3d) 257 (8:1), that the court, having allowed the appeal of the accused alleged to be the principal on a charge of first degree murder as a result of improper admission of evidence, should also allow the appeal of the co-accused who was alleged to be a party to the offence. This was necessary to avoid the potentially incongruous and unacceptable result that the prime mover in the crime might on the new trial be only convicted of second degree murder whereas the party to the offence would have remained convicted of first degree murder.

**Dismissal of appeal where procedural irregularities [subsec. (1)(b)(iv)]** – Subsection (1)(b)(iv) may be invoked and the appeal dismissed although the accused's right to be present under s. 650 was breached. In this case the trial judge, due to an error, delivered judgment in the absence of the accused. When the accused did attend in court the trial judge, using the transcript of the earlier proceedings, read to the accused the entire proceedings that had taken place in his absence. The right of an accused to be present is a matter of procedure and the accused suffered no prejudice: *R. v. Joinson* (1986), 32 C.C.C. (3d) 542 (B.C.C.A.).

A similar result was reached in *R. v. Cloutier* (1988), 43 C.C.C. (3d) 35, 27 O.A.C. 246 (C.A.). The court there held that subsec. (1)(b)(iv) now required that three different types of errors be distinguished. Errors of substance, where the court has no jurisdiction over the class of offences charged and which are not procedural in nature would not be cured either by this subparagraph or subpara. (1)(b)(iii). Irregularities in procedure of a relatively minor nature which do not result in a loss of jurisdiction may be cured by subpara. (1)(b)(iii). Finally, irregularities in procedure which are so serious in nature that they are deemed to be matters of substance which result in a loss of jurisdiction can be cured by application of this subparagraph. The accused has suffered no prejudice and thus this subparagraph may be applied although the accused was excluded from the court-room if his exclusion did not affect the outcome of the trial adversely to him. This is not to say that the court would exercise its discretion and dismiss the appeal in every case where it is of the opinion that the accused had suffered no prejudice. Such a case might be where the exclusion in violation of s. 650 was intentional after it was brought to the judge's attention that the accused had inadvertently been excluded.

Subsection (1)(b)(iv) could not apply to an error in the jury selection process where the trial judge instead of following the procedure prescribed in the Criminal Code for summoning of *talesmen*, purported to continuously expand the jury panel by adding additional members with the result that those potential jurors who were directed by the Crown to stand by were never called again to be sworn unless challenged: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 112 (Ont. C.A.).

Subsection (1)(b)(iv) could apply and the appeal of an inmate from the refusal to issue a writ of *habeas corpus* dismissed where the Court of Appeal, having held that the superior court judge erred in refusing to issue the writ, went on to consider the merits of the inmate's application, with the participation of the inmate, and held that the application should have been dismissed: *R. v. Olson* (1989), 47 C.C.C. (3d) 491, [1989] 1 S.C.R. 296, 68 O.R. (2d) 256n (5:0).

It was held in *R. v. Tran*, [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34 that, where there has been a violation of s. 14 of the Charter, it was for the court to fashion an appropriate and just remedy tailored to the particular circumstances of the case under s. 24(1) of the Charter. Neither s. 686(1)(b)(iii) nor s. 686(1)(b)(iv) have any application in such circumstances. A breach of the Charter cannot be characterised as minor or harmless or a mere procedural irregularity. As a matter of law, a violation of s. 14 of the Charter precludes application of these curative provisions. As a general rule, however, the appropriate remedy under s. 24(1) of the Charter for breach of s. 14 will be the same as it would be under the common law and under statutory guarantees, namely a rehearing of the issue or proceeding in which the violation occurred. [Also see note of this case under s. 24 of the Charter *infra*.]

**Power to set aside conviction and substitute not criminally responsible verdict [subsec. (1)(d)]** – In *Mailloux v. The Queen* (1988), 45 C.C.C. (3d) 193, 67 C.R. (3d) 75 (S.C.C.) (6:0), the court explained the effect of the combined operation of the predecessor to subsec. (1)(d) and subsec. (1)(a) as follows:

1. When the issue is raised for the first time on appeal, the court will examine the evidence and, if it is satisfied that the appellant was insane at the time of the wrongful act, it will exercise its power under para. (d) to quash the conviction and to substitute the special verdict of not guilty by reason of insanity.
2. If insanity [now mental disorder] has been raised at trial and there has been an error of law in the form of a misdirection on the issue, and
  - (a) if the court is satisfied that a proper direction would have resulted in a verdict of not guilty by reason of insanity, it will substitute that verdict;
  - (b) if the court is not satisfied that, absent the misdirection, the inevitable verdict would have been not guilty by reason of insanity, it will decline to act under para. (d) but will order a new trial.
3. If there has been no misdirection, but the verdict is either unreasonable or cannot be supported by the evidence, the court will set aside the conviction and substitute the special verdict provided for under para. (d).
4. If there has been no error of law and the verdict cannot be said to be unreasonable or unsupported by the evidence, the court will decline to interfere with the verdict. Thus para. (d) does not give the Court of Appeal an unfettered jurisdiction to substitute an insanity verdict without regard to the reasonableness of the jury's verdict.

It was held, considering the predecessor to this section that while the Code conferred no express power to order a new trial where an accused appealed against an insanity verdict, by providing a right of appeal against such verdict [as is also the case in respect of the verdict of not criminally responsible on account of mental disorder] the legislative intent was clear and the court of appeal could set aside the special verdict and order a new trial: *R. v. Simpson* (1977), 35 C.C.C. (2d) 337, 77 D.L.R. (3d) 507, 16 O.R. (2d) 129 (C.A.).

**Power to set aside conviction and substitute finding of unfitness [subsec. (1)(e)]** – In



the absence of misdirection or other fault in the trial of the issue as to fitness to stand trial, the issue is properly one to be decided by the jury and, unless the Court of Appeal is satisfied the jury erred in its finding, the Court cannot substitute its opinion for that of the jury: *R. v. Hubach*, [1966] 4 C.C.C.114, 48 C.R.252 (3:2) (Alta.S.C.App.Div.).

**Order to be made when appeal from conviction allowed [subsec. (2)]** – Where it cannot be said that there was no evidence to go to the jury the proper disposition is to order a new trial: *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.).

Service of a portion of an intermittent gaol term prior to a successful appeal is a factor making it appropriate to order that an acquittal be entered: *R. v. Dillabough* (1975), 28 C.C.C. (2d) 482 (Ont. C.A.). *Contra: R. v. O'Brien* (1987), 41 C.C.C. (3d) 86 (Que. C.A.).

The accused's conviction following a third trial for trafficking in narcotics having been quashed as a result of, *inter alia*, misdirection of the jury and improper admission of evidence, the appropriate order was to enter a verdict of acquittal rather than order a new trial: *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287, 90 N.S.R. (2d) 164 (C.A.).

In the absence of a Crown appeal against the accused's acquittal of the full offence charged, Court of Appeal if it allows the accused's appeal against conviction for the included offence is limited to ordering a new trial on the included offence and cannot order that the new trial be on the full offence: *Guillemette v. The Queen* (1986), 26 C.C.C. (3d) 1, 51 C.R. (3d) 273, 27 D.L.R. (4th) 682 (S.C.C.) (7:0).

Similarly, except in cases where the rule precluding multiple convictions applies [see notes *supra*], in the absence of a Crown appeal from an acquittal, the court of appeal has no jurisdiction to substitute a conviction for the offence of which the accused was acquitted when it allows an appeal from conviction for a related offence. Thus, in this case, the accused were charged with criminal negligence causing bodily harm [the victim being the mother] and criminal negligence causing death [the victim being the unborn child]. They were acquitted on the merits on the former offence and convicted on the latter offence. Since there was no appeal by the Crown from the acquittal, the court of appeal had no jurisdiction to substitute a conviction for that offence when it determined that the appeal on the latter offence must be allowed because the unborn child was not a "person": *R. v. Sullivan* (1991), 63 C.C.C. (3d) 97, 122 N.R. 166 (S.C.C.) (8:1).

**Appeal by Crown from acquittal [subsec. (4)] / Burden on Crown** – It is the duty of the Crown in order to obtain a new trial to satisfy the appellate Court that the verdict would not necessarily have been the same if the trial Judge had properly directed the jury: *Vezeau v. The Queen* (1976), 28 C.C.C. (2d) 81, 8 N.R. 235 (S.C.C.) (9:0).

Before the Court of Appeal may exercise its jurisdiction under subsec. (4)(b)(ii) and enter a conviction rather than order a new trial, it must be shown that all the findings necessary to support a verdict of guilty must have been made either explicitly or implicitly or not be in issue: *R. v. Cassidy* (1989), 50 C.C.C. (3d) 193, 61 D.L.R. (4th) 480, [1989] 2 S.C.R. 345 (7:0).

Once an appellate Court has concluded that the trial Judge erred in law, the Crown appellant, before a new trial will be ordered, must discharge the onus of satisfying the appellate Court that had the trial Judge properly instructed himself, his judgment of acquittal would not necessarily have been the same: *R. v. Anthes Business Forms Ltd.* (1975), 26 C.C.C. (2d) 349, 10 O.R. (2d) 153 (C.A.).

However, the test to be applied is an objective one and not whether the particular trial judge who erroneously granted a directed verdict would have acquitted the accused: *R. v. Melo* (1986), 29 C.C.C. (3d) 173 (Ont. C.A.).

**Procedure** – Prior to the imposition of sentence under this subsection the appeal court must give the accused an opportunity to make his submissions: *Lowry and Lepper v. The Queen* (1972), 6 C.C.C. (2d) 531, 26 D.L.R. (3d) 224 (S.C.C.).

The provision in subsec. (1)(b)(iv) had no application to a Crown appeal against

acquittal where the jury was never properly constituted because of the improper ruling by the trial judge limiting the Crown's right to stand jurors aside under s. 634. The failure to follow the jury selection process was fatal to the trial court's jurisdiction: *R. v. Bain* (1989), 47 C.C.C. (3d) 250, 68 C.R. (3d) 50, 31 O.A.C. 357 (C.A.).

In an unusual case, the court of appeal, on a Crown appeal, concluded that the trial judge erred in entering a stay of proceedings by reason of the delay in instituting the proceedings. Thus, while the proper order was to set aside the stay of proceedings, nevertheless the court entered an acquittal, since, based on the findings of fact by the trial judge, the accused was not guilty of the offences charged. This order was proper, notwithstanding no provision is made for entering an acquittal under subsec. (4): *R. v. Fraillon* (1990), 62 C.C.C. (3d) 474 (Que. C.A.).

**Effect of failure of Crown to object, advance theory or offer further evidence** – It is not open to the Crown to seek a new trial following the accused's acquittal in order to submit to the jury a basis of liability not raised at the original trial: *Wexler v. The King* (1939), 72 C.C.C. 1, [1939] S.C.R. 350 (7:0); *R. v. Merson* (1983), 4 C.C.C. (3d) 251 (B.C.C.A.). Similarly, where the appellate Court finds that there is no evidence to support the conviction on the basis of liability relied upon by the Crown at trial, the Court will enter an acquittal rather than order a new trial which would enable the Crown to place before the jury a new theory of liability not relied upon at trial: *Savard and Lizotte v. The King* (1945), 85 C.C.C. 254, 1 C.R. 105, [1946] S.C.R. 20 (5:0).

On the other hand the failure of Crown counsel to object to misdirection at trial will not necessarily preclude an appeal from an acquittal based on such misdirection as where the trial Judge was led into error by defence counsel's address to the jury and the accused did not testify and called no witnesses: *Cullen v. The King* (1949), 94 C.C.C. 337, 8 C.R. 141, [1949] S.C.R. 658 (4:1).

Where for the very first time, the Crown at a non-capital murder trial, after the charge, raised the issue that the accused could be found guilty as an aider or abettor under s. 21, the trial judge was correct in refusing to so recharge the jury. Furthermore, after acquittal as an alleged principal he would be in double jeopardy if he were to be tried again upon the same indictment as a principal, even though it would be alleged that he was only an aider and abettor and, accordingly, the Crown appeal against acquittal was dismissed: *R. v. Armstrong* (1971), 3 C.C.C. (2d) 424, 14 C.R.N.S. 396 (B.C.C.A.).

Beyond the court's general power to control its process in case of abuse, subsec. (4) confers no discretion on the court of appeal to refuse to order a new trial where a reversible error of law is found in the trial judge's decision. The court's residual discretion to remedy an abuse of the court's process can be exercised only in the clearest of cases where the conduct shocks the conscience of the community and is so detrimental to the proper administration of justice that it warrants judicial intervention. There must be overwhelming evidence that the proceedings under scrutiny are unfair to the point that they are contrary to the interests of justice. It may be, however, that a court of appeal might find an abuse of process in a case where the Crown refuses to continue a trial, despite sufficient evidence to found a verdict, for the sole purpose of obtaining an interlocutory appeal on an adverse ruling: *R. v. Power*, [1994] 1 S.C.R. 601, 89 C.C.C. (3d) 1, 29 C.R. (4th) 1.

**Power of court of appeal** – The power of the Court of Appeal to order a new trial means an order for a full new trial and not merely resumption of the original trial before the trial Judge: *Gunn v. The Queen* (1982), 66 C.C.C. (2d) 294 (S.C.C.) (7:0).

**Procedure on new trial** – It was held, prior to the recent amendment to s. 491 [now s. 561], that where the Court of Appeal orders a new trial under this subsection an accused who has, pursuant to his previous election or re-election, been tried by a magistrate, he has no right to re-elect trial by a Court composed of a Judge and jury on the new trial: *Re R. and Sagliocco* (1979), 45 C.C.C. (2d) 493, 10 C.R. (3d) 62 (B.C.S.C.), affd 51 C.C.C. (2d) 188 (B.C.C.A.).

It has also been held that the fact that the accused in such circumstances could not re-elect trial by jury did not offend. s. 11(f) of the Canadian Charter of Rights and Freedoms: *Re Regina and Switzer* (1985), 22 C.C.C. (3d) 60 (B.C.S.C.); *R. v. Leaney*, [1991] 6 W.W.R. 314, 82 Alta. L.R. (2d) 63 (C.A.).

The power of the Court of Appeal under para. (b) of this subsection is to enter a verdict of guilty and although the order of the court is expressed as a "verdict of conviction", the trial court, to whom the matter of sentence had been remitted, is not precluded from granting a discharge under s. 736: *R. v. Stewart* (No. 2) (1983), 11 C.C.C. (3d) 92, 45 O.R. (2d) 185, 8 D.L.R. (4th) 275 (H.C.J.).

**Request for new trial by jury [subsec. (5)(a)]** – In *R. v. Budic* (No. 2) (1977), 35 C.C.C. (2d) 333 (Alta. S.C. App. Div.) the accused was allowed to amend his notice of appeal to request that the new trial be before a Judge and jury, the original trial having been before a Judge alone.

Where an accused was tried by a judge and jury and the Court of Appeal orders a new trial, he has no right to re-elect trial by a judge alone: *R. v. Frattura* (1987), 40 C.C.C. (3d) 379 (B.C.C.A.).

**Additional order under subsec. (8)** – Where the Crown appealed an acquittal by a provincial court judge of a charge of assault with intent to resist lawful arrest, and it transpired that the accused had never been put to his election and accordingly the trial judge had no jurisdiction over him, it was held (2:1) that that was still a matter for appeal within s. 676, but the proper order would be to dismiss the appeal and pursuant to subsection (8) quash the proceedings below. Schroeder, J.A., was of the view that as the trial proceedings were a nullity no appeal lay and the Crown's appeal should be quashed for want of jurisdiction, and no order should be made with respect to the acquittal, leaving the Crown free to proceed again against the accused, who could not successfully plead *autrefois acquit*: *R. v. Brown* (1970), 2 C.C.C. (2d) 528, [1971] 2 O.R.32 (Ont. C.A.).

An example of an additional just order was in *Reference re Regina v. Gorecki* (No. 2) (1976), 32 C.C.C. (2d) 135, 14 O.R. (2d) 218 (C.A.), where at the conclusion of a reference under s. 690(b) a new trial was ordered limiting the accused to raising the defence of insanity.

Where on an appeal by the accused the Court of Appeal quashes the conviction and orders a new trial, it may also order a new trial on an alternative charge which was dismissed at trial solely because of the application of the doctrine precluding multiple convictions notwithstanding the Crown has not appealed the latter acquittal: *R. v. Letendre* (1979), 46 C.C.C. (2d) 398, 7 C.R. (3d) 320 (B.C.C.A.). Similarly: *R. v. McLeod, Pinnock and Farquharson* (1983), 6 C.C.C. (3d) 29 (Ont. C.A.). Also see *R. v. Terlecki* (1983), 4 C.C.C. (3d) 522, 42 A.R. 87 (C.A.), affd 22 C.C.C. (3d) 224n, 65 A.R. 401 (S.C.C.) (7:0) noted, *supra*, under s. 613.

Where the Court of Appeal allows a new trial because of misdirection by the trial Judge it may order that the new trial be on an included offence or an attempt where it is of the view that in any event the full offence had not been made out: *R. v. Cook* (1979), 47 C.C.C. (2d) 186, 9 C.R. (3d) 85 (Ont. C.A.); *R. v. Ruptash* (1982), 68 C.C.C. (2d) 182, 36 A.R. 346 (C.A.).

## POWERS OF COURT ON APPEAL AGAINST SENTENCE / Effect of judgment.

687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

(a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or

(b) dismiss the appeal.



(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. R.S., c. C-34, s. 614.

#### CROSS-REFERENCES

See s. 673 for the definition of “sentence”. Sections 675(1)(b) and 676(1)(d) confer rights of appeal respecting sentences. Under s. 689(2), the court has jurisdiction to consider appropriate terms of orders of restitution. Section 687(1) permits the court to receive new or “fresh” evidence on an appeal against sentence. This avoids the more onerous standards applicable under s. 683(1)(d).

#### ANNOTATIONS

**Powers of Court of Appeal** – The clause “vary the sentence within the limits prescribed by law” plainly fixes the scope of the power of an appellate Court by reference to the maximum prescribed penalty irrespective of the penalty imposed at trial, and accordingly where the Crown has given reasonable notice in its factum an appellate Court may increase the sentence on the accused’s sentence appeal. Furthermore on any appeal against sentence an appellate Court has jurisdiction to vary either way as it deems proper: *Hill v. The Queen* (No. 2) (1975), 25 C.C.C. (2d) 6, 62 D.L.R. (3d) 193, [1977] 1 S.C.R. 827 (5:4).

Thus the Court may on its own motion upon notice to the accused impose a sentence of life imprisonment where the accused has appealed against a definite sentence: *R. v. Kempton* (1980), 53 C.C.C. (2d) 176, 12 Alta. L.R. (2d) 258 (C.A.).

As part of its jurisdiction over sentence appeals an appellate Court has the power to adjudicate upon a trial Judge’s order either granting or refusing a discharge: *R. v. Christman* (1973), 11 C.C.C. (2d) 245, 22 C.R.N.S. 338 (Alta. S.C. App. Div). *Folld: R. v. Fallofield* (1973), 13 C.C.C. (2d) 450, 22 C.R.N.S. 342 (B.C.C.A.), and *R. v. McInnis* (1973), 13 C.C.C. 471, 23 C.R.N.S. 152 (Ont. C.A.) (5:0).

**Effect of variation of sentence [subsec. (2)]** – Violation of a probation order imposed by an appeal Court in substitution for the trial Court’s penalty is to be dealt with by the trial Court as the substituted sentence is really the sentence of that Court: *Re Keller* (1971), 14 C.R.N.S. 234 (Sask. Q.B.).

Also see *R. v. H.* (1983), 6 C.C.C. (3d) 382, [1983] 5 W.W.R. 94 *sub nom.* A.- G. *Alta. v. H.* (Alta. C.A.), noted, *infra*, under s. 738(3).

**General principles [As to procedure in sentencing, also see notes under s. 717 and for discharges, see s. 736]** – On an appeal from sentence, the Court of Appeal has no power to remit the matter to the trial court, notwithstanding that serious errors in procedure and admission of evidence at the sentence hearing would make this the preferable course to follow. The court’s only power is to consider the fitness of the sentence, taking into account evidence which was properly admissible: *R. v. Pellerier* (1989), 52 C.C.C. (3d) 340 (Que. C.A.).

A variation in the sentence should only be made if the court of appeal is convinced it is not fit in the sense that the sentence is clearly unreasonable. The court of appeal must determine if the sentencing judge applied wrong principles or if the sentence was clearly excessive or inadequate. Unreasonableness in the sentence process involves the sentencing order falling outside the acceptable range of orders: *R. v. Shropshire* (1995), 43 C.R. (4th) 269, 102 C.C.C. (3d) 193, 106 W.A.C. 37 (S.C.C.). Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if it is demonstrably unfit. Furthermore, an appellate court should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is insubstantial and marked from the sentences customarily imposed for similar offenders committing similar crimes: *R. v. M.* (C.A.) (unreported, March 21, 1996, S.C.C.) [096/085/064-82 pp.].

Retribution, which is conceptually distinct from denunciation, is an accepted and

appropriate principle of sentencing. Retribution reflects the moral blameworthiness of an offender whereas denunciation reflects society's condemnation of the offender's conduct. Retribution represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offender's conduct: *R. v. M.(C.A.)*, *supra*.

A useful review of the modern authorities on the principles of sentencing is found in *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472, 29 C.R.N.S. 327 (Alta. S.C. App. Div.) where it was also held that the sentence should be within the range of those contemporaneously imposed for similar offences and that the enormity of the tragic consequences of an offence should not be allowed to unduly distort the consideration of the Court as to the appropriate penalty.

Where guilt depends upon the probable, not the actual result of an act, and it is clear that at the time of the act the probability of the actual results of the act would not have been on the accused's mind, it is an error for the trial Judge on sentence to give undue weight to the actual rather than to the probable results of the act: *R. v. Griffin* (1975), 23 C.C.C. (2d) 11, 7 Nfld. & P.E.I.R. 139 (P.E.I.S.C.).

In *R. v. McGinn* (1989), 49 C.C.C. (3d) 137, 75 Sask. R. 161 (C.A.), Cameron J.A. dealt at length with the principles applicable to sentencing. In particular, he noted two important principles of sentence, deterrence and the need to maintain the integrity of the administration of justice. The latter includes the notions of upholding the public's confidence in the effective enforcement of the criminal law, of imposing proportionate sentences, and of achieving equity in the sense of avoiding disparity.

In our changing society the Courts should continue to review and reappraise the elements of and their emphasis upon sentence, the current view being that the factors are (1) punishment; (2) deterrence; (3) protection of the public; and (4) the reformation and rehabilitation of the offender. Furthermore, with changing conditions less emphasis should be placed upon the trial Judge's advantage in seeing and hearing the accused and an appellate Court should not hesitate to disagree with his reasons and conclusions if it feels that the sentence was not fit: *R. v. Morrisette and two others* (1970), 1 C.C.C. (2d) 307, 12 C.R.N.S. 392 (Sask. C.A.).

It is unrealistic to believe that persons coming from extremely disadvantaged backgrounds can be rehabilitated, once the cycle of crime starts, by successive and increased periods of imprisonment, especially when, upon release, they are returned to the same environment and lifestyle which contributed to their misfortune in the first place. What is required, in such a case, is intensive guidance, encouragement, training and supervision while on probation, preferably on a daily basis by a person in whom the accused has confidence. In the case of a native Canadian, it may be essential that any program include support of his indigenous community: *R. v. M.(R.B.)* (1990), 54 C.C.C. (3d) 132 (B.C.C.A.).

While denunciation is a legitimate principle of sentencing, the application of that principle can only be assessed on the basis of the circumstances of the particular case and of the offender. Thus, the court must consider whether any adverse effects which a denunciatory sentence would have on the rehabilitation of the offender can be justified in the overall interests of the protection and advancement of society. Thus, it would rarely be appropriate that the denunciatory aspect of punishment should be the predominant consideration in a manslaughter case in which there is a lack of deliberation or motivation and where the accused is a disadvantaged person and a first offender: *R. v. Pettigrew* (1990), 56 C.C.C. (3d) 390 (B.C.C.A.).

It is an error in principle to impose a gaol term instead of a fine for an offence because the defendant is a man of means, for to do so is to discriminate against an economic class rather than dispensing equal treatment before the law: *R. v. Johnson* (1971), 5 C.C.C. (2d) 541, 17 C.R.N.S. 329 (N.S.S.C. App. Div.).

It would not be proper to increase the sentence which would otherwise be appropriate because of the voluntary disclosure by the accused of information to a psychiatrist which gave the acts committed a more serious character. The disclosure of this information was necessary if treatment of the accused was to be effective and it should not be used to impose a sentence which would not otherwise be warranted: *R. v. Henderson* (1990), 56 C.C.C. (3d) 413 (B.C.C.A.).

Conduct of the defence at trial, including suspected perjury by the accused in testifying or defence tactics in cross-examination of the complainant, cannot be taken into account as aggravating circumstances in sentencing the accused. The accused's conduct in his defence can only be used to negate any other evidence of remorse which might have mitigated the fit sentence: *R. v. Kozy* (1990), 58 C.C.C. (3d) 500, 74 O.R. (2d) 545, 80 C.R. (3d) 59 (C.A.).

**“Starting point” approach** – As part of its duty to give guidance to the trial courts the Alberta Court of Appeal is committed to the “starting point approach” to sentencing whereby the court states with precision the appropriate sentence for a typical case while acknowledging that each actual case presents differences which might mitigate or aggravate. The advantage of such an approach is that it attempts to prevent unjustified disparity while taking into account the immense variety of circumstances which can be found in different cases involving a conviction for the same offence. The sentencing courts are required to acknowledge the starting point and then to summarize the relevant factors before passing sentence. In the result dangerous rigidity is avoided because there are no arbitrary end points nor is there real disparity because all sentences of the same genre start at the same point and differences are rationally explained: *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79, 48 C.R. (3d) 154, [1986] 1 W.W.R. 291 (Alta. C.A.). In this case, the court was considering the appropriate range of sentence for a “major sexual assault”. The court discussed at length the impact of the various mitigating and aggravating circumstances in such a case.

For sentencing purposes, a major sexual assault of a child by a parent or by a person who because of his relationship with the child is in a position of control and trust with respect to the child, should constitute a separate category. The starting point in those cases where there is a single major sexual assault upon a child should be four years. Sentencing in these cases is based mainly on the principles of general deterrence and denunciation. The fact that there is a very real risk of very real psychological harm to the child is one which can be relied upon, even when there is no expert or non-expert evidence called in the particular case to establish that the child has suffered some specific traumatic effect. Factors such as repetition of the assaults, protracted confinement or kidnapping, gratuitous violence and injuries, threats to kill or hurt the child, extreme youth of the child, parental use of the child for the carnal pleasure of other adults, exposure of the child to pornography, transmission of venereal or other sexually-transmitted disease or pregnancy of the child resulting from the sexual assault will constitute aggravating factors. There may be mitigating factors such as a guilty plea: *R. v. S. (W.B.)*; *R. v. P. (M.)* (1992), 73 C.C.C. (3d) 530, 15 C.R. (4th) 324, 127 A.R. 65 (C.A.).

In *R. v. Glassford* (1988), 42 C.C.C. (3d) 259, 63 C.R. (3d) 209 (Ont. C.A.), the court reiterated its refusal to apply the starting point approach to sentencing. The court nevertheless recognized that recent cases reflected a trend towards longer sentences for serious sexual offences. Crimes of this sort had become all too frequent and the court must be sensitive to public concerns and the importance of public safety. However, the just administration of the criminal law requires that sentences must be imposed on the basis of the principles of law laid down in the cases. This requires consideration of reformation, and specific and general deterrence.

Despite its adherence to the “starting point” approach, the Alberta Court of Appeal refused to lay down a starting point in respect of the offence of criminal negligence causing death arising out of operation of a motor vehicle. The court pointed out that this approach is helpful only when the Court of Appeal can describe, with some particularity,



a typical case and this was almost impossible to do for this crime because no one set of facts is typical. The court did, however, describe at length the relevant aggravating and mitigating factors which the sentencing judge would take into account: *R. v. Konkolus* (1988), 6 M.V.R. (2d) 220, 86 A.R. 144 (C.A.).

As well, the starting point approach was inappropriate for the offence of manslaughter as a result of death caused during commission of an offence where the degree of culpability may vary so widely from case to case or where the factors affecting the sentence are so specific to the case that it has limited value as a vehicle for the guideline judgment that the starting approach will not be adopted: *R. v. Tallman* (1989), 48 C.C.C. (3d) 81, 68 C.R. (3d) 367, 65 Alta. R. (2d) 75 (C.A.).

**Sentencing circle** – While it is open to the trial judge to use a sentencing circle to assist in developing the appropriate sentence, the power and duty to impose a fit sentence remains vested exclusively in the trial judge. Where a sentencing circle recommends a sentence which is not fit, the judge is duty-bound to ignore the recommendation to the extent that it varies from what is a fit sentence. The duty of the court of appeal in reviewing the fitness of a sentence is the same. The very purpose of sentencing circles is to fashion sentences that will differ in some mix or measure from those which the courts have up to now imposed in order to take into account aboriginal culture and traditions, and to permit and take into account direct community participation both in imposition and administration of the sentence. The possibility of rehabilitation is a factor which must be taken into account in any sentence and departure from the normal range of sentences for a given offence may be permitted where there are circumstances out of the ordinary to justify the departure. This leaves substantial room for the use of sentencing circles. However, it would not be appropriate to use a sentencing circle in those cases where it was clear that the circumstances required a penitentiary term. If a sentence exceeds two years imprisonment, the court is without power to impose any condition on the accused after the sentence has been served and there is no means of enforcing any obligations undertaken by an accused as a result of the recommendations of the community through a sentencing circle: *R. v. Morin* (1995), 101 C.C.C. (3d) 124, 42 C.R. (4th) 339, [1995] 9 W.W.R. 696 (Sask. C.A.).

**Offences motivated by racial or religious hatred** – An accused who commits offences of mischief to property which are motivated by racial or religious hatred cannot be sentenced for his beliefs. Those beliefs are, however, relevant in so far as they explain his actions and an offence which is directed against a particular racial or religious group is more heinous, as it attacks the very fabric of society and invites imitation and incites retaliation. Moreover, where the offence involves desecration of a place of worship, it is even more serious, especially where it is done to cause emotional upset and injury to the members of the congregation. Such offences require a more severe penalty than mischief which is done merely to damage property: *R. v. Lelas* (1990), 58 C.C.C. (3d) 568, 74 O.R. (2d) 552 (C.A.).

An assault which is racially motivated renders the offence more heinous and the sentence to be imposed in such a case must be one which expresses the public abhorrence for such conduct and their refusal to countenance it: *R. v. Ingram and Grimsdale* (1977), 35 C.C.C. (2d) 376 (Ont. C.A.). In this case reformatory sentences for an unprovoked racially motivated assault which caused serious injury to the victim were raised to penitentiary terms.

Similarly, *R. v. Simms* (1990), 60 C.C.C. (3d) 499 (Alta. C.A.) where sentences for assault were substantially increased to take into account that the assaults were racially inspired by the accused who were adherents to or sympathizers with neo-Nazi organizations.

**Terrorism** – In cases of acts of politically motivated terrorism, the paramount consideration is general deterrence: *R. v. Arwal* (1990), 57 C.C.C. (3d) 143 (B.C.C.A.); *R. v. Balian* (1988), 29 O.A.C. 387 (C.A.).

**Frequency of offence** – An unusually high frequency of a particular offence in the area is only one factor to be considered in imposing sentence. The paramount question is always: “What should this offender receive for this offence, committed in the circumstances under which it was committed?”: *R. v. Sears* (1978), 39 C.C.C. (2d) 199, 2 C.R. (3d) S-27 (Ont. C.A.).

**Totality and disparity** – Where a sentence is a marked departure from sentences imposed for that offence and cannot be reconciled with sentences imposed for other crimes of a similar violent nature and the record does not disclose justification for such disparity, it will be increased: *R. v. Mikkelsen* (1973), 14 C.C.C. (2d) 255 (Sask. C.A.).

The imposition of an excessively lenient sentence on one co-accused by one trial Court will not bind the other trial Court to make the same error in principle against the second co-accused: *R. v. Hunter* (1970), 16 C.R.N.S. 12 (Ont. C.A.).

The totality principle requires a sentencing judge who has correctly applied the rules relating to concurrent and consecutive sentences and who has arrived at the appropriate sentence for each separate offence to then look back to ensure that the totality of the consecutive sentences is not excessive. Where the total intended sentence is excessive the individual sentences must then be adjusted below the figure which would be appropriate for each offence taken in isolation, so that the total sentence is proper. The principle of disparity requires that the sentence imposed on one accused should not be unduly disparate with that received by his co-accused, except that where the sentence to which it is being compared is considered to be wholly inadequate a sentence will not be reduced by the appellate court: *R. v. Fait* (1982), 68 C.C.C. (2d) 367, 37 A.R. 273 (C.A.).

Generally speaking, the court should try to make a sentence conform with that imposed upon a co-accused for the same offence by some other court not merely to achieve equality of treatment but to avoid bitterness and resentment. Nevertheless, less severe treatment may be warranted for an accused in view of a difference in material circumstances, as where he suffers from a severe personality disorder which was a form of mental illness but which did not afflict the co-accused: *R. v. Chisholm* (1985), 18 C.C.C. (3d) 518 (N.S.S.C. App. Div.), leave to appeal to S.C.C. refused *loc. cit.*

**Imposition of sentence for purposes of treatment** – Even though it was imposed with the best of intentions an extended sentence to provide an opportunity for treatment for drug abuse will not be maintained where there is no connection between the accused’s addiction and the commission of the crime: *R. v. Luther* (1971), 5 C.C.C. (2d) 354, 16 C.R.N.S. 14 (2:1) (Ont. C.A.).

**Effect of accused having left jurisdiction** – The accused’s demonstrated successful rehabilitation as a result of his having “jumped bail” many years before is entitled to little consideration as a mitigating factor. The courts cannot impose a light sentence in such circumstances and thus appear to reward accused for breaching their bail conditions. On the other hand, the courts may properly take into account the accused’s voluntary surrender and guilty plea as a mitigating circumstance: *R. v. Thompson* (1989), 50 C.C.C. (3d) 126, 98 A.R. 348 (C.A.).

**Use of statistics** – Evidence of statistics compiled by a police department based on police investigations during a certain period without regard to population growth and presented to the court by a police employee untrained in statistics is insufficient and inherently unreliable for use at a sentence hearing: *R. v. Petrovic* (1984), 13 C.C.C. (3d) 416, 41 C.R. (3d) 275 (Ont. C.A.). Compare *R. v. Richards* noted, *infra*, under “Effect of addiction”.

**Evidence of other offences** – At his sentence hearing on a charge of robbery the accused was entitled to lead psychiatric evidence to show he was not a danger to the community but it was also open to the Crown to lead evidence in reply as to the circumstances surrounding the accused’s arrest which showed the accused was planning a further robbery,

the money from the first robbery having run out: *Lees v. The Queen* (1979), 46 C.C.C. (2d) 385, [1979] 2 S.C.R. 749, 10 C.R. (3d) 517 (7:0).

The difficult question of when the Crown is entitled to lead evidence of other criminal acts which have not resulted in convictions has been considered in at least five recent cases. In *R. v. Roud and Roud* (1981), 58 C.C.C. (2d) 226, 21 C.R. (3d) 97, leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 37 N.R. 449n (Ont. C.A.), the court held that evidence of other acts of violence directed at the victim and his brother, the accused's children, was properly admitted as showing the accused's character and background, which are proper matters for inquiry on sentencing. However, in *R. v. L. (J.C.)* (1987), 36 C.C.C. (3d) 32, 64 Nfld. & P.E.I.R. 81 (Nfld. C.A.), the court adopted the principle that the trial judge must exclude evidence of untried charges, at least where objection is taken and the accused has not introduced evidence of his good character. See also: *R. v. Demers* (1981), 63 C.C.C. (2d) 351 (Que. C.A.).

**Taking other offences into account** – In passing sentence the trial judge may take into consideration other outstanding charges to which the accused would either plead guilty or be proven guilty, and upon which the Crown makes a commitment not to proceed: *R. v. Garcia and Silva*, [1970] 3 C.C.C. 124, [1970] 1 O.R. 821 (C.A.).

However, the procedure for taking offences into account is not appropriate where the offences are of a different class, for example, rape and robbery, where the public interest may require separate prosecutions: *R. v. Robinson* (1979), 49 C.C.C. (2d) 464 (Ont. C.A.).

**Pre-trial custody** – It is improper to adopt as a rule of thumb that pre-trial custody should equal double sentence time; it is only a circumstance to be taken into account in imposing sentence: *R. v. Regan, Huntley, Hasay And Blenkinsop* (1975), 24 C.C.C. (2d) 225, [1975] 4 W.W.R. 335 (Alta. S.C. App. Div.).

**Position of trust** – Theft by a person such as a bank manager who is in a position of trust requires imposition of a custodial sentence except in exceptional circumstances: *R. v. McEachern* (1978), 42 C.C.C. (2d) 189, 7 C.R. (3d) S-8 (Ont. C.A.).

In *R. v. Spiller*, [1969] 4 C.C.C. 211, 6 C.R.N.S. 360 (B.C.C.A.), the principles to be considered in a white collar, \$492,000 theft from a financial institution were reviewed with the result that the accused woman's three year, first offence theft term was doubled. The Court rejected the following defence contentions: as to her good character, because it enabled her to commit the crime; as to the plea of guilty, she was inescapably caught; as to her co-operation for recovery, it cannot buy a year or two off her sentence; as to her insignificant position, by handling money she was in a position of trust; as to the ineptness of the bank to curtail the thefts, the crime was elaborately executed; and as public opinion being no concern of the Court, deterrence of others is a factor in passing sentence.

In a special situation where the accused upon conviction would lose his business position and benefits of 25 years an absolute discharge will be granted in lieu of a suspended sentence: *R. v. Tanguay* (1975), 24 C.C.C. (2d) 77 (Que. C.A.).

**Domestic assault** – Where there is a serious offence involving violence to the person, then general and individual deterrence must be the paramount consideration in sentencing. This principle is also applicable to domestic violence and while not every incident requires imposition of a custodial term, such a term should be normal where significant bodily harm has been inflicted. Where the offence is even graver, involving persistent or repetitious and escalating violence towards the spouse, a longer term may be justified: *R. v. Inwood* (1989), 48 C.C.C. (3d) 173, 69 C.R. (3d) 181, 32 O.A.C. 287 (C.A.).

In domestic assaults, jail terms will usually be imposed unless the assault is very minor in nature or there are strong extenuating circumstances. Nevertheless, even on a charge of assault causing bodily harm, a discharge may be an appropriate disposition as where the accused was subjected to provocation by the victim, the incident was an isolated one



and there was no significant bodily harm: *R. v. Mullin* (1990), 56 C.C.C. (3d) 476, 93 Nfld & P.E.I.R. 206 (P.E.I.C.A.).

Domestic violence is a profound problem and when cases of beatings of a wife by a husband result in prosecution and conviction, then the courts have an opportunity, by their sentencing policy, to denounce such offences in clear terms and attempt to deter its recurrence on the part of the accused and on the part of other men. The starting point in sentencing in such cases would be to determine what would be a fit sentence if the man had assaulted a woman on the street or in a bar. The court must then examine circumstances which are peculiar because of the relationship. When a man assaults his wife or other female partner, his violence toward her constitutes a breach of a position of trust and is an aggravating factor. The paramount considerations in imposing sentence must be general deterrence and denunciation. The desire of the victim that the accused be returned to her and that she not be further victimized by being deprived of his income should not readily be permitted to prevail over the general sentencing policy that requires imprisonment of a man as not only an instrument of deterrence of other persons, but as a means of breaking the cycle of violence in the accused's home: *R. v. Brown*; *R. v. Highway*; *R. v. Umpherville* (1992), 73 C.C.C. (3d) 242, 125 A.R. 150 (C.A.); *R. v. Bonneteau* (1994), 93 C.C.C. (3d) 385, 77 W.A.C. 138, 24 Alta. L.R. (3d) 153 (C.A.).

**Effect of guilty plea** – A factor in mitigation of sentence is the plea of guilty which saves the community the expense of a trial: *R. v. Johnston and Tremayne*, [1970] 4 C.C.C. 64, [1970] 2 O.R. 780 (C.A.).

**Position taken by counsel at trial** [*Also see notes under s. 676*] – The Crown upon appeal against a sentence as inadequate cannot repudiate its position taken before sentencing at trial: *R. v. Agozzino*, [1970] 1 C.C.C. 380, 6 C.R.N.S. 147 (Ont. C.A.). *Contra*, *R. v. Wood* (1975), 26 C.C.C. (2d) 100, [1976] 2 W.W.R. 135 (Alta. S.C. App. Div.).

However, an undertaking by Crown counsel at trial that he would not recommend an appeal, but that he could not bind the Attorney General, does not in fact prevent the Attorney General from exercising his right to appeal against the sentence imposed by the trial judge, which sentence was below that which Crown counsel sought at trial: *R. v. Dubien* (1982), 67 C.C.C. (2d) 341, 27 C.R. (3d) 378 (Ont. C.A.).

To permit the Crown to repudiate its position at trial is destructive of the orderly administration of justice and the Crown will therefore only be permitted to do so where it can be shown that the public interest in the orderly administration of justice is outweighed by the gravity of the offence and the gross insufficiency of the sentence: *R. v. MacArthur* (1978), 39 C.C.C. (2d) 158, 15 C.R. (3d) S-4 (P.E.I.S.C. App. Div.); *R. v. Smith* (1981), 25 C.R. (3d) 190 (Alta. C.A.).

While generally speaking, the Crown will not be entitled to repudiate a position taken at trial by Crown counsel as to the appropriate sentence, a greater latitude is given the accused in that he is not generally bound to the same extent by the submission of his counsel as to sentence. Where the sentence imposed by the trial judge as a result of a joint submission by Crown and defence counsel, having regard to all the circumstances, is not a fit sentence, the Court of Appeal will reduce it accordingly: *R. v. Wood* (1988), 43 C.C.C. (3d) 570 (Ont. C.A.).

The court will pay a great deal of attention to a joint recommendation and the parties should not lightly be heard to repudiate on appeal the positions that were taken before the sentencing judge. Where, however, the joint recommendation was based, in part, on a psychological report which the "psychologist" was not qualified to make, then the court will not attach much weight either to the report or to the joint submission. In this case, a lengthy sentence for manslaughter was substantially reduced on appeal by the accused where the court was provided with more accurate information in the report of a

qualified psychiatrist as to the accused's background and her state of mind at the time of the offence: *R. v. Valiquette* (1990), 60 C.C.C. (3d) 325, 78 C.R. 368 (Que. C.A.).

**Maximum sentence** – The maximum sentence is reserved for the worst case which generally means the worst offence and offender but bearing in mind that the heinous circumstances of a particular crime may outweigh all other considerations and require that the accused be characterized as one of the worst offenders, or that the criminal record and incorrigibility of the accused are such as to justify the maximum sentence to deter him and protect society although the particular crime is not one of the worst of its kind: *R. v. Ko* (1979), 50 C.C.C. (3d) 430, 11 C.R. (3d) 298 (B.C.C.A.).

The "worst case" means the worst offender and offence and would thus not apply to an accused who has a great potential for rehabilitation: *R. v. Pruner* (1979), 9 C.R. (3d) S-8 (Ont. C.A.).

In determining the fitness of a sentence the maximum sentence provided by Parliament is an important consideration and where the Crown proceeds summarily on a Crown option offence it is the maximum provided for a summary conviction which must be considered: *R. v. Sanatkar* (1981), 64 C.C.C. (2d) 325 (Ont. C.A.).

**Corporations** – In *R. v. McNamara et al.* (No. 2) (1981), 56 C.C.C. (2d) 516 (Ont. C.A.) the Court upheld fines imposed on corporations for conspiracy to defraud government agencies in the rigging of bids on dredging contracts, which ranged from \$50,000 to two million dollars. The Court dealt with the various factors which governed the size of the fines which to be an effective general deterrent would have to be substantial and exemplary. In particular, the Court was of the view that it could properly consider the anticipated profits (rather than the actual profits or profits shown on the accused's books) in determining the size of the fine.

In another case involving sentencing of a corporation, the Court considered that while it was a relevant factor that the corporation was now owned by persons who had had no knowledge of the commission of the offence by former employees, this did not warrant the imposition of merely a nominal penalty. A fine of some magnitude was required as a matter of general deterrence and to make clear to corporations the duty to properly supervise employees: *R. v. Adam Clark Co. Ltd.* (1982), 3 C.C.C. (3d) 323 (Ont. C.A.).

**Youthful offenders** – Particularly, in the case of a youthful first offender the first sentence of imprisonment should focus on the particular offender, including requirements of individual deterrence. Its length ought not to be governed by the factor of general deterrence: *R. v. Vandale and Maciejewski* (1974), 21 C.C.C. (2d) 250 (Ont. C.A.).

In *R. v. Demeter and Whitmore* (1976), 32 C.C.C. (2d) 379, 3 C.R. (3d) S-55 (Ont. C.A.), custodial sentences for robbery were reduced (2:1) to time served and probation; the majority being of the view that for youthful first offenders the paramount consideration must be rehabilitation, while Houlden, J.A., felt that for such a serious crime, unless there were extraordinary circumstances, a substantial reformatory term is required.

The view of the majority was followed by a majority of the Manitoba Court of Appeal in *R. v. McCormick* (1979), 47 C.C.C. (2d) 224, 9 C.R. (3d) 248, in upholding a three-month sentence against a Crown appeal in the case of a 20-year-old first offender of previous good character and member of the United States armed forces who committed an armed robbery while under the influence of drugs and alcohol.

Where, however, violence or a serious crime is involved this principle does not apply and particularly where careful planning is involved a lengthy reformatory sentence may be imposed: *R. v. Gonidis, McCullough and Stevenson* (1980), 57 C.C.C. (2d) 90 (Ont. C.A.); *R. v. Campbell* (1981), 64 C.C.C. (2d) 336, [1982] 1 W.W.R. 739 (B.C.C.A.).

In fact, a penitentiary sentence may be required in the case of young offenders who commit a number of serious offences such as the armed robbery of small convenience stores: *R. v. Johnas et al.*; *R. v. Cardinal* (1982), 2 C.C.C. (3d) 490, 32 C.R. (3d) 1 (Alta. C.A.).

Where a juvenile is tried in an ordinary Court the general principles of sentencing in the adult Court take precedence over the special sentencing provisions of the Juvenile Delinquents Act: *R. v. Chamberlain* (1974), 22 C.C.C. (2d) 361 (Ont. C.A.).

A judge is entitled to take a chance with a convicted person, particularly a youthful one, by exercising leniency in circumstances where leniency might not otherwise appear to be called for, provided there is some factor present in the case that is sufficient to warrant a reasonable belief on the part of the trial judge, going beyond a mere hope, that the leniency proposed to be extended holds some prospect of succeeding where other dispositions available to the trial judge might fail. Such a factor might be the indication of remorse, a glimpsed change in attitude on the part of the accused, or some other sign that the accused may have learned something beneficial from his past and present encounters with the criminal justice system: *R. v. Quesnel and Smith* (1984), 14 C.C.C. (3d) 254 (Ont. C.A.).

**Juvenile antecedents** – Juvenile antecedents should be considered in the preparation of a young offender's pre-sentence report, and in the case of a young offender a custodial sentence should generally be avoided, but if it is necessary it is undesirable that it should be very long: *R. v. Beacon and Modney* (1976), 31 C.C.C. (2d) 56, [1976] W.W.D. 91 (Alta. S.C. App. Div.).

However, the Court is not entitled to consider the juvenile delinquencies as in the case of an adult's criminal record: *Denault v. The Queen* (1981), 20 C.R. (2d) 154 (Ont. C.A.).

**First offender** – In the case of a first offender, whether or not he is a young offender all other methods available to the Court of punishing the accused must be carefully considered before a term of imprisonment is imposed. Moreover, before a prison term is imposed there should be a pre-sentence report or some very clear statement with respect to the accused's background and circumstances: *R. v. Bates* (1977), 32 C.C.C. (2d) 493 (Ont. C.A.).

**Dangerous offender** – In *R. v. Pontello* (1977), 38 C.C.C. (2d) (Ont. C.A.) the Court considered the propriety of a life sentence in a case of rape. The accused was convicted of two counts of rape and psychiatric evidence indicated he was a very dangerous person. The Court held that in a case of rape unaccompanied by acts of unusual violence, brutality or cruelty the evidence of a psychiatrist with respect to the accused's continuing or potential danger to the physical safety of others would not justify a Court in categorizing the offence as one calling for a sentence outside the usual range of sentences for such offences. In this case the nature of the offences indicated a serious personality disorder and required that the expert evidence be taken into consideration and the life sentence was upheld. The Court stated however that a life sentence may not be sought by the Crown so as to avoid the protective provisions of the dangerous offenders legislation, Part XXIV of the Code.

A sentence of life imprisonment for attempted murder was upheld having regard to the uncertainty as to when the accused might be cured or cease to be dangerous, the cruelty and callousness of his act and the severity of his personality disorder which made him a continuing danger to others. Cases in which a sentence of life imprisonment is appropriate are not necessarily confined to cases in which the facts could be described as "stark horror" or to cases which form part of a pattern of violent behaviour: *R. v. Simpson* (No. 3) (1981), 58 C.C.C. (2d) 308, 20 C.R. (3d) 263 (Ont. C.A.).

While the court can, in effect, impose a sentence of preventive detention by sentencing the accused to life imprisonment although the Crown has not proceeded under Part XXIV, it should do so only where it is shown that the accused is dangerous and not merely incorrigible: *R. v. Hastings* (1985), 19 C.C.C. (3d) 86, 44 C.R. (3d) 143 (Alta. C.A.).

**Effect of parole** – In imposing sentence it is the duty of the Court to punish in accordance with the established principles and to disregard any policies of the Parole



Board whose only function is to determine when the punishment may be safely alleviated: *R. v. Holden*, [1963] 2 C.C.C. 394, 39 C.R. 228 (B.C.C.A.).

The Court's function of imposing sentence and the Parole Board's subsequent review of the punishment for parole purposes are intended by Parliament to be complementary one to the other in the field of corrections. The deliberate imposition of a long sentence to support the policies of the Parole Board would amount to an improper abandonment and delegation of the Court's duties to the Board. However, a Court may in determining an appropriate prison term quite properly take into consideration the powers and duties of the Parole Board: *R. v. Wilmott*, [1967] 1 C.C.C. 171, 49 C.R. 22 (Ont. C.A.).

In *R. v. Jackson* (1975), 23 C.C.C. (2d) 147, 11 N.S.R. (2d) 154 (S.C. App. Div.) only MacDonald, J.A., followed *R. v. Evans* (1975), 24 C.C.C. (2d) 300, 11 N.S.R. (2d) 91 (S.C. App. Div.) and held that where a forfeiture of parole has occurred as a result of the offence then the sentence should to some degree reflect that additional punishment.

In *R. v. Keeble* (1977), 37 C.C.C. (2d) 387, 1 C.R. (3d) 521 (P.E.I. S.C. in *banco*) the Court preferred the minority view in *R. v. Evans*, *supra*, and held that the Court should not reduce an otherwise proper sentence to mitigate against the forfeiture of parole. Similarly: *R. v. Labuik* (1984), 42 C.R. (3d) 185, [1984] 6 W.W.R. 102, 29 Man. R. (2d) 256 (C.A.).

**Conduct of and co-operation with authorities** – In *R. v. Burke*, [1968] 2 C.C.C. 124, [1967] 2 O.R. 562, the Court of Appeal in considering a possible inference of unfairness where the police obviously must have originally known of both similar offences and had just prior to the accused's release from prison from serving his sentence on the second offence arrested him for the first offence, accordingly reduced the second sentence to time served until the appeal.

Co-operation with the authorities leading to the conviction of the accused's confederates is a proper consideration to be taken into account in mitigation of sentence: *R. v. Laroche* (1983), 6 C.C.C. (3d) 268 (Que. C.A.).

**Driving offences** – Having regard to the serious problem of drinking and driving, sentences imposed for alcohol-related driving offences must reflect that general deterrence is the predominant concern. Such deterrence is not realized by over-emphasizing that individual deterrence is seldom needed once tragedy has resulted from the driving: *R. v. McVeigh* (1985), 22 C.C.C. (3d) 145 (Ont. C.A.). Similarly: *R. v. Crow* (1985), 33 M.V.R. 157 (Alta. C.A.); *R. v. Fletcher* (1989), 57 Man. R. (2d) 218, 13 M.V.R. (2d) 334 (Man. C.A.).

The new offence of dangerous driving causing death is more akin to the former offence of criminal negligence in the operation of a motor vehicle causing death. Further, the sentence to be imposed should reflect the added gravity of the offence where death or serious injury is caused by a drinking driver: *R. v. Doiron* (1987), 39 C.C.C. (3d) 452, 7 M.V.R. (2d) 78, 67 Nfld. & P.E.I.R. 137 (P.E.I.S.C. App. Div.).

The offences of impaired operation causing injury or death fall outside the traditional criminal offences where the punishment may be significantly tailored to the intent of the accused. An accused, convicted of such an offence, is liable to an increased penalty even if his intent may have been no different than some other impaired driver who, through good fortune, is not involved in an accident. The amount of the punishment will reflect the extent of the consequences. Further, the reasons why the accused drank or that, because of drink, he was unable to comprehend the extent of his impairment or the possible consequences are not mitigating circumstances: *R. v. Horon* (1990), 58 C.C.C. (3d) 418, 107 A.R. 328 (C.A.).

**Drug offences / Principles generally in drug cases** – Except in highly unusual cases a custodial sentence is required for narcotic trafficking even in cases involving *cannabis*. The Courts should not, however, attempt to define what can constitute exceptional or highly unusual circumstances: *R. v. Burchnall*; *R. v. Dumont* (1980), 65 C.C.C. (2d) 490, [1980] 6 W.W.R. 462 (Alta. C.A.).

Although the Crown has proceeded on the trafficking offence rather than the importing offence under the Narcotic Control Act, R.S.C. 1970, c. N-1, the Court may properly take into account the fact that the narcotic was imported by the accused as one of the aggravating circumstances: *R. v. McPartland* (1981), 63 C.C.C. (2d) 88 (Ont. C.A.); *R. v. Ramirez* (1986), 26 C.C.C. (3d) 258 (B.C.C.A.).

In *R. v. Bengert et al.* (No. 4) (1979), 52 C.C.C. (2d) 100, 15 C.R. (3d) 97 (B.C.S.C.) Berger J., prior to imposing sentence for conspiracy to traffic in cocaine, heard evidence concerning the drug and the danger its use presented to society. In holding that the doctrine of precedent does not apply to evidence he rejected the exaggerated views as to the dangers of cocaine reflected in earlier cases which views were founded on expert testimony which no longer squared with present medical opinion. His Lordship thereupon concluded that cocaine was more properly compared to the amphetamines than heroin.

The appeals by the accused and the Crown against the sentences imposed by Berger J. were either dismissed or abandoned: *R. v. Jefferies* (1981), 61 C.C.C. (2d) 58 (B.C.C.A.); *R. v. Ponak* (1981), 61 C.C.C. (2d) 60 (B.C.C.A.).

A conclusion similar to that reached by Berger J. was reached by the trial Judge in *R. v. Libby* (1980), 63 C.C.C. (2d) 69, 23 C.R. (3d) 10 (Que. Ct. Sess. of Peace).

While cocaine is an amphetamine-like drug its use can result in a high degree of psychological dependence and psychological damage. Trafficking in cocaine must be dealt with sternly and even first offenders engaged in single transactions will be imprisoned for periods depending on the amount of the narcotic and money involved. Except where there is no profit motivation even a large fine would not be sufficient: *R. v. Merlin* (1984), 13 C.C.C. (3d) 549, 63 N.S.R. (2d) 78 (S.C. App. Div.).

**Effect of addiction** – In *R. v. Richards* (1979), 49 C.C.C. (2d) 517, 11 C.R. (3d) 193 (Ont. C.A.) the Court considered at length the principles applicable to sentencing a heroin addict on a charge of possession of heroin. In upholding the disposition of the trial Judge against a Crown appeal (suspended sentence and probation with community service order), the Court considered the statistics compiled by the Federal Bureau of Dangerous Drugs showing the dispositions with respect to various drug offences. While such statistics should not be given undue weight it was of significance that in a high percentage of cases of simple possession of heroin a non-custodial sentence was imposed. Since the offence, the accused in this case had been cured of his addiction and thus a jail sentence was not required as a matter of rehabilitation and while the offence was serious it was not of such gravity that a jail term was required as a matter of general deterrence. The Court also approved the use of a community service order, in this case a benefit concert, the accused being a musician, it being appropriate to tailor the order to the work he is fitted to perform, although an additional term requiring that the accused engage in a programme to point out the dangers of drug use would have been desirable.

In sentencing a heroin addict for possession of narcotics, the principle of deterrence should yield to any reasonable chance of rehabilitation which may show itself to the court imposing sentence. The protection which society derives from incarcerating the addict is transitory at best, whereas, if the addict can be rehabilitated, through attendance at a drug rehabilitation facility as part of a probation order, then society will be permanently protected: *R. v. Preston* (1990), 79 C.C.C. (3d) 61, 79 C.R. (3d) 61, 47 B.C.L.R. (2d) 273 (C.A.).

While trafficking in hard drugs such as morphine is normally dealt with severely, where the accused addict has, since the commission of the offence, controlled his habit and the circumstances are such as to found a reasonable belief that he is no longer a danger to society, a lengthy period of incarceration is no longer required, and in some cases a suspended sentence and probation will be appropriate: *R. v. Lebovitch* (1979), 48 C.C.C. (2d) 539, 8 C.R. (3d) S-41 (Que. C.A.).

On the other hand where the accused addict has not demonstrated an ability to succeed in a drug rehabilitation programme, her willingness to again enter such a pro-

gramme is not sufficient to prevent the operation of normal sentencing principles in trafficking cases: *R. v. Sabloff* (1979), 13 C.R. (3d) 326 (Que. S.C.).

The fact that the accused is a reformed addict who was not a large scale dealer is not such an exceptional circumstance that would warrant the Court to impose a non-custodial sentence for heroin trafficking. There must at least be other factors such as evidence that the trafficking was casual and done solely for the purpose of and limited in quantity sufficient only to support the accused's own dependency: *R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 47 N.R. 240.

**Importing** – In *R. v. Saulnier* (1987), 21 B.C.L.R. (2d) 232, [1988] 2 W.W.R. 546 (B.C.C.A.), the court considered the principles applicable to imposition of sentence for persons found guilty of importing narcotics, since the striking down of the 7 year minimum by the Supreme Court in *Smith v. The Queen* (1987), 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, [1987] 1 S.C.R. 1045. The court noted that previous precedents must be carefully considered since it was reasonable to believe that most cases of sentences for 7 to 10 or 12 years were influenced by the minimum. Sentencing was based on the seven-year "floor". Even sentences of 15 or 20 years may have been affected, having been imposed in the climate created by the minimum in which all importing sentences were imposed. Doing away with the minimum permits courts to treat the less serious cases less severely. Distinctions can be made depending on the type of narcotic imported, in view of its nature. As well, a distinction should be drawn between a narcotic such as heroin that can only be obtained outside Canada, and a drug such as marihuana.

To a similar effect is the decision in *R. v. Cirone* (1988), 43 C.C.C. (3d) 228, 87 A.R. 222 (C.A.), where the court pointed out that the striking down of the minimum penalty in no way detracts from the seriousness of the importing offence. In considering an appeal from a sentence imposed prior to the decision in *Smith v. The Queen*, *supra*, the court should consider the type and quantity of the drug involved, the position of the offender in the drug distribution hierarchy, the appellant's post-sentence conduct and the effect that the seven-year minimum may have had on the sentence originally imposed.

**Sentencing after retrial** – The judge sentencing a person after a retrial should be alive to the accused's justified sense of grievance if, without apparent reason, the second judge imposes a much longer sentence than the first. Accordingly, where an accused has been convicted of an offence a second time after retrial, the sentencing judge should first consider the fitness of the original sentence. If the judge does not accept the fitness of the original sentence, either because it was inordinately low or because new facts have emerged, the judge may impose a longer sentence. But, where no new facts have emerged, the judge should avoid imposing a sentence which is so much longer than the first as to cause a reasonable person to think that the accused was penalized for his successful appeal: *R. v. W. (R.S.)* (1992), 74 C.C.C. (3d) 1 (Man. C.A.).

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**RIGHT OF APPELLANT TO ATTEND / Appellant represented by counsel / Argument may be oral or in writing / Sentence in absence of appellant.**

688. (1) Subject to subsection (2), an appellant who is in custody is entitled, if he desires, to be present at the hearing of the appeal.

(2) An appellant who is in custody and who is represented by counsel is not entitled to be present

- (a) at the hearing of the appeal, where the appeal is on a ground involving a question of law alone,
- (b) on an application for leave to appeal, or
- (c) on any proceedings that are preliminary or incidental to an appeal,



unless rules of court provide that he is entitled to be present or the court of appeal or a judge thereof gives him leave to be present.

(3) An appellant may present his case on appeal and his argument in writing instead of orally, and the court of appeal shall consider any case of argument so presented.

(4) A court of appeal may exercise its power to impose sentence notwithstanding that the appellant is not present. R.S., c. C-34, s. 615.

#### CROSS-REFERENCES

See s. 694.2 for a similar provision respecting appeals to the Supreme Court of Canada. These provisions are incorporated by s. 822(1) into summary conviction appeals under s. 812.

#### SYNOPSIS

This section deals with when an appellant, who is in custody, is entitled to be present for the hearing of his or her appeal.

An “in person” appellant has a right to appear at the hearing. However, an appellant who has retained counsel has no right to attend (a) the hearing of an appeal on a question of law alone; (b) an application for leave to appeal, or (c) a proceeding preliminary or incidental to an appeal. This is subject to any rules of court or an order of a judge (subsec. (1), (2)).

Arguments may be presented in written form instead of orally (subsec. (3)).

The appellant need not be present for the court to impose sentence (subsec. (4)).

#### ANNOTATIONS

In *Smith v. The Queen*, [1966] 1 C.C.C. 162, 47 C.R. 1, [1965] S.C.R. 658, it was held that an appeal cannot proceed in the absence of an appellant who has signified his desire to be present at the hearing.

In *R. v. Trecroce* (1980), 55 C.C.C. (2d) 202 (Ont. C.A.) the accused who was present during his appeal pursuant to this section sought to discharge his counsel. The Court being possessed of certain psychiatric evidence raised the question of the accused’s competency to discharge his counsel and appoint other counsel. The Court thereupon directed that the accused be examined by psychiatrists who then gave evidence as to the accused’s fitness to instruct counsel. The Court held that the accused was competent to instruct counsel based on the evidence that he understood the nature of the proceedings and the function of the persons involved and knew the issues and the possible outcomes notwithstanding he might misinterpret some of the evidence and might not only disagree with his counsel but might not act with good judgment.

**Subsec. (4)** – The term “appellant” is to be construed as equivalent to the accused even though he is the respondent on the appeal: *R. v. Krawetz* (1974), 20 C.C.C. (2d) 173, [1975] 2 W.W.R.676 (Man. C.A.).

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#### RESTITUTION OR FORFEITURE OF PROPERTY / Annulling or varying order.

**689. (1)** Where the trial court makes an order for compensation or for the restitution of property under section 725, 726 or 727 or an order of forfeiture of property under subsection 462.37(1), the operation of the order is suspended

(a) until the expiration of the period prescribed by rules of court for the giving of notice of appeal or of notice of application for leave to appeal, unless the accused waives an appeal; and

(b) until the appeal or application for leave to appeal has been determined, where an appeal is taken or application for leave to appeal is made.

**NOTE:** Subsection (1) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to ss. 725, 726 or 727 with ss. 738 or 739.

(2) The court of appeal may by order annul or vary an order made by the trial court with respect to compensation or the restitution of property within the limits prescribed by the provision under which the order was made by the trial court, whether or not the conviction is quashed. R.S., c. C-34, s. 616; R.S.C. 1985, c. 42 (4th Supp.), s. 5.

#### CROSS-REFERENCES

A comprehensive code governing the limitations on the authorization of restitution orders may be found in ss. 725 to 727.9. The definition of "sentence" in s. 673 includes such orders. Those orders are reviewable on an appeal against sentence under ss. 675(1)(b) and 676(1)(d). The incorporation of these provisions by s. 822(1) renders them applicable to summary conviction appeals under s. 812.

If the authority of s. 689 is not limited to proceedings where fitness of sentence is in issue, the Supreme Court of Canada would seem to have equivalent jurisdiction.

#### SYNOPSIS

Subsection (1) provides for the automatic stay of compensation, restitution or forfeiture orders until either the expiration of the appeal period or the resolution of any appeal or application for leave which is taken (subsec. (1)).

The court can annul or vary any compensation or restitution orders even if it does not quash the underlying conviction (subsec. (2)).

#### ANNOTATIONS

Notwithstanding this section, in a proper case, the superior court may grant an interim injunction to a victim to prevent an accused from disposing of assets which were the fruits of crime so that those assets would be available to satisfy a compensation order made under s. 725, should the accused's appeal from conviction be dismissed: *Oerlikon Aerospace Inc. v. Ouellete* (1989), 54 C.C.C. (3d) 403, 74 C.R. (3d) 105, 68 D.L.R. (4th) 489 (Que. C.A.).

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## ***Powers of Minister of Justice***

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### **POWERS OF MINISTER OF JUSTICE.**

690. The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,

- (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
- (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
- (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly. R.S., c. C-34, s. 617.

#### CROSS-REFERENCES

The extension of the royal prerogative of mercy is authorized under ss. 749 to 751. These provisions also authorize the Governor in Council to grant a free or conditional pardon or order relief from any penalty, fine or forfeiture. Pursuant to s. 53(2) of the Supreme Court Act, R.S. 1985, c. S-26, the Governor in Council may direct references to the Supreme Court of Canada.

## SYNOPSIS

This section sets out the powers of the Minister of Justice with respect to applications, for the mercy of the Crown, by persons who have been convicted of an indictable offence or sentenced to preventive detention as dangerous offenders under Part XXIV.

The Minister may: (a) order a new trial or hearing; (b) refer the matter to a court of appeal as if it were an appeal taken in the normal course of the proceedings; or (c) refer the matter to the court of appeal with a request that it give its opinion with respect to specific questions.

## ANNOTATIONS

The rules as to the admissibility of fresh evidence on appeal should be borne in mind on a reference under para. (b). The appellate Court will determine each such situation on its merits and where the circumstances are unusual the appellate Court should not refuse to hear fresh evidence where the interests of justice require that it be heard: *Reference re Regina v. Gorecki (No. 2)* (1976), 32 C.C.C. (2d) 135, 14 O.R. (2d) 218 (C.A.).

In *Reference re: Milgaard (Can.)* (1992), 71 C.C.C. (3d) 260, 90 D.L.R. (4th) 1, [1992] 3 W.W.R. 385 (S.C.C.) the Governor in Council had referred the accused's case to the Supreme Court of Canada to determine whether the continued conviction of the accused for murder constituted a miscarriage of justice. The court considered a number of instances where the continued conviction would constitute a miscarriage of justice and thus require that the Governor in Council be advised to exercise powers under s. 749. As well, if the court was satisfied on a preponderance of evidence that the accused was innocent of the murder, then it would be open to the accused to apply to reopen his application for leave to appeal to the Supreme Court of Canada with a view to determining whether the conviction should be quashed and a verdict of acquittal entered, in which case, the Minister would be advised to take no steps pending final determination of those proceedings. The continued conviction of the accused would also constitute a miscarriage of justice if there were reasonably believable new evidence which was relevant to the issue of the accused's guilt and which, taken together with the evidence adduced at trial, could reasonably be expected to have affected the verdict. In that case, the Minister of Justice would be advised to quash the conviction and direct a new trial under para. (a) of this section. It would then be for the provincial Attorney General to determine whether or not to enter a stay in all the circumstances.

It would seem that in light of the Canadian Charter of Rights and Freedoms the refusal of the Minister to exercise his power under this section is reviewable by the courts: *Wilson v. Minister of Justice* (1985), 20 C.C.C. (3d) 206, 46 C.R. (3d) 91 (Fed. C.A.), leave to appeal to S.C.C. refused 62 N.R. 394n.

Neither a superior court judge nor a commission of inquiry, appointed by the province with the powers of a superior court judge, has the power to compel another judge to testify on how and why he arrived at a particular judicial decision and why a certain judge sat on a particular panel of the court of appeal to hear a reference under para. (b) of this section. It is an essential element of judicial independence that judges be immune from testifying with respect to their grounds for decision and the reasons for composition of a given panel: *MacKeigan v. Hickman* (1989), 50 C.C.C. (3d) 449, 61 D.L.R. (4th) 688, [1989] 2 S.C.R. 796 (5:2).

## Appeals to the Supreme Court of Canada

### APPEAL FROM CONVICTION / Appeal where acquittal set aside.

691. (1) A person who is convicted of an indictable offence and whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents; or



(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

**(2) A person**

(a) who is acquitted of an indictable offence other than by reason of a verdict of not criminally responsible on account of mental disorder and whose acquittal is set aside by the court of appeal, or

(b) who is tried jointly with a person referred to in paragraph (a) and is convicted and whose conviction is sustained by the court of appeal,

may appeal to the Supreme Court of Canada on a question of law. R.S., c. C-34, s. 618; 1974-75-76, c. 105, s. 18; R.S.C. 1985, c. 34 (3rd Supp.), s. 10; 1991, c. 43, s. 9.

**CROSS-REFERENCES**

Similar rights of appeal to the Supreme Court of Canada from a verdict of not criminally responsible on account of mental disorder or a finding of unfit to stand trial are authorized in s. 692. See ss. 693 and 696 for the rights of appeal of the Attorney General. The Supreme Court of Canada has the authority to determine appeals under Part XXI, equivalent to that of provincial courts of appeal whose authority is incorporated by reference under s. 695(1).

See s. 672.1 for definition of "verdict of not criminally responsible on account of mental disorder".

**SYNOPSIS**

This section governs appeals to the Supreme Court of Canada by a person convicted of an indictable offence. Such appeals are restricted to "questions of law".

Where an appeal by the accused has been dismissed by the court of appeal an appeal may be taken "as of right" on any question of law upon which a judge of the court of appeal has dissented. Absent such a dissent, leave to appeal must be obtained from the Supreme Court (subsecs. (1)(a), (b)). (Note: Where an appeal is taken on the basis of a dissent, leave is required to raise other issues.)

An appeal "as of right" lies from a judgment of the court of appeal allowing a Crown appeal from acquittal (subsec. (2)(a)).

Where the court of appeal allows a Crown appeal from acquittal, a co-accused who was convicted at the same trial and whose appeal was dismissed may appeal "as of right" (subsec. (2)(b)).

(Note: Appeals with respect to summary conviction matters and prerogative writs are governed by s. 40 of the Supreme Court Act.)

**ANNOTATIONS**

**Dissent in law [subsec. 1(a)]** – To proceed under this paragraph there must be a strict question of law, not one of mixed fact and law, which is involved in the *ratio decidendi* and upon which there was a disagreement in the provincial appellate Court: *Demenoff v. The Queen*, [1964] 2 C.C.C. 305, 41 C.R. 407 (S.C.C.) (5:0).

In *Mahoney v. The Queen* (1982), 67 C.C.C. (2d) 197, 27 C.R. (3d) 97, [1982] 1 S.C.R. 834, the majority of the Court appears to have adopted the view that the application of s. 686(1)(b)(iii) is a question of law which is reviewable by the Supreme Court of Canada.

As well, the court has now held that the application of former s. 613(1)(a)(i) as to whether the verdict of guilty is unreasonable raises a question of law: *Yeboes v. The Queen* (1987), 36 C.C.C. (3d) 417, 59 C.R. (3d) 108, [1987] 2 S.C.R. 168 (6:0).

In view of s. 27(5) of the Young Offenders Act, no appeal lies as of right under this section in matters governed by the *Young Offenders Act*. Thus, even if there is a dissent in law, leave to appeal must be obtained: *R. v. C.(T.L.)*, [1994] 2 S.C.R. 1012, 92 C.C.C. (3d) 444, 32 C.R. (4th) 243.

**Leave to appeal [subsec. (1)(b)]** – With the literal interpretation of s. 40 of the Supreme

Court Act, R.S.C. 1985, c. S-26, particularly the words “convicting” and “conviction” in subsec. (3) thereof jurisdiction to entertain an appeal against the principle, not the fitness, of a sentence from an appellate Court’s order was confirmed in *Hill v. The Queen* (1975), 23 C.C.C. (2d) 321, 58 D.L.R. (3d) 697 (S.C.C.) (8:0). It should be noted that while six members of the Court agreed with the reasons for judgment of Pigeon, J., Laskin, C.J.C., concurred in the conclusion, not by applying a rule of interpretation, but by proceeding on the basis that he would only exclude from the leave jurisdiction of the Court those appeals which are quite plainly excluded by statute.

Where the court grants leave to appeal without restriction, the appellant was entitled to bring into question the validity of his conviction on a question of law, other than the question of law upon which leave to appeal was sought, which arose as a result of a decision of the Supreme Court intervening between the order granting leave and the hearing of the appeal: *Wigman v. The Queen* (1987), 33 C.C.C. (3d) 97, 56 C.R. (3d) 289, [1987] 1 S.C.R. 246 (6:0).

The granting of leave does not preclude the Court from later deciding that the question does not raise a ground of law: *Demeter v. The Queen* (1977), 34 C.C.C. (2d) 137, 75 D.L.R. (3d) 251 (S.C.C.) (9:0).

By virtue of amendments to the Supreme Court Act, R.S.C. 1985, c. S-26, an application for leave to appeal may be determined on the basis of the written material and without according an oral hearing: *R. v. Chaulk* (1989), 48 C.C.C. (3d) 65, 69 C.R. (3d) 217, [1989] 4 W.W.R. 90 (S.C.C.) (7:0).

An appellant who seeks to raise the invalidity of a law, under which he was convicted on grounds arising out of a subsequent decision of the Supreme Court, must still be in the judicial system in that an appeal has been launched to the court, an application for leave has been made within time or an application for an extension of time is granted, based on the criteria that normally apply in such cases, including demonstration of an intention to appeal within the appeal period and an adequate explanation of the delay: *R. v. Thomas* (1990), 75 C.R. (3d) 352, [1990] 1 S.C.R. 713, 108 N.R. 147 (3:0).

**Acquittal set aside by court of appeal [subsec. (2)(a)]** – Subsec. (2)(a) gives a right of appeal to an accused who is convicted only of an included offence and whose acquittal on the full offence is set aside by the Court of Appeal and a new trial ordered on the full offence. The appeal however is limited to setting aside the acquittal and the accused may not raise additional grounds of appeal concerning the conviction for the included offence: *Guillemette v. The Queen* (1986), 26 C.C.C. (3d) 1, 51 C.R. (3d) 273, 27 D.L.R. (4th) 682 (S.C.C.) (7:0).

An accused may appeal under subsec. (2)(a) where the trial judge “quashed” the charges against him on the basis of a violation of s. 11(b) of the Charter of Rights and Freedoms. The judge should have stayed the proceedings, which order is tantamount to an acquittal: *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260.

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**APPEAL AGAINST AFFIRMATION OF VERDICT OF NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER / Appeal against affirmation of verdict of unfit to stand trial / Grounds of appeal.**

**692. (1) A person who has been found not criminally responsible on account of mental disorder and**

- (a) whose verdict is affirmed on that ground by the court of appeal, or
- (b) against whom a verdict of guilty is entered by the court of appeal under subparagraph 686(4)(b)(ii),

may appeal to the Supreme Court of Canada.

(2) A person who is found unfit to stand trial and against whom that verdict is affirmed by the court of appeal may appeal to the Supreme Court of Canada.

**(3) An appeal under subsection (1) or (2) may be**

- (a) on any question of law on which a judge of the court of appeal dissents, or**
- (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.** R.S., c. C-34, s. 620; R.S.C. 1985, c. 34 (3rd Supp.), s. 11; 1991, c. 43, s. 9.

**CROSS-REFERENCES**

See s. 2 for definition of "unfit to stand trial" and s. 672.1 for definition of "verdict of not criminally responsible".

Section 675(3) governs an accused's right of appeal from a finding of unfitness or a verdict of not guilty by reason of insanity. In these circumstances, leave to appeal is not required respecting such grounds. Such an appeal is not restricted to questions of law alone. Under ss. 676(1)(a) and 67(3), the right of appeal of the prosecutor in respect of similar findings is restricted to questions of law alone. For the authority of the court of appeal to hear such appeals, see s. 686(1) to (4), (6) and (7). See s. 695(1) for the equivalent authority of the Supreme Court of Canada.

**SYNOPSIS**

This section governs appeals to the Supreme Court of Canada by an accused who has been found unfit or not criminally responsible on account of mental disorder. These may be brought, on questions of law: (a) "as of right" on the basis of a dissent in the court of appeal; or (b) with leave of the Supreme Court (subsec. (3)).

An appeal lies where a verdict of not criminally responsible is either: (a) affirmed on appeal (subsec. (1)(a)); or (b) is set aside and a conviction entered by the court of appeal (subsec. (1)(b)). A finding of unfitness which is affirmed on appeal may also be appealed (subsec. (2)).

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**APPEAL BY ATTORNEY GENERAL / Terms.**

**693. (1) Where a judgment of a court of appeal sets aside a conviction pursuant to an appeal taken under section 675 or dismisses an appeal taken pursuant to paragraph 676(1)(a), (b) or (c) or subsection 676(3), the Attorney General may appeal to the Supreme Court of Canada**

- (a) on any question of law on which a judge of the court of appeal dissents; or**
- (b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada.**

**(2) Where leave to appeal is granted under paragraph (1)(b), the Supreme Court of Canada may impose such terms as it sees fit.** R.S., c. C-34, s. 621; R.S.C. 1985, c. 27 (1st Supp.), s. 146, c. 34 (3rd Supp.), s. 12.

**CROSS-REFERENCES**

See s. 2 for definition of "Attorney General". The Attorney General of Canada has equivalent rights of appeal to those of a provincial Attorney General under Part XXII, respecting proceedings instituted at the instance of and conducted by or on behalf of the Government of Canada. Section 695(1) authorizes the Supreme Court of Canada to determine appeals by the Attorney General. Section 695(1) incorporates the dispositive authority of the court of appeal. See the Supreme Court Act and Rules for procedure in appeals to the Supreme Court of Canada.

**SYNOPSIS**

This section governs appeals by the Crown to the Supreme Court of Canada in indictable matters. Such appeals may be brought, on questions of law: (a) "as of right" on the basis of a dissent in the court of appeal; or (b) with leave of the Supreme Court (subsec. (1)).

Where the Crown is granted leave to appeal, the court can impose such conditions as it sees fit (*e.g.*, in a "test" case, the Crown may be ordered to pay the respondent's costs) (subsec. (2)).



(Note: Appeals with respect to summary conviction matters and prerogative writs are governed by s. 40 of the Supreme Court Act.)

## ANNOTATIONS

**Subsec. (1)(b)** – Where the provincial appellate court had to weigh the evidence in coming to its decision, it cannot be said that the decision was a pure question of law: *R. v. Fergusson* (1961), 132 C.C.C. 112, 36 C.R. 271 (5:0) (S.C.C.).

A useful guide to determine a question of law on a factual aspect of an appeal is found in the comment of Laskin, C.J.C., in *R. v. K. C. Irving Ltd. and three other corporations* (1976), 32 C.C.C. (2d) 1, 72 D.L.R. (3d) 82 (9:0) (S.C.C.), that since there was no appeal on questions of fact, then in the absence of any argument on complete absence of evidence or on complete disregard of admissible evidence touching on any of the issues, the Court would accept the facts found by the trial Judge unless altered by the Court of Appeal.

A finding by the Court of Appeal that there was no evidence to go to the jury raises a question of law alone: *R. v. Olan, Hudson and Hartnett* (1978), 41 C.C.C. (2d) 145, 86 D.L.R. (3d) 212, [1978] 2 S.C.R. 1175; *R. v. Cotroni*; *R. v. Papalia* (1979), 45 C.C.C. (2d) 1, 93 D.L.R. (3d) 161, 7 C.R. (3d) 185 (S.C.C.).

Under this section, the Crown right of appeal is limited to a case where the court of appeal “dismisses an appeal”. Thus, where the court of appeal had allowed the Crown appeal on some grounds, but not others, the Crown had no right to cross-appeal with respect to that part of the decision of the court of appeal with respect to those latter grounds although the accused was appealing to the Supreme Court of Canada pursuant to s. 691(2): *R. v. MacKenzie* (1993), 78 C.C.C. (3d) 193, [1993] 1 S.C.R. 212, 18 C.R. (4th) 133.

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## NOTICE OF APPEAL.

**694. No appeal lies to the Supreme Court of Canada unless notice of appeal in writing is served by the appellant on the respondent in accordance with the *Supreme Court Act*. R.S., c. C-34, s. 622; R.S.C. 1985, c. 34 (3rd Supp.), s. 13.**

## CROSS-REFERENCES

Section 678 contains a similar provision respecting appeals to the provincial court of appeal. See the Supreme Court Act and Rules of the Supreme Court of Canada for applicable rules relating to service and filing of the notice of appeal.

## SYNOPSIS

This section states that the appellant on an appeal to the Supreme Court of Canada must give notice to the respondent in accordance with the Supreme Court Act.

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## LEGAL ASSISTANCE FOR ACCUSED / Counsel fees and disbursements / Taxation of fees and disbursements.

**694.1 (1)** The Supreme Court of Canada or a judge thereof may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal to the Court or to proceedings preliminary or incidental to an appeal to the Court where, in the opinion of the Court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance.

**(2)** Where counsel is assigned pursuant to subsection (1) and legal aid is not granted to the accused pursuant to a provincial legal aid program, the fees and disbursements of counsel shall be paid by the Attorney General who is the appellant or respondent, as the case may be, in the appeal.

**(3) Where subsection (2) applies and where counsel and the Attorney General cannot agree on fees or disbursements of counsel, the Attorney General or the counsel may apply to the Registrar of the Supreme Court of Canada, and the Registrar may tax the disputed fees and disbursements. R.S.C. 1985, c. 34 (3rd Supp.), s. 13.**

#### CROSS-REFERENCES

Section 684 contains similar provisions applicable where accused is a party to an appeal to the provincial court of appeal or proceedings related thereto. For a similar provision applicable at trial, see s. 672.24 which prescribes the assignment of counsel where the accused is unrepresented and an issue of fitness is being directed.

#### SYNOPSIS

This section provides that the Supreme Court of Canada, or a judge thereof, can appoint counsel for an appellant or respondent who is without means to independently retain such assistance (subsec. (1)). Such an application will generally be made only after Legal Aid has refused to assist in this regard.

In the absence of legal aid, funding costs are paid by the Attorney General who is a party to the appeal (subsec. (2)). In the event of a dispute with respect to fees and disbursements, the Registrar of the Supreme Court may tax the account submitted by counsel.

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#### **RIGHT OF APPELLANT TO ATTEND / Appellant represented by counsel.**

**694.2 (1) Subject to subsection (2), an appellant who is in custody and who desires to be present at the hearing of the appeal before the Supreme Court of Canada is entitled to be present at it.**

**(2) An appellant who is in custody and who is represented by counsel is not entitled to be present before the Supreme Court of Canada**

**(a) on an application for leave to appeal,**

**(b) on any proceedings that are preliminary or incidental to an appeal, or**

**(c) at the hearing of the appeal,**

**unless rules of court provide that entitlement or the Supreme Court of Canada or a judge thereof gives the appellant leave to be present. R.S.C. 1985, c. 34 (3rd Supp.), s. 13.**

#### CROSS-REFERENCES

For a similar and more extensive provision applicable in appeals to the Supreme Court of Canada, see s. 688.

#### SYNOPSIS

This section deals with when an appellant, who is in custody, is entitled to be present for a hearing before the Supreme Court of Canada.

An "in person" appellant has a right to attend. However, an appellant who has retained counsel has no right to attend: (a) an application for leave to appeal; (b) a proceeding preliminary or incidental to an appeal; or (c) the hearing of an appeal. This is subject to any rules of court or an order of a judge (subsec. (1), (2)).

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#### **ORDER OF SUPREME COURT OF CANADA / When appeal presumed abandoned.**

**695. (1) The Supreme Court of Canada may, on an appeal under this Part, make any order that the court of appeal might have made and may make any rule or order that is necessary to give effect to its judgment.**

**(2) An appeal to the Supreme Court of Canada that is not brought on for hearing by the appellant at the session of that court during which the judgment appealed from is**

pronounced by the court of appeal, or during the next session thereof, shall be deemed to be abandoned, unless otherwise ordered by the Supreme Court of Canada or a judge thereof. R.S., c. C-34, s. 623.

#### CROSS-REFERENCES

See the Supreme Court Act and Rules of Court for procedure on appeal to the Supreme Court of Canada.

See also the references cited under ss. 683, 686 and 689 for the scope of authority conferred by each of these sections.

#### SYNOPSIS

This section provides that the Supreme Court of Canada may make any order that the court of appeal might have made on appeal, and any other necessary order. Appeals not brought on before the end of the sitting of the court subsequent to the sitting during which the court of appeal judgment was pronounced are presumed abandoned, unless ordered otherwise by the court or a judge thereof.

#### ANNOTATIONS

Where the Appeal Court allowed the accused's main ground of appeal and accordingly did not consider his other grounds, the Supreme Court of Canada upon reversing the Appeal Court on that main ground is empowered to deal with and dispose of the other grounds: *R. v. Borg*, [1969] 4 C.C.C. 262, 7 C.R.N.S. 85 (S.C.C.) (9:0).

The respondent can raise any argument which supports the order of the court below, including grounds on which the respondent was successful in the court below, re-arguing grounds which were unsuccessful or not dealt with below, and even making new arguments. The Supreme Court of Canada has a discretion not to hear arguments which lack an appropriate evidentiary basis below, but that decision is not related to the court's jurisdiction: *R. v. Keegstra*, [1995] 2 S.C.R. 381, 98 C.C.C. (3d) 1, 39 C.R. (4th) 205; *R. v. Perka*, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113.

This section gives the Supreme Court the power to make any order that the Court of Appeal might have made under its broad powers under s. 686(8): *R. v. P. (D.W.)* (1989), 49 C.C.C. (3d) 417, 70 C.R. (3d) 315, [1989] 5 W.W.R. 97 (S.C.C.) (5:0).

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## *Appeals by Attorney General of Canada*

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### RIGHT OF ATTORNEY GENERAL OF CANADA TO APPEAL.

**696.** The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part. R.S., c. C-34, s. 624.

#### CROSS-REFERENCES

See s. 2 for definition of "Attorney General". Section 676 describes the right of the Attorney General to appeal in proceedings by indictment.

The Attorney General of Canada has equivalent rights of appeal to those of the provincial Attorney General under Part XXVII, respecting summary conviction proceedings instituted at the instance of and conducted by or on behalf of the Government of Canada.



## Part XXII / PROCURING ATTENDANCE

### Application

#### APPLICATION.

697. Except where section 527 applies, this Part applies where a person is required to attend to give evidence in a proceeding to which this Act applies. R.S., c. C-34, s. 625; R.S.C. 1985, c. 27 (1st Supp.), s. 147.

#### CROSS-REFERENCES

Section 527 concerns procedure to procure the attendance of a prisoner for a preliminary inquiry, for trial or to give evidence in any other proceeding to which the Criminal Code applies.

The content and circumstances of issue of a subpoena or warrant to compel attendance of a witness are governed by ss. 698 to 700.

The execution or service of process on a person and a corporation and the jurisdictional application of a subpoena, as well as the jurisdictional application of a warrant and a summons, are addressed in ss. 701 to 703.2.

Sections 704 to 708 govern procedure and sanctions in respect of defaulting or absconding witnesses.

Procedure in respect of commission evidence is governed by ss. 709 to 714. Section 715 provides for the reading in of testimony given at an investigation, preliminary inquiry or previous trial on the same charge where the witness is unavailable to the present trial. Section 715.1 provides for the admission, in certain circumstances, of videotape evidence.

#### SYNOPSIS

This section clarifies that Part XXII is to apply where a person is required to give evidence, except where s. 527 applies because the person is a prisoner.

### Process

#### SUBPOENA / Warrant in Form 17 / Subpoena issued first.

698. (1) Where a person is likely to give material evidence in a proceeding to which this Act applies, a subpoena may be issued in accordance with this Part requiring that person to attend to give evidence.

(2) Where it is made to appear that a person who is likely to give material evidence

(a) will not attend in response to a subpoena if a subpoena is issued, or

(b) is evading service of a subpoena,

a court, justice or provincial court judge having power to issue a subpoena to require the attendance of that person to give evidence may issue a warrant in Form 17 to cause that person to be arrested and to be brought to give evidence.

(3) Except where paragraph (2)(a) applies, a warrant in Form 17 shall not be issued unless a subpoena has first been issued. R.S., c. C-34, s. 626.

#### CROSS-REFERENCES

"Justice" and "provincial court judge" are defined in s. 2.

See s. 699 for the form of a subpoena and the authority by whom it may be issued, and s. 700 for its content. Under s. 699(6), a subpoena may be in Form 16. It may be in the form of a *subpoena ad testificandum* – a requirement to attend and give evidence, or a *subpoena duces tecum* – a requirement that the witness attend, give evidence and bring anything in his possession or control that relates to the charge or any document or thing specified in the subpoena.

The service of a subpoena and execution of a warrant are governed by ss. 701 to 703.2.

Sections 704 to 708 prescribe procedure and sanctions in respect of defaulting or absconding witnesses.

Under s. 705, a warrant for the arrest of an elusive witness may be issued in Form 17. Under s. 706, where the witness is brought before a court as a consequence of a warrant, the court may detain him in custody or release him on recognizance in Form 32.

## SYNOPSIS

Under Part XXII of the Code a person who is likely to have material evidence to give may be the subject of either a subpoena or an arrest warrant. A warrant may be issued where it appears that the person will not respond to a subpoena or is evading service of a subpoena that has already been issued (subsecs. (2), (3)).

## ANNOTATIONS

In an unusual case counsel for the accused during the adjournment of a trial for an offence under s. 253(b) obtained a subpoena from another judge requiring the breathalyzer technician, who was already a witness at the trial, to attend the trial with the breathalyzer machine. The accused's application to the trial judge to require the technician to produce the machine had been refused. In quashing the subpoena the court held that the provincial court judge has some responsibility and discretion to determine whether the person sought to be subpoenaed is likely to give material evidence. The judge is not required to make such an inquiry but if he issues a subpoena to a person who could not give material evidence or if the subpoena was obtained for an indirect or improper object, then the superior court may quash it. In this case the subpoena was obtained to circumvent the ruling of the trial judge. This was improper and constituted an abuse of process: *Re Regina and McConnell* (1977), 35 C.C.C. (2d) 435, 38 C.R.N.S. 290 *sub nom.* *A.- G. Sask. and Underhill v. Boychk and McConnell* (Sask. C.A.).

A trial judge has jurisdiction to quash a subpoena issued by another judge of the same court where the subpoena should never have been issued or its issue amounted to an abuse of process. A subpoena may issue only where the witness has material evidence in the proceedings and not to authorize a pure fishing expedition: *R. v. Gingras* (1992), 71 C.C.C. (3d) 53, 120 A.R. 300 (C.A.). In this case, it was also held that the subpoena was irregular in that it required the person named in the subpoena not to produce evidence in court, but to produce it to the party seeking the subpoena.

The provincial Superior Court has jurisdiction to quash a subpoena issued out of that Court or any other Court of provincial jurisdiction in the Province where the witness would not be able to give any material evidence: *Re Baldwin and Bauer and The Queen* (1980), 54 C.C.C. (2d) 85 (Ont. H.C.J.).

Notwithstanding that a subpoena is regular on its face the subpoena power can still be abused if some form of abuse were shown or the witness's interests under s. 7 of the Charter infringed, the superior court would have jurisdiction to grant an appropriate remedy. In this case, shortly before a police informer was to testify, protection was withdrawn from his parents, allegedly in breach of an agreement that the witness had with the police. Even if the subpoena were not quashed, the superior court must consider whether to exercise the inherent jurisdiction of the court and grant an appropriate remedy, even though the witness's parents were outside the country: *R. v. A.* (1990), 55 C.C.C. (3d) 562, 108 N.R. 214 (S.C.C.) (7:2).

It is implicit in this section that before issuing the subpoena the justice or other person having power to issue a subpoena should conduct some inquiry to be satisfied that the proposed witness has material evidence to give. The type of inquiry is within the discretion of the justice who may choose not to insist upon evidence on oath but may nevertheless want to conduct an oral examination, if only a cursory one, of some person who has knowledge of the circumstances. The extent of such an examination will depend on the circumstances but, if he takes no steps whatever to satisfy himself that the person is

likely to give material evidence, then the justice is abusing his power and discretion and the decision to issue the subpoena may be set aside on *certiorari*: *Foley v. Gares* (1989), 53 C.C.C. (3d) 82, 74 C.R. (3d) 386 (Sask. C.A.). Folld: *R. v. Singh* (1990), 57 C.C.C. (3d) 444, 108 A.R. 233 (Q.B.).

It was held in *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.) that in Ontario where counsel for an accused seeks to secure the hospital records relating to a person, such as a Crown witness, he must apply to a Court under the applicable provincial legislation. This legislation requires a process issued out of a Court and the application should be on notice to the witness and the Crown. The routine securing and serving of a subpoena on the hospital does not conform to the requirements of the legislation. An appeal by the accused to the S.C.C. was dismissed 47 C.C.C. (2d) 411, [1980] 1 S.C.R. 158, 98 D.L.R. (3d) 385 without reference to this point.

In *R. v. Coon* (1992), 74 C.C.C. (3d) 146 (Ont. Ct. (Gen. Div.)) it was held that an order should be made for the disclosure of the hospital records pursuant to the provincial legislation where disclosure is essential in the interests of justice. In determining what is essential in the interests of justice, the court will attempt to strike a balance between the right of the accused by cross-examination to test the motive, disposition, veracity and reliability of the witness and the witness' right to privacy and confidentiality in respect of medical records. If a sufficient foundation is laid, then the privacy interest must yield to the accused's right to full answer and defence. The right to full answer and defence is not, however, synonymous with a fishing expedition. Some of the factors that may be considered as to whether a substantial foundation has been established are the nature and seriousness of the offence; the importance of the witness to establishing the guilt of the accused; the proximity of the mental disorder to the date of the offence; the existence of evidence to suggest a motive to fabricate; criminal antecedents of the witness; the mode of life or other discreditable conduct which may tend to discredit testimony; and evidence of bizarre or incompetent behaviour. Whether or not the court has the power to edit the records having made the decision to disclose them, the court should be loathe to do so for fear that the clinical picture might be altered especially in circumstances where experts both on behalf of the Crown and the accused are likely to examine the material. The court might contemplate editing where the records contain material which is so manifestly extraneous and so manifestly intrusive of privacy. Even where a disclosure order is made, to preserve the legitimate privacy interests of the complainant, disclosure should be subject to certain conditions concerning access and custody of the records.

The applicant must make it clear to the trial Judge that the proposed witness is likely to give material evidence before he will consider whether or not to issue a bench warrant: *R. v. Kinzie* (1956), 25 C.R.6, [1956] O.W.N.896 (C.A.).

#### HOW SUBPOENA ISSUED / Who may issue / Order of judge / Seal / Signature / Form.

**699. (1)** Where a person is required to attend to give evidence before a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction, a subpoena directed to that person shall be issued out of the court before which the attendance of that person is required.

**(2)** Where a person is required to attend to give evidence before a summary conviction court under Part XXVII or in proceedings over which a justice has jurisdiction, a subpoena directed to that person shall be issued

- (a)** by a justice, where the person whose attendance is required is within the province in which the proceedings were instituted; or
- (b)** by a provincial court judge or out of a superior court of criminal jurisdiction of the province in which the proceedings were instituted, where the person whose attendance is required is not within the province.

**(3)** A subpoena shall not be issued out of a superior court of criminal jurisdiction pur-



suant to paragraph (2)(b), except pursuant to an order of a judge of the court made on application by a party to the proceedings.

(4) A subpoena or warrant that is issued by a court under this Part shall be under the seal of the court and shall be signed by a judge of the court or by the clerk of the court.

(5) A subpoena or warrant that is issued by a justice or provincial court judge under this Part shall be signed by the justice or provincial court judge.

(6) A subpoena issued under this Part may be in Form 16. R.S., c. C-34, s. 627; 1994, c. 44, s. 69.

#### CROSS-REFERENCES

The terms “superior court of criminal jurisdiction”, “court of appeal”, “court of criminal jurisdiction”, “provincial court judge” and “justice” are defined in s. 2.

The definitions of “appeal court” and “summary conviction court” in Part XXVII are restricted to that Part and do not have application to Part XXII.

See s. 701(2) for the requirement that a subpoena issued pursuant to s. 699(2)(b) be personally served on the witness. See s. 698 for corresponding notes on other related provisions.

#### SYNOPSIS

This section deals with the manner in which subpoenas (and warrants under s. 698) are issued.

Except in summary conviction proceedings or proceedings over which a justice of the peace has jurisdiction, a subpoena shall be issued out of the court before which the witness is required to attend (subsec. (1)).

Where the matter is summary conviction or is a proceeding over which a justice of the peace has jurisdiction, subpoenas may only be issued by a justice of the peace if the witness is within the province (subsec. (2)(a)). Out-of-province subpoenas must be sought from a judge and can only be issued by order (subsec. (2)(b), (3)).

#### ANNOTATIONS

It was held in *Re Medicine Hat Greenhouses Ltd. and German et al. and The Queen* (No. 2) (1977), 34 C.C.C. (2d) 339 (Alta. S.C. App. Div.) by two of the Judges that while no appeal is provided from an order under this section by a superior Court Judge, the superior Court has an inherent right to inquire into the regularity of its process and this right can be exercised by the Appeal Division of the Court as well as the Trial Division. However, it would be a remarkable case that warranted intervention by the appeal Court of an order made by a Justice of the Trial Division.

It is implicit in this section that before issuing the subpoena the justice or other person having power to issue a subpoena should conduct some inquiry to be satisfied that the proposed witness has material evidence to give. The type of inquiry is within the discretion of the justice who may choose not to insist upon evidence on oath but may nevertheless want to conduct an oral examination, if only a cursory one, of some person who has knowledge of the circumstances. The extent of such an examination will depend on the circumstances, but if he takes no steps whatever to satisfy himself that the person is likely to give material evidence, then the justice is abusing his power and discretion and the decision to issue the subpoena may be set aside on *certiorari*: *Foley v. Gares* (1989), 53 C.C.C. (3d) 82 (Sask. C.A.).

#### CONTENTS OF SUBPOENA / Witness to appear and remain.

700. (1) A subpoena shall require the person to whom it is directed to attend, at a time and place to be stated in the subpoena, to give evidence and, if required, to

bring with him anything that he has in his possession or under his control relating to the subject-matter of the proceedings.

(2) A person who is served with a subpoena issued under this Part shall attend and shall remain in attendance throughout the proceedings unless he is excused by the presiding judge, justice or provincial court judge. R.S., c. C-34, s. 628; R.S.C. 1985, c. 27 (1st Supp.), s. 148.

#### CROSS-REFERENCES

Form 16 is used for both types of subpoenas described in this section: the *subpoena ad testificandum*, which compels attendance to give evidence; and the *subpoena duces tecum*, which compels attendance as well as requires the witness to bring documents or other material relevant to the subject-matter of the proceedings.

See s. 698 for corresponding notes on other related provisions.

#### SYNOPSIS

A subpoena requires that a witness attend court as directed. It may also direct the witness to bring documents or other material relating to the proceedings (subsec. (1)).

A person served with a subpoena shall remain in attendance throughout the proceedings unless excused by the presiding judge or justice (subsec. (2)).

#### ANNOTATIONS

Where the trial Judge concludes that the witness is not compellable he has the power under this section to excuse him. At least since the proclamation of the Charter of Rights and Freedoms, a trial Judge in a proper case is not precluded from permitting counsel to be heard on behalf of the witness: *Re Chase and The Queen* (1982), 1 C.C.C. (3d) 188, 142 D.L.R. (3d) 507 (B.C.S.C.).

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## ***Execution or Service of Process***

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### **SERVICE / Personal service / Proof of service.**

701. (1) Subject to subsection (2), a subpoena shall be served in a province by a peace officer or any other person who is qualified in that province to serve civil process, in accordance with subsection 509(2), with such modifications as the circumstances require.

(2) A subpoena that is issued pursuant to paragraph 699(2)(b) shall be served personally on the person to whom it is directed.

(3) Service of a subpoena may be proved by the affidavit of the person who effected service. R.S., c. C-34, s. 629; 1972, c. 13, s. 56; 1994, c. 44, s. 70.

#### CROSS-REFERENCES

See s. 2 for the definition of "peace officer".

See s. 698 for corresponding notes on other related sections.

#### SYNOPSIS

This section specifies how a subpoena is to be served.

A subpoena issued by a Supreme, County or District Court judge for service out of province (see s. 699(2)(b)) must be personally served on the person to whom it is directed (subsec. (2)). In all other cases a subpoena may be served personally or, if the person to whom it is directed cannot conveniently be found, left at his or her last known or usual place of residence with someone who appears to be at least 16 years old (see s. 509(2)) (subsec. (1)).

Proof of service may be made by affidavit (subsec. (3)).

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**SUBPOENA EFFECTIVE THROUGHOUT CANADA / Subpoena effective throughout province.**

**702. (1) A subpoena that is issued by a provincial court judge or out of a superior court of criminal jurisdiction, a court of appeal, an appeal court or a court of criminal jurisdiction has effect anywhere in Canada according to its terms.**

**(2) A subpoena that is issued by a justice has effect anywhere in the province in which it is issued. R.S., c. C-34, s. 630; 1994, c. 44, s. 71.**

**CROSS-REFERENCES**

The terms “superior court of criminal jurisdiction”, “court of appeal”, “court of criminal jurisdiction” and “provincial court judge” are defined in s. 2. The definitions of “appeal court” and “summary conviction court” in Part XXVII are restricted to that part and do not have application to Part XXII.

Under s. 701(2), a subpoena issued under s. 699(2)(b) must be personally served on the witness. The territorial jurisdiction of a warrant or summons is described in ss. 703 and 703.1.

See s. 698 for corresponding notes on other related provisions.

**SYNOPSIS**

This section states that a subpoena issued by a justice or a provincial court judge has effect in the province in which it is issued, but any other subpoena has effect throughout Canada.

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**WARRANT EFFECTIVE THROUGHOUT CANADA / Warrant effective in a province.**

**703. (1) Notwithstanding any other provision of this Act, a warrant of arrest or committal that is issued out of a superior court of criminal jurisdiction, a court of appeal, an appeal court within the meaning of section 812 or a court of criminal jurisdiction other than a provincial court judge acting under Part XIX may be executed anywhere in Canada.**

**(2) Notwithstanding any other provision of this Act but subject to subsection 705(3), a warrant of arrest or committal that is issued by a justice or provincial court judge may be executed anywhere in the province in which it is issued. R.S., c. C-34, s. 631; R.S.C. 1985, c. 27 (1st Supp.), s. 149.**

**CROSS-REFERENCES**

Forms 17 to 20 are used for warrants of arrest or committal in respect of witnesses.

The terms “superior court of criminal jurisdiction”, “court of criminal jurisdiction”, “provincial court judge”, “court of appeal” and “justice” are defined in s. 2. The definition of “appeal court” is in s. 812. Warrants issued to compel attendance of a defaulting or absconding witness are described in ss. 704 and 705.

See ss. 706 to 708 for the procedure to be followed on default.

See s. 514 for the execution of a warrant issued under s. 703(2).

**SYNOPSIS**

This section provides that a warrant for arrest or committal issued by a justice or provincial court judge has effect in the province in which it was issued, or throughout Canada if it was issued for a defaulting or absconding witness under s. 705(3). Other warrants for arrest or committal have effect throughout Canada under any circumstances.

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**SUMMONS EFFECTIVE THROUGHOUT CANADA.**

**703.1 A summons may be served anywhere in Canada and, if served, is effective**



**notwithstanding the territorial jurisdiction of the authority that issued the summons. R.S.C. 1985, c. 27 (1st Supp.), s. 149.**

#### **CROSS-REFERENCES**

The content and service of a summons are described in s. 509. The potential consequences of failure to appear in response to a summons are described in ss. 510 and 145(4).

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#### **SERVICE OF PROCESS ON A CORPORATION.**

**703.2 Where any summons, notice or other process is required to be or may be served on a corporation, and no other method of service is provided, such service may be effected by delivery**

- (a) in the case of a municipal corporation, to the mayor, warden, reeve or other chief officer of the corporation, or to the secretary, treasurer or clerk of the corporation; and**
- (b) in the case of any other corporation, to the manager, secretary or other executive officer of the corporation or of a branch thereof. R.S.C. 1985, c. 27 (1st Supp.), s. 149.**

#### **CROSS-REFERENCES**

See ss. 620, 622 and 623 for the trial of a corporation for an indictable offence. Section 800 governs the appearance of a corporation in respect of summary conviction proceedings. See s. 621 for provision for notice of an indictment to be served on a corporation; the section makes no provision for the method of service.

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### ***Defaulting or Absconding Witness***

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#### **WARRANT FOR ABSCONDING WITNESS / Endorsement of warrant / Copy of information.**

**704. (1) Where a person is bound by recognizance to give evidence in any proceedings, a justice who is satisfied on information being made before him in writing and under oath that the person is about to abscond or has absconded may issue his warrant in Form 18 directing a peace officer to arrest that person and to bring him before the court, judge, justice or provincial court judge before whom he is bound to appear.**

**(2) Section 528 applies, with such modifications as the circumstances require, to a warrant issued under this section.**

**(3) A person who is arrested under this section is entitled, upon request, to receive a copy of the information on which the warrant for his arrest was issued. R.S., c. C-34, s. 632.**

#### **CROSS-REFERENCES**

See s. 2 for definitions of “justice”, “peace officer” and “provincial court judge”.

The territorial jurisdiction of a warrant for arrest is defined in s. 703.

While s. 704 applies to a witness who is bound by recognizance to give evidence and who has absconded or is about to abscond, s. 705 applies to a witness who has been served with a subpoena or bound by a recognizance and fails to attend the hearing. A witness may be either required to enter into a recognizance or, under s. 706, be released on a recognizance following arrest. A warrant issued in respect of an absconding witness is in Form 18. See s. 706 for the procedure to be followed in the case of a witness arrested by warrant and brought before court. Section 707 governs his detention thereafter.

**SYNOPSIS**

This section authorizes a justice of the peace to issue a warrant for the arrest of a person bound by a recognizance to give evidence where he or she is satisfied, by information on oath, that the witness has absconded or is about to abscond (subsec. (1)). Anyone arrested on such a warrant is entitled to receive a copy of the information (subsec. (3)).

A warrant may be endorsed (pursuant to s. 528) with respect to the terms of release (subsec. (2)).

**WARRANT WHEN WITNESS DOES NOT ATTEND / Warrant where witness bound by recognizance / Warrant effective throughout Canada.**

**705. (1) Where a person who has been served with a subpoena to give evidence in a proceeding does not attend or remain in attendance, the court, judge, justice or provincial court judge before whom that person was required to attend may, if it is established**

**(a) that the subpoena has been served in accordance with this Part, and**

**(b) that the person is likely to give material evidence,**  
issue or cause to be issued a warrant in Form 17 for the arrest of that person.

**(2) Where a person who has been bound by a recognizance to attend to give evidence in any proceeding does not attend or does not remain in attendance, the court, judge, justice or provincial court judge before whom that person was bound to attend may issue or cause to be issued a warrant in Form 17 for the arrest of that person.**

**(3) A warrant that is issued by a justice or provincial court judge pursuant to subsection (1) or (2) may be executed anywhere in Canada. R.S., c. C-34, s. 633.**

**CROSS-REFERENCES**

See s. 2 for definitions of “justice” and “provincial court judge”.

See s. 704 for the issuance of a warrant for the arrest of an absconding witness.

See ss. 701(1) and 509(2) for service of a subpoena. A subpoena issued under s. 699(2)(b) must be served personally on the person to whom it is directed. A warrant issued pursuant to this section is in Form 17.

See s. 703(2) for the general rule that a warrant of arrest issued by a justice or provincial court judge may be executed only in the province in which it is issued; s. 705(3) is the only exception to this rule.

See s. 706 for the procedure to be followed in the case of a witness arrested by warrant and brought before court. Section 707 governs his detention thereafter. By s. 708, failure to attend or remain in attendance to give evidence when required by law to do so is punishable as contempt.

**SYNOPSIS**

This section provides for the issuance of an arrest warrant for a witness who does not attend after having either been served with a subpoena or released on a recognizance on the condition that he or she appear to give evidence. Such warrants are issued by the court, judge or justice of the peace before whom the witness was to have appeared and are valid throughout Canada.

**ANNOTATIONS**

A provincial court judge has the power to issue a warrant under this section requiring that the witness be brought before him and to reserve for himself the exclusive jurisdiction to deal with the witness: *Pigeau v. Crowell* (1990), 57 C.C.C. (3d) 45, 96 N.S.R. (2d) 412 (C.A.).

**ORDER WHERE WITNESS ARRESTED UNDER WARRANT.**

**706. Where a person is brought before a court, judge, justice or provincial court**

judge under a warrant issued pursuant to subsection 698(2) or section 704 or 705, the court, judge, justice or provincial court judge may order that the person

(a) be detained in custody, or

(b) be released on recognizance in Form 32, with or without sureties, to appear and give evidence when required. R.S., c. C-34, s. 634.

#### CROSS-REFERENCES

See s. 2 for definitions of "justice" and "provincial court judge".

A warrant of arrest of a witness may be issued in the circumstances of ss. 698(2), 704 and 705.

Release on recognizance under this section is in Form 32.

The maximum period for which a witness may be detained as a witness is prescribed by s. 707. By s. 708, failure to attend or remain in attendance in accordance with a recognizance may attract liability for contempt. See s. 145(2) for the consequences of breach of recognizance. Execution of a warrant under s. 514 is conducted within the territorial jurisdictions permitted by ss. 703 and 705(3).

#### SYNOPSIS

This section provides that when a witness is brought before any court under a warrant pursuant to s. 698(2) (witness not likely to appear), s. 704 (witness absconding) or s. 705 (witness failing to appear), that court may order the witness detained or released on recognizance.

#### ANNOTATIONS

A provincial court judge has the power to issue a warrant under s. 705 requiring that the witness be brought before him and to reserve for himself the exclusive jurisdiction to deal with the witness. Where the warrant is issued in that form then a justice of the peace before whom the witness is originally brought has no jurisdiction under this section to deal with her: *Pigeau v. Crowell* (1990), 57 C.C.C. (3d) 45, 96 N.S.R. (2d) 412 (C.A.).

#### MAXIMUM PERIOD FOR DETENTION OF WITNESS / Application by witness to judge / Review of detention.

**707. (1)** No person shall be detained in custody under the authority of any provision of this Act, for the purpose only of appearing and giving evidence when required as a witness, for any period exceeding thirty days unless prior to the expiration of those thirty days he has been brought before a judge of a superior court of criminal jurisdiction in the province in which he is being detained.

**(2)** Where at any time prior to the expiration of the thirty days referred to in subsection (1), a witness being detained in custody as described in that subsection applies to be brought before a judge of a court described therein, the judge before whom the application is brought shall fix a time prior to the expiration of those thirty days for the hearing of the application and shall cause notice of the time so fixed to be given to the witness, the person having custody of the witness and such other persons as the judge may specify, and at the time so fixed for the hearing of the application the person having custody of the witness shall cause the witness to be brought before a judge of the court for that purpose.

**(3)** If the judge before whom a witness is brought under this section is not satisfied that the continued detention of the witness is justified, he shall order him to be discharged, or to be released on recognizance in Form 32, with or without sureties, to appear and to give evidence when required, but if the judge is satisfied that the continued detention of the witness is justified, he may order his continued detention until the witness does what is required of him pursuant to section 550 or the trial is concluded, or until the witness appears and gives evidence when required, as the case may be, except that the total period of detention of the witness from the time he



**was first detained in custody shall not in any case exceed ninety days. R.S., c. C-34, s. 635.**

#### CROSS-REFERENCES

Authorization to detain a witness arrested by warrant issued pursuant to ss. 698(2), 704 or 705 is found in s. 706.

Liability for contempt under s. 708 or for having breached a recognizance under s. 145(2) could result if a witness without lawful excuse fails to attend or remain to give evidence.

Release on recognizance under this section is in Form 32. See s. 550 for an order of continued detention.

#### SYNOPSIS

This section sets out the procedures to be followed in dealing with a witness who has been ordered detained.

A person imprisoned as a material witness may not be held for more than 30 days unless brought before a judge of a superior court (subsec. (1)). Such a person may, in any event, apply within the 30-day period to be taken before a superior court judge for a hearing (subsec. (2)).

The judge may release the witness, with or without a recognizance, or order that he or she remain in custody until the evidence has been given or the trial concluded. A witness may not be held for more than 90 days (subsec. (3)).

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#### CONTEMPT / Punishment / Form.

**708. (1) A person who, being required by law to attend or remain in attendance for the purpose of giving evidence, fails, without lawful excuse, to attend or remain in attendance accordingly is guilty of contempt of court.**

**(2) A court, judge, justice or provincial court judge may deal summarily with a person who is guilty of contempt of court under this section and that person is liable to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding ninety days or to both, and may be ordered to pay the costs that are incident to the service of any process under this Part and to his detention, if any.**

**(3) A conviction under this section may be in Form 38 and a warrant of committal in respect of a conviction under this section may be in Form 25. R.S., c. C-34, s. 636.**

#### CROSS-REFERENCES

The terms “justice” and “provincial court judge” are defined in s. 2.

See s. 145(2) and (3) for potential liability where a witness fails to comply with the terms of a recognizance.

A conviction under this section may be in Form 38, and a warrant of committal in respect of conviction under this section may be in Form 25.

An appeal from conviction and sentence of contempt is authorized by s. 10(1). Such an appeal is governed by Part XXI.

#### SYNOPSIS

A witness who, without lawful excuse, fails to attend court as required is guilty of contempt and may be dealt with summarily. The maximum penalty is a fine of \$100 and/or imprisonment for 90 days, plus costs (subsecs. (1), (2)).

## Evidence on Commission

### ORDER APPOINTING COMMISSIONER / *Idem*.

709. (1) A party to proceedings by way of indictment or summary conviction may apply for an order appointing a commissioner to take the evidence of a witness who

(a) is, by reason of

(i) physical disability arising out of illness, or

(ii) some other good and sufficient cause,

not likely to be able to attend at the time the trial is held; or

(b) is out of Canada.

(2) A decision under subsection (1) is deemed to have been made at the trial held in relation to the proceedings mentioned in that subsection. R.S., c. C-34, s. 637; R.S.C. 1985, c. 27 (1st Supp.), s. 150; 1994, c. 44, s. 72.

### CROSS-REFERENCES

An application under s. 709 is made pursuant to the provisions of s. 710. See s. 712(1) in respect of a proposed witness who is out of Canada. Section 711 governs the reception of evidence taken under s. 709(1)(a) and s. 710. The evidence of a witness out of Canada is governed by s. 709(1)(b), s. 712(2) and 713.1.

See s. 713(1) for an order that an accused be present or represented by counsel when commission evidence is taken.

### SYNOPSIS

A commissioner may be appointed to take the evidence of a witness who is out of Canada or, because of illness or some other reason, is likely to be unable to attend the trial. It would appear that subsec. (2) was added to overcome the problem identified in *R. v. Pawlowski*, *infra*, that, under the former provision, no appeal lay from a decision refusing to make an order for commission evidence. In that case, the judge had also made an order for costs against the Crown which could not be appealed.

### ANNOTATIONS

As an appeal is a proceeding a Judge of the Court of Appeal may make an order for evidence on commission to be taken out of Canada: *R. v. Lester* (1972), 6 C.C.C. (2d) 227, [1972] 2 O.R.330 (C.A. in Chambers).

An application under this section may be made during the trial. However, in deciding whether to grant the application the trial Judge is entitled to consider such factors as whether the trial will be seriously disrupted, the possible prejudice to the opposite party resulting therefrom, as well as the consequence that the trier of fact will not have the advantage of observing the demeanour of the witness: *R. v. Bullement* (1979), 46 C.C.C. (2d) 429 (Ont. C.A.).

Evidence on commission as opposed to *viva voce* evidence at trial particularly where it goes to the root of the defence is unsatisfactory, but the seriousness of the charge and the accused's pre-trial detention require that his request for this order be granted: *R. v. Banton* (1976), 30 C.C.C. (2d) 253 (Ont. H.C.J.).

The court has no power to dictate to the Crown the manner in which it presents its case and thus cannot refuse an order for commission evidence until the completion of the preliminary inquiry. On the other hand, the courts have the right to ensure basic principles of a fair trial and if the defence is severely prejudiced by the decision to take commission evidence before the preliminary inquiry then an application may have to be brought to reopen the commission at the Crown's expense: *R. v. Buchanan* (1991), 65 C.C.C. (3d) 336 (Alta. Q.B.).

A superior court judge to whom an application is made under this section may make

an order awarding costs against the Crown, not only where there has been serious misconduct by the Crown, but where there has been an infringement of the Charter: *R. v. Pawlowski* (1993), 79 C.C.C. (3d) 353, 20 C.R. (4th) 233, 101 D.L.R. (4th) 267 (Ont. C.A.), leave to appeal to S.C.C. refused September 23, 1993.

#### **APPLICATION WHERE WITNESS IS ILL / Evidence of medical practitioner.**

- 710. (1) An application under paragraph 709(1)(a) shall be made**
- (a) to a judge of a superior court of the province in which the proceedings are taken; or**
  - (b) to a judge of a county or district court in the territorial division in which the proceedings are taken; or**
  - (c) to a provincial court judge, where**
    - (i) at the time the application is made, the accused is before a provincial court judge presiding over a preliminary inquiry under Part XXVIII, or**
    - (ii) the accused or defendant is to be tried by a provincial court judge acting under Part XIX or XXVII.**
- (2) An application under subparagraph 709(1)(a)(i) may be granted on the evidence of a registered medical practitioner. R.S., c. C-34, s. 638; R.S.C. 1985, c. 27 (1st Supp.), s. 151; 1994, c. 44, s. 73.**

#### **CROSS-REFERENCES**

See s. 711 for the circumstances in which the evidence of a witness taken under ss. 709(1)(a) and 710 may be read in evidence in the proceedings.

See the corresponding note to s. 709 for other related provisions.

#### **SYNOPSIS**

An application for the appointment of a commissioner with respect to a witness who is in Canada shall be made to a Supreme, County or District Court judge except where the proceedings are before the Provincial Court, in which case it will be made to a judge of that court (subsec. (1)). The application may be supported by the evidence of a doctor (subsec. (2)).

#### **READING EVIDENCE OF WITNESS WHO IS ILL.**

**711. Where the evidence of a witness mentioned in paragraph 709(1)(a) is taken by a commissioner appointed under section 710, it may be read in evidence in the proceedings if**

- (a) it is proved by oral evidence or by affidavit that the witness is unable to attend by reason of death or physical disability arising out of illness or some other good and sufficient cause,**
- (b) the transcript of the evidence is signed by the commissioner by or before whom it purports to have been taken; and**
- (c) it is proved to the satisfaction of the court that reasonable notice of the time for taking the evidence was given to the other party, and that the accused or his counsel, or the prosecutor or his counsel, as the case may be, had or might have had full opportunity to cross-examine the witness. R.S., c. C-34, s. 639; R.S.C. 1985, c. 27 (1st Supp.), s. 152; 1994, c. 44, s. 74.**

#### **CROSS-REFERENCES**

See ss. 709(1)(a) and 710 for application to appoint a commissioner to take the evidence of a witness too ill to attend trial.

The requirements governing the reading in of evidence under this section may be contrasted with the absence of such requirements under s. 712(2) in respect of the evidence of a witness out of Canada.



**SYNOPSIS**

This section deals with the use of evidence taken by a commissioner from a witness in Canada. The party seeking to "read in" testimony must establish: (a) that the witness is unable to attend (this may be done by affidavit); (b) that the transcript purports to be signed by the commissioner; and (c) that the other party had reasonable notice of the taking of the evidence and had, or could have had, an opportunity to cross-examine the witness.

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**APPLICATION FOR ORDER WHEN WITNESS OUT OF CANADA / Reading evidence of witness out of Canada.**

- 712. (1) An application that is made under paragraph 709(1)(b) shall be made**
- (a) to a judge of a superior court of criminal jurisdiction or of a court of criminal jurisdiction before which the accused is to be tried; or**
  - (b) to a provincial court judge, where the accused or defendant is to be tried by a provincial court judge acting under Part XIX or XXVII.**
- (2) Where the evidence of a witness is taken by a commissioner appointed under this section, it may be read in evidence in the proceedings. R.S., c. C-34, s. 640; R.S.C. 1985, c. 27 (1st Supp.), s. 153(1); 1994, c. 44, s. 75.**
- (3) [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 153(2).]**

**CROSS-REFERENCES**

The term "superior court of criminal jurisdiction" is defined in s. 2.

See s. 709(1)(b) for an application to appoint a commissioner to take the evidence of a witness who is out of Canada.

See s. 711 governing the reading in of evidence of a witness who is ill; s. 712(2) does not contain similar conditions precedent.

See s. 713.1 respecting admission of evidence taken out of Canada.

**SYNOPSIS**

An application for the appointment of a commissioner with respect to a witness who is out of Canada shall be made to a judge of a superior court or to a judge of the court before which the trial is to take place, except where the trial is before the Provincial Court, in which case it will be made to a judge of that court (subsec. (1)). Evidence so taken may be "read in" at the trial.

**ANNOTATIONS**

Where the trial has commenced before the provincial court judge an application by the accused to take commission evidence should be made to that judge rather than to the superior court. It is inappropriate, however, to name the trial judge as the commissioner as the accused may later choose not to tender the evidence at the trial. The disadvantage of the trial judge not being able to see the witness can be met by use of audio-visual equipment: *R. v. Nunus* (1985), 19 C.C.C. (3d) 522 (Ont. H.C.J.).

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**PROVIDING FOR PRESENCE OF ACCUSED COUNSEL / Return of evidence.**

**713. (1) A judge or provincial court judge who appoints a commissioner may make provision in the order to enable an accused to be present or represented by counsel when the evidence is taken, but failure of the accused to be present or to be represented by counsel in accordance with the order does not prevent the reading of the evidence in the proceedings if the evidence has otherwise been taken in accordance with the order and with this Part.**

**(2) An order for the taking of evidence by commission shall indicate the officer of the**

**court to whom the evidence that is taken under the order shall be returned. R.S., c. C-34, s. 641.**

#### CROSS-REFERENCES

The appointment of a commissioner to take the evidence of a person unable or unlikely to attend at trial is governed by ss. 709, 710, 712 and 713.1.

Section 714 establishes that, except where the provisions of Part XXII provide otherwise, the practice and procedure relating to the appointment of commissioners under this Part shall be that which governs like matters in civil proceedings in the superior court of the province in which the proceedings are taken.

#### SYNOPSIS

An order for the appointment of a commissioner may make provision to enable the accused or defence counsel to be present when the evidence is taken (*e.g.*, ordering the Crown to pay reasonable expenses). However, the fact that the accused is not present or represented when the evidence is taken will not, in and of itself, prevent the evidence being used (subsec. (1)).

The order shall specify the officer of the court to whom the transcript is to be returned (subsec. (2)).

#### ANNOTATIONS

An order made under this section may properly include provision that the Crown as applicant pay reasonable expenses of the accused's counsel including a counsel fee for the time spent travelling to and from the foreign jurisdiction: *R. v. Nicholson and Murphy* (1981), 62 C.C.C. (2d) 477 (B.C.S.C.).

This section does not authorize the judge appointing a commission to refuse, without justifiable excuse, permission to the accused to attend the commission. Rather, this section contemplates a situation in which the accused either voluntarily absents himself from the taking of the commission evidence or is unable to attend for reasons beyond the control of the court: *R. v. Branco* (1988), 41 C.C.C. (3d) 248, 62 C.R. (3d) 371 (Ont. C.A.).

It is not a valid objection to the making of an order for commission evidence that the accused is unwilling to attend on the commission because he might be arrested in the jurisdiction and the Crown is not bound to attempt to obtain assurances from the foreign government that the accused would not be arrested: *R. v. Buchanan* (1991), 65 C.C.C. (3d) 336 (Alta. Q.B.). And the admission of evidence obtained in such circumstances did not violate the accused's rights under ss. 7 and 11(d) of the Charter: *R. v. Buchanan* (1992), 76 C.C.C. (3d) 236, 133 A.R. 321 (Q.B.).

Even though evidence has been taken in accordance with an order made under s. 709 it is still for the trial judge to determine its admissibility. Thus, where the accused was improperly barred from attending on the taking of the commission evidence, his absence at the commission amounted to absence at trial once the evidence was tendered at the trial, and the evidence should not have been admitted: *R. v. Branco* (1988), 41 C.C.C. (3d) 248, 62 C.R. (3d) 371 (Ont. C.A.).

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#### EVIDENCE NOT EXCLUDED.

**713.1. Evidence taken by a commissioner appointed under section 712 shall not be excluded by reason only that it would have been taken differently in Canada, provided that the process used to take the evidence is consistent with the law of the country where it was taken and that the process used to take the evidence was not contrary to the principles of fundamental justice. 1994, c. 44, s. 77.**

#### CROSS-REFERENCES

The application for a commission to take the evidence of a witness out of Canada is made

under ss. 709(b) and 712. The evidence is admitted pursuant to s. 712(2) and this section. Presence of the accused and representation by counsel at the commission are governed by s. 713. Rules and practice at the commission are governed by the civil rules pursuant to s. 714.

### SYNOPSIS

This section provides that evidence is admissible although the process was different than would be the procedure in Canada, provided that the procedure used conformed with the law of the country where it was taken and was not contrary to the principles of fundamental justice.

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### RULES AND PRACTICE SAME AS IN CIVIL CASES.

**714.** Except where otherwise provided by this Part or by rules of court, the practice and procedure in connection with the appointment of commissioners under this Part, the taking of evidence by commissioners, the certifying and return thereof and the use of the evidence in the proceedings shall, as far as possible, be the same as those that govern like matters in civil proceedings in the superior court of the province in which the proceedings are taken. R.S., c. C-34, s. 642.

### CROSS-REFERENCES

The appointment of a commissioner to take the evidence of a person unable or unlikely to attend at trial is governed by ss. 709, 710 and 712.

Section 713 makes provision for an accused or his counsel to be present at the giving of commission evidence. The reading in of commission evidence is governed by ss. 711 and 712(2).

### SYNOPSIS

This section states that procedures with respect to commissioners under this Part shall be the same as those in the superior civil court of the jurisdiction, unless otherwise provided for in this Part or the rules of court.

### ANNOTATIONS

Subject to objections as to admissibility of its contents evidence taken *ex juris* on commission for a preliminary inquiry may also be read in at trial: *R. v. Crux* (1972), 6 C.C.C. (2d) 330 (B.C.S.C.).

To obtain the evidence of an unwilling witness in a foreign jurisdiction the party seeking the examination requires the assistance of the appropriate Court in the foreign jurisdiction to compel the witness to attend, answer questions and apply sanctions if the witness does not comply. Further, an order from the Court of the foreign jurisdiction appointing the commission with full authority to do everything necessary to accomplish the purpose of the order including prescribing the practice and procedure, gives the commissioner power to rule on objections to relevancy. However, ultimate admissibility of the evidence will be determined by the trial Judge in Canada: *R. v. Robertson* (1982), 66 C.C.C. (2d) 210, 31 C.R. (3d) 383 (B.C.C.A.), leave to appeal to S.C.C. refused C.R. *loc. cit.*, 43 N.R. 619n.

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## *Evidence Previously Taken*

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### EVIDENCE AT PRELIMINARY INQUIRY MAY BE READ AT TRIAL IN CERTAIN CASES / *Idem* / Absconding accused deemed present.

**715.** (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge,



refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

- (a) is dead,
- (b) has since become and is insane,
- (c) is so ill that he is unable to travel or testify, or
- (d) is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be read as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

(2) Evidence that has been taken on the preliminary inquiry or other investigation of a charge against an accused may be read as evidence in the prosecution of the accused for any other offence on the same proof and in the same manner in all respects, as it might, according to law, be read in the prosecution of the offence with which the accused was charged when the evidence was taken.

(3) For the purposes of this section, where evidence was taken at a previous trial or preliminary hearing or other proceeding of an accused in the absence of the accused, who was absent by reason of having absconded, the accused is deemed to have been present during the taking of the evidence and to have had full opportunity to cross-examine the witness. R.S., c. C-34, s. 643; 1974-75-76, c. 93, s. 76; 1994, c. 44, s. 77.

#### CROSS-REFERENCES

The term “justice” is defined in s. 2.

The order and receipt of evidence taken on commission is provided for in ss. 709 to 714.

#### SYNOPSIS

This section provides for the admissibility at trial of the transcript of the evidence given at a preliminary inquiry, or previous trial, where the witness refuses to be sworn; is dead; insane; unable due to illness to attend, or absent from Canada.

To use a transcript one of the above conditions must be established together with the fact that the evidence was taken in the presence of the accused. The onus is on the accused to prove that he or she was denied a full opportunity to cross-examine (subsec. (1)). (Note: Even if the statutory preconditions have been met, the Supreme Court of Canada has held that a trial judge has a discretion not to admit the evidence.)

Subsection (2) provides that transcript evidence is admissible at the trial of a charge other than the one which was the subject of the earlier proceedings.

An accused who absconded during an earlier trial is deemed to have had a full opportunity to cross-examine the witness (subsec. (3)). (Note: Section 544(1)(a) provides that an accused who absconds at a preliminary inquiry is deemed to have waived his or her right to be present.)

#### ANNOTATIONS

**Application of provision** – It was held in *R. v. Canning*, [1966] 4 C.C.C. 379, 49 C.R. 13 (B.C.C.A.), that there is nothing in this section which provides that the transcript of an earlier hearing may be “read as evidence in the proceedings” in all the circumstances. Thus, on an application for preventive detention before a different Court from the one that heard the substantive charge, evidence must be repeated.

Compliance with this section does not require proof that the witness’ absence or refusal to testify is unavoidable and justified. Further, the right to full opportunity to cross-examine the witness refers to the procedure at the preliminary hearing and does not include a right to cross-examination of events which have occurred since the preliminary hearing: *R. v. Cole* (1980), 53 C.C.C. (2d) 269 (Ont. C.A.); *R. v. Rogers and Thurber*, *infra*.

Illness in this section includes mental illness and is not confined to physical illness: *R. v. Novalinga* (1985), 19 C.C.C. (3d) 190 (Ont. H.C.J.).

This section is applicable although the witness is only temporarily absent from Canada: *R. v. Rogers and Thurber* (1987), 35 C.C.C. (3d) 50, 55 Sask. R. 198 (C.A.).

The trial judge having found that the accused and his spouse had entered into a marriage of convenience so that she could avoid having to testify against the accused at his trial, the spouse's preliminary inquiry evidence was admissible under this section. The witness, having deliberately put herself beyond the reach of the court, has refused to testify for the purposes of this section: *R. v. Hawkins* (1995), 96 C.C.C. (3d) 503, 37 C.R. (4th) 229, 22 O.R. (3d) 193 (C.A.).

**Principles to be applied generally** – In *R. v. Waucash* (1966), 1 C.R.N.S. 262 (Ont.H.C.J.), Grant, J., at trial, decided (affirmed without written reasons by the Ontario Court of Appeal, April 25, 1967), that where the accused had been committed to custody at the pleasure of the Lieutenant-Governor in Council ten years previously just after his preliminary inquiry at which he had been represented by experienced counsel, the evidence which was taken of three witnesses, since deceased, could not be now admitted, as at that time the accused, because of his mental condition, was at a disadvantage in advising his counsel and was unable to avail himself of his full opportunity to cross-examine those witnesses.

This section does not infringe an accused's rights to fundamental justice and a fair trial under ss. 7 and 11(d) of the Charter of Rights and Freedoms, although the accused would have a constitutional right to have the prior evidence excluded if he did not have a full opportunity to cross-examine as where he was deprived of the right to counsel or where improper restrictions were placed by the court on the cross-examination by counsel. However, properly interpreted, it gives the trial judge a discretion to depart from the purely mechanical application of this section and to exclude evidence where the testimony was obtained in a manner which was unfair to the accused or where its admission at the trial would not be fair to the accused. The discretion should be exercised only after weighing the competing interests of fair treatment of the accused and society's interest in the admission of probative evidence. The importance of the evidence is not the determinative factor in deciding whether to exercise the discretion and in fact the purpose of this provision was to ensure that evidence, even important and highly probative evidence, is not lost because of the unavailability of a witness at trial. Where the trial judge does admit the evidence then it is highly desirable that he remind the jury that they have not had the benefit of observing the witness giving the testimony. This is particularly the case where the unavailability arises from the witness's deliberate refusal to testify before the jury: *Potvin v. The Queen* (1989), 47 C.C.C. (3d) 289, 68 C.R. (3d) 193 (S.C.C.) (5:0).

Where the cross-examination of an important Crown witness at the preliminary inquiry by counsel for the co-accused seriously weakened admissions obtained by counsel for the accused, the trial judge should consider whether fairness required that the transcript of the cross-examination by the co-accused's counsel be deleted now that the co-accused having pleaded guilty was no longer on trial: *R. v. Ingraham* (1991), 66 C.C.C. (3d) 27, 46 O.A.C. 216 (C.A.).

In considering the exercise of the discretion under this section, the trial judge should have considered that the complainant's absence from the jurisdiction was unexplained with no suggestion that it was through threats or duress from the accused: *R. v. Harris* (1991), 66 C.C.C. (3d) 536 (Ont. C.A.).

In *R. v. Oickle* (1984), 11 C.C.C. (3d) 180, 61 N.S.R. (2d) 239 (S.C. App. Div.) the court held that the judge erred in permitting the Crown to adduce a witness' preliminary hearing testimony. The testimony initially given was ambiguous and of no probative value but the Crown had then been permitted to cross-examine the witness at the preliminary inquiry on a prior statement pursuant to s. 9(2) of the Canada Evidence Act. This

statement, while prejudicial to the accused, was never adopted by the witness. This section does not make evidence admissible that would otherwise be inadmissible.

The evidence given by an expert at the first trial of the accused was properly read in under this section on the retrial. In exercising the discretion under this section, in the circumstances of this case, the issue was whether there was a need for further cross-examination of the expert in light of the publication by him of a second treatise after the first trial. Any question as to the expert's honesty or the weight to be given his opinion was effectively dealt with in other ways and, accordingly, the evidence was admissible. *R. v. Zundel* (1990), 53 C.C.C. (3d) 161 (Ont. C.A.).

**Procedure** – Notwithstanding a witness' preliminary hearing testimony has been read in pursuant to this section because of his refusal to testify, where the witness then changes his mind and agrees to testify, it is open to the trial Judge to permit defence counsel to cross-examine the witness: *R. v. Valence* (1982), 5 C.C.C. (3d) 552 (Que. C.A.), leave to appeal to S.C.C. granted C.C.C. *loc. cit.*, 46 N.R. 628n.

There were no grounds for interfering with the trial Judge's discretion permitting the Crown to reopen its case and prove that the accused was the person referred to in the testimony given at the preliminary hearing which was read in at the accused's trial pursuant to this section: *Robillard v. The Queen* (1978), 41 C.C.C. (2d) 1, 85 D.L.R. (3d) 449, [1978] 2 S.C.R. 728 (9:0).

Evidence of statements by the missing witness as to his intention to leave the jurisdiction, even if hearsay, are admissible to prove the absence of the witness from Canada, if such evidence is surrounded by circumstantial guarantees of trustworthiness: *R. v. Kaddoura* (1987), 60 C.R. (3d) 393 (Alta. C.A.).

Where a witness who was called at the preliminary hearing is not called at trial and his evidence is not read in under this section and his evidence is not admissible under some exception to the hearsay rule then it is improper to place before the jury the witness' preliminary hearing testimony by referring to such evidence and asking the accused on cross-examination if he remembers the witness giving that evidence: *R. v. McNamara et al.* (No. 1) (1981), 56 C.C.C. (2d) 193 (Ont. C.A.) at pp. 381-4.

## Videotaped Evidence

### EVIDENCE OF COMPLAINANT.

**715.1** In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape. R.S.C. 1985, c. 19, (3rd Supp.), s. 16.

### CROSS-REFERENCES

See s. 486(2.1) to (4) for the reception of evidence of complainants under 18 years of age in cases of sexual assault, interference and exploitation.

See s. 16 of the Canada Evidence Act, R.S.C. 1985, c. C-5, for the manner in which evidence of a witness under 14 years of age or of diminished mental capacity may be received.

Where an accused is charged with an offence listed in s. 715.1, his spouse is a competent and compellable prosecution witness, without the accused's consent, under s. 4(2) of the Canada Evidence Act.

Also see notes under s. 150.1.



**SYNOPSIS**

This section allows for the admission of videotaped testimony in proceedings relating to certain listed offences. These offences include the various types of child molestation and sexual assault. This section only applies where the complainant was under 18 years of age at the time of the alleged offence. The videotaped testimony must describe the acts complained of, must be adopted in the testimony of the complainant at trial and must have been taped within a reasonable time after the alleged offence.

**ANNOTATIONS**

It is open to the trial judge to exclude the evidence where its prejudicial effect outweighs its probative value. The videotape is not an exhibit which goes to the juryroom during the jury's deliberations: *R. v. Kilabuk* (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.).

The witness adopts the contents of the videotape, within the meaning of this section, where she testifies that she believes the contents to be true, because she recalls giving the statement and attempting then to be honest and truthful, whether or not she actually recalls the events discussed at the time of testifying. In effect, this section removes one of the prerequisites for the past recollection recorded exception to the hearsay rule that the witness had no present recollection. A videotape is made within a reasonable time after the offence if it is made when the events were sufficiently fresh and vivid to be probably accurate. The term "acts complained of" include a description of the assailant. A child who is permitted to give unsworn evidence is still "testifying" and thus capable of adopting the contents of the videotape. Where the conditions for application of this section are met then the videotape is admissible for its truth. Admissibility should not, however, be confused with weight and, in considering the weight to be attached to the tape, the trier of fact must consider whether the witness, when making the tape, had a motive to falsify, and whether the method of questioning used was suggestive and persistent. Where a witness cannot recall and affirm what is on the tape then the trial judge should probably give the jury a special warning about relying on the evidence: *R. v. Meddoui* (1990), 61 C.C.C. (3d) 345, [1991] 2 W.W.R. 289, 2 C.R. (4th) 316 (Alta. C.A.).

The statement admitted under this section is admissible to prove the truth of its contents. The determination of whether the complainant adopts all or any part of the statement must be made by the trier of fact. The trial judge must, however, as a condition of admissibility, satisfy herself that there is an evidentiary basis on which the trier of fact could conclude that the complainant adopted the statement. In order for the complainant to have adopted the statement she must acknowledge making the statement and be able, based on present memory of the events referred to in the statement, to verify the accuracy of the contents of this statement. It is not sufficient that the witness is able to vouch for the accuracy of the statement based solely on the circumstances surrounding the making of it. In some cases it may be that the complainant will have no memory of certain events referred to in the statement. If those parts of the statement are prejudicial to the accused, the trial judge will have to determine whether the tape can be edited. If editing is not possible, the trial judge will have to consider whether she should exercise her discretion and exclude the videotaped statement. Even where the videotaped statement is adopted by the complainant, it is admissible only to the extent that it describes the act complained of. References to other acts not encompassed by the indictment or to conversations which do not form part of the acts complained of are not admissible. The judge has the power to edit statements to avoid prejudice and irrelevancies where the editing process can be effected without distorting the nature of the evidence adduced. The judge would also have the discretion to exclude a videotape statement which complies with the requirements of this section where the trial judge determines that the prejudicial effect of the evidence outweighs its probative value. However, except in the most extreme cases, the statement should be admitted: *R. v. Toten* (1993), 83 C.C.C. (3d) 5, 14 O.R. (3d) 225, 16 C.R.R. (2d) 49 (C.A.).

In *R. v. L.(D.O.)* (1993), 85 C.C.C. (3d) 289, 25 C.R. (4th) 285, 88 Man. R. (2d) 241

(S.C.C.) the court held that the trial judge did not err in admitting a videotaped interview under this section, notwithstanding the delay of five months from the time disclosure was first made by the nine-year-old complainant. In her concurring opinion, L'Heureux-Dubé held that what is a reasonable time depends entirely on the circumstances of the case and that in making the determination the judge may take into consideration the fact that children often delay disclosure. As well, it may be necessary to conduct a prior investigation to ensure the seriousness of the allegations. On the other hand, such determination must also take into account empirical data which makes clear that recollection decreases in accuracy with time and that children's memories fade faster than those of adults. There is thus a clear advantage to gathering evidence from a child as early as possible.

In considering whether or not a videotape statement was made within a reasonable time after the alleged offence, the court should consider the totality of circumstances. One consideration in particular is the fact that children, for a number of reasons, are often likely to delay disclosure, as where the child has been severely traumatized by the assault: *R. v. Scott* (1993), 87 C.C.C. (3d) 327, 27 C.R. (4th) 55, 67 O.A.C. 213 (C.A.).

Even though there was a very lengthy delay [perhaps 17 months] between the date of the offence and the time of the taping, it was open to the judge to find that the delay was reasonable and that the videotape was admissible. The delay arose because of the natural reluctance of the complainant and perhaps the mother to make a report to the authorities: *R. v. M. (S.)* (1995), 98 C.C.C. (3d) 526, 89 W.A.C. 307, 165 A.R. 307 (C.A.).

The phrase "the acts complained of" in this section does not include additional assaults which may be introduced as similar fact evidence but are not charged in the indictment: *R. v. A. (J.F.)* (1993), 82 C.C.C. (3d) 295, 64 O.A.C. 359 (C.A.).

It does, however, include a description given by the complainant of her assailant and statements made by the attacker during the offence: *R. v. Scott* (1993), 87 C.C.C. (3d) 327, 27 C.R. (4th) 55, 67 O.A.C. 213 (C.A.).

**Constitutional considerations** – This section violates neither s. 7 nor s. 11 of the Charter. Incorporation of a judicial discretion to edit or refuse to admit videotaped evidence where its prejudicial effect outweighs its probative value ensures that the section is consistent with fundamental principles of justice and the right to a fair trial: *R. v. L.(D.O.)*, *supra*.

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## Part XXIII / PUNISHMENTS, FINES, FORFEITURES, COSTS AND RESTITUTION OF PROPERTY

### *Punishment Generally*

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**NOTE:** Part XXIII replaced by 1995, c. 22, s. 6 (to come into force by order of the Governor in Council). See text following s. 751.

**DEFINITIONS**—"accused"—"court".

**716. In this Part,**

"accused" includes a defendant;

"court" means

- (a) a superior court of criminal jurisdiction,
- (b) a court of criminal jurisdiction,
- (c) a justice or provincial court judge acting as a summary conviction court under Part XXVII, or
- (d) a court that hears an appeal. R.S., c. C-34, s. 644; 1974-75-76, c. 93, s. 77; R.S.C. 1985, c. 27 (1st Supp.), s. 154.

**CROSS-REFERENCES**

For further definitions and aids to interpretation, see references cited under s. 2.

**SYNOPSIS**

This section contains the definitions of "accused" and "court" for the purposes of this Part.

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**DEGREES OF PUNISHMENT / Discretion respecting punishment / Imprisonment in default where term not specified / Cumulative punishments.**


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**717. (1)** Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.

**(2)** Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.

**(3)** Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribed the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

**(4)** Where an accused

- (a)** is convicted while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed,
- (b)** is convicted of an offence punishable with both fine and imprisonment, and both are imposed with a direction that, in default of payment of the fine, the accused shall be imprisoned for a term certain, or
- (c)** is convicted of more offences than one before the same court at the same sittings, and
  - (i)** more than one fine is imposed with a direction in respect of each of them that, in default of payment thereof, the accused shall be imprisoned for a term certain,
  - (ii)** terms of imprisonment for the respective offences are imposed, or
  - (iii)** a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence with a direction that, in default of payment, the accused shall be imprisoned for a term certain,

the court that convicts the accused may direct that the terms of imprisonment shall be served one after the other. R.S., c. C-34, s. 645.

**CROSS-REFERENCES**

Disposition and enforcement of fines are governed by ss. 718 to 720. For method of payment and to whom fines are payable, see ss. 723 and 724. The place and manner for serving a sentence of imprisonment are governed by ss. 730 to 734. The terms "punishment" and "sentence" have no general definition in the Criminal Code.

See s. 673 for definition of "sentence" for the purposes of Part XXI and s. 785 for the purposes of Part XXVII.

**SYNOPSIS**

This section deals with certain of the discretionary aspects of sentencing.

Where different degrees or kinds of punishment are provided, the judge, subject to



any specific statutory limitations, has a discretion as to the penalty to be imposed (e.g., a fine and/or imprisonment) (subsec. (1)). There are no “minimum” sentences unless the legislation so provides (subsec. (2)).

Where an offence is punishable by both a fine and imprisonment, the maximum term in default of payment of a fine, unless otherwise provided, shall not exceed the maximum term that is prescribed for that offence (subsec. (3)).

“Consecutive” jail sentences may be imposed where an accused: (a) is already under sentence of imprisonment; (b) is sentenced to a period of incarceration and to pay a fine with a term in default of payment; or (c) is convicted of more than one offence before the same court and several periods of incarceration are imposed, whether in default of payment of a fine or otherwise (subsec. (4)).

## ANNOTATIONS

**General** – There is no pre-set ceiling of 20 or 25 years on fixed-term sentences under the Criminal Code whether or not life imprisonment is available. In a number of potential situations, a trial judge will be in a position to impose a total fixed-term sentence beyond 14 years, but life imprisonment will either be unavailable or inappropriate in the circumstances. In selecting a “just and appropriate” fixed-term sentence, the trial judge must have regard to the fundamental principle that the global sentence imposed reflect the overall culpability of the offender and the circumstances of the offence: *R. v. M.*(C.A.) (unreported, March 21, 1996, S.C.C.) [096/085/064-82 pp.].

**Delay in imposition of sentence [subsec. (1)]** – A lengthy delay to consider matters not in existence at the time of the offence is improper and unfair to the accused: *R. v. Urton*, [1974] 5 W.W.R. 476 (Sask. C.A.).

In *R. v. Nunner* (1976), 30 C.C.C. (2d) 199 (Ont. C.A.) (2:1) it was held that postponement of sentence for more than one or two months must be regarded as *prima facie* evidence of the exercise of the judicial discretion to delay sentence for an illegal purpose. However, in this case the Court refused to interfere with a trial Judge’s discretion, delaying for five months the imposition of sentence on a charge of robbery in the case of a 16 year old, to see how the accused responded to probation imposed for other less serious offences. Having regard to the youth of the accused and the objectives sought to be achieved by the trial Judge, it could not be said that the postponement of five months was an illegal exercise of his discretion.

A seven-month delay in sentencing so that the accused, a mature offender with a lengthy criminal record, might overcome his drug problem and “prove himself” was not a proper exercise of the trial Judge’s discretion: *R. v. Shea* (1980), 55 C.C.C. (2d) 475, 42 N.S.R. (2d) 218 (S.C. App. Div.). Similarly: *R. v. Brisson* (1989), 47 C.C.C. (3d) 474, 19 Q.A.C. 231 (C.A.).

While the trial judge must take into consideration the accused’s rehabilitation, the judicial function requires that the judge, after a reasonable period for consideration, form an opinion as to the proper sentence. Certain circumstances may require that sentencing be delayed in order to permit a better evaluation of the accused’s circumstances, but such delay must remain within acceptable limits and it is not proper to postpone the decision for a lengthy period of time to follow the course of therapy: *R. v. Cardin* (1990), 58 C.C.C. (3d) 221 (Que. C.A.).

**Procedure on sentence hearing** – Where following a plea of guilty there is conflicting evidence with respect to factors going to the gravity of the offence, the onus is on the Crown to prove the aggravating facts beyond a reasonable doubt: *R. v. Gardiner* (1982), 68 C.C.C. (2d) 477, 30 C.R. (3d) 289, 140 D.L.R. (3d) 612, [1982] 2 S.C.R. 368.

However, the Court is not to assume all mitigating factors in favour of the accused merely because of an absence of proof beyond a reasonable doubt of the contrary: *R. v. Holt* (1983), 4 C.C.C. (3d) 32 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 47 N.R. 240n.

In *R. v. Boulet* (1990), 58 C.C.C. (3d) 178, 78 C.R. (3d) 309, 85 Sask. R. 93 (C.A.), the majority of the court held that it did not need to consider the principles to be applied respecting the conduct of a sentence hearing where there are disputed facts as to the circumstances of the commission of the offence, since, even on the version of the facts most favourable to the accused, the sentence originally imposed was inadequate and thus the Crown appeal must be allowed. Bayda C.J.S., however, in his dissenting opinion, gave extensive consideration to the issue and held that the judge does not have the power to accept the prosecution's version of material disputed facts unless he first holds a formal sentence hearing at which evidence is called. Where the accused's version of the facts is so manifestly false as to be incapable of belief or is not within the bounds of reasonable possibility, the judge is entitled to reject that version, in which case, the prosecution's version is deemed not to be in dispute. Where the accused's version, however, is not manifestly false and is reasonable, the judge may accept the accused's version at an informal hearing and without the necessity of a formal hearing. The onus is primarily on the Crown to request the formal hearing, where it disputes the accused's version of events, although the trial judge may on his own motion hold a formal sentence hearing.

In *R. v. Poorman* (1991), 66 C.C.C. (3d) 82 (Sask. C.A.) the court returned to this issue and held that where there is a conflict between the Crown and the accused's version of facts, which are not crucial for the determination of guilt or innocence, then, in an informal sentence hearing, the trial judge is required so far as possible to accept the version of the accused. If the judge is of the view that the matter cannot be resolved in that way, then he must hear sworn evidence.

**Interpreting jury's verdict** – The sentencer is bound by the express and implied factual implications of the jury's verdict but, *semble*, where the factual implication is ambiguous, the sentencer should not attempt to follow the logical processes of the jury, but may come to an independent determination of the relevant facts. Thus, where the accused charged with dangerous driving causing death was convicted only of dangerous driving, *simpliciter*, the consequence of death cannot be taken into account in imposing sentence: *R. v. Brown* (1991), 66 C.C.C. (3d) 1, 125 N.R. 363 (S.C.C.).

**Consecutive sentences / Procedure [subsec. (4)]** – In *Re Dean and The Queen* (1977), 35 C.C.C. (2d) 217 (Ont. C.A.) the accused had been sentenced to a number of consecutive sentences. He was then given a sentence to run "consecutive with sentence now serving" and argued that this latter sentence, while consecutive to the first of the sentences earlier imposed, was concurrent to the other consecutive sentences because he was not then serving those sentences. It was held, dismissing his application for *habeas corpus*, that by virtue of s. 14(1) of the Parole Act, R.S.C. 1970, c. P-2 as amended by R.S.C. 1970, c. 31 (1st Supp.), where a person is sentenced to two or more terms of imprisonment such terms "shall, for all purposes of this Act, the *Penitentiary Act* and the *Prisons and Reformatories Act*, be deemed to constitute one sentence". Once the accused was in the custody of the penitentiary services it was those three statutes which governed the time to be served and in the result, at the time he was given the last sentence he was then serving one sentence to which the final sentence was consecutive, and not a series of consecutive sentences. Section 14 abrogates the effect of the earlier decision in *Ex p. McCaud*, [1970] 1 C.C.C. 293, 7 C.R.N.S. 222 (Ont. H.C.J.).

A fixed sentence cannot be made consecutive to a sentence of life imprisonment: *R. v. Sinclair* (1972), 6 C.C.C. (2d) 523 (Ont. C.A.); *R. v. Cooney* (1981), 62 C.C.C. (2d) 95 (Que. C.A.); *R. v. Camphaug* (1986), 28 C.C.C. (3d) 125 (B.C.C.A.). Nor to a sentence of preventive detention in a penitentiary for an indeterminate period: *R. v. Robillard* (1985), 22 C.C.C. (3d) 505 (Que. C.A.).

The power to impose a consecutive sentence must be found in some federal enactment, such as this section. Paragraph (4)(c) should be interpreted as permitting a Judge to order that a sentence be served consecutively to another sentence he has previously or is at the same time imposing (although such interpretation gives little or no meaning to

the words “at the same sittings”), but in view of para. (4)(a) he cannot order that a sentence be made consecutive to that imposed by another Judge in another case unless that sentence has already been imposed by the other Judge at the time of the conviction in the case in which he is sentencing: *Paul v. The Queen* (1982), 67 C.C.C. (2d) 97, 27 C.R. (3d) 193, 138 D.L.R. (3d) 455, [1982] 1 S.C.R. 621 (5:0).

**Consecutive sentences / Principles** – In *R. v. Chisholm*, [1965] 4 C.C.C. 289, [1965] 2 O.R. 612 (C.A.), it was held that where there was no relationship between the separate commissions of criminal offences the Court should, bearing in mind the total term, impose consecutive sentences.

A second crime committed while in flight from a first crime should be punished with a consecutive punishment: *R. v. McCaw, Warnholtz, Frame and Morrison* (1974), 15 C.C.C. (2d) 321 (Ont. C.A.).

In considering the appropriate sentence, where the accused has been convicted of more than one offence arising out of the same general circumstances, the proper approach is to first identify the gravamen of the conduct giving rise to all of the criminal offences. The trial judge should next determine the total sentence to be imposed. Having determined the appropriate total sentence, the judge should, with respect to each offence, impose sentences which result in that total sentence and appropriately reflect the gravamen of the overall criminal conduct, considering not only the appropriate sentence for each offence but whether, in light of totality concerns, a particular sentence should be consecutive or concurrent to the other sentences imposed: *R. v. Jewell* (1995), 100 C.C.C. (3d) 274, 83 O.A.C. 81 (C.A.).

A sentencing judge may take into account offences committed after an accused has been convicted but prior to sentencing in order to assess the character of the accused and the degree to which he may be on the road to rehabilitation but such offences do not carry the same weight as a prior criminal record where the accused having been convicted and punished commits new criminal offences. Further, if a consecutive sentence could not be imposed directly because of this subsection, it could not be imposed indirectly in the guise of an improper concurrent sentence: *R. v. Paquin* (1989), 70 C.R. (3d) 39 (Que. C.A.).

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**FINE IN LIEU OF OTHER PUNISHMENT / Fine in addition to other punishment / Imprisonment in default of payment / Time for payment / What to be considered / Idem / Warrant of committal / Reasons for committal / Surrender by accused / Young offenders / Extension of time / Definition of “fine”.**

718. (1) An accused who is convicted of an indictable offence punishable with imprisonment for five years or less may be fined in addition to or in lieu of any other punishment that is authorized, but an accused shall not be fined in lieu of imprisonment where the offence of which he is convicted is punishable by a minimum term of imprisonment.

(2) An accused who is convicted of an indictable offence punishable with imprisonment for more than five years may be fined in addition to, but not in lieu of, any other punishment that is authorized.

(3) Where a fine is imposed under this section, a term of imprisonment may be imposed in default of payment of the fine, but no such term shall exceed

- (a) two years, where the term of imprisonment that may be imposed for the offence is less than five years, or
- (b) five years, where the term of imprisonment that may be imposed for the offence is five years or more.

(4) Subject to this section, where an accused is convicted of an offence and is fined, the court that convicts the accused may direct that the fine

- (a) be paid forthwith; or



(b) be paid at such time and on such terms as the court may fix.

(5) Where a court imposes a fine, the court shall not, at the time the sentence is imposed, direct that the fine be paid forthwith, unless

- (a) the court is satisfied that the convicted person is possessed of sufficient means to enable him to pay the fine forthwith;
- (b) on being asked by the court whether he desires time for payment, or for discharging the fine in accordance with section 718.1, where a program has been established for that purpose, the convicted person does not request such time, or
- (c) for any other special reason, the court deems it expedient that no time should be allowed.

(6) The court, in considering whether time should be allowed for payment of a fine and, if so, for what period, shall consider any representation made by the accused but any time allowed shall be not less than fourteen clear days from the date sentence is imposed.

(7) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine until the expiration of the time allowed for payment.

(8) Where no time has been allowed for payment of a fine and a warrant committing the accused to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal.

(9) Notwithstanding subsection (7), where, before the expiration of the time allowed for payment, the accused appears before a court and signifies in writing that he prefers to be committed immediately rather than to await the expiration of the time allowed, the court may forthwith issue a warrant committing the accused to prison.

(10) Where a person who has been allowed time for payment of a fine appears to the court to be not less than sixteen nor more than twenty-one years of age, the court shall, before issuing a warrant committing the person to prison for default of payment of the fine, obtain and consider a report concerning the conduct and means to pay of the accused.

(11) Where time has been allowed for payment under subsection (4), the court that imposed the sentence may, on an application by or on behalf of the accused, allow further time for payment, subject to any rules made by the court under section 482.

(12) In this section "fine" includes a pecuniary penalty or other sum of money. R.S., c. C-34, s. 646; R.S.C. 1985, c. 27 (1st Supp.), s. 155.

#### CROSS-REFERENCES

An individual accused may discharge a fine completely or in part under a fine option program, under s. 718.1. Section 722 permits the reduction of a default term upon partial payment of fine. See ss. 723 and 724 for disposition and recovery of fines, respectively. Sections 719 and 720 govern the imposition and enforcement of fines levied against corporate accused. Payment of a fine may be suspended by the court of appeal, pending determination of the appeal, under s. 683(5). Pursuant to s. 822(1), summary conviction appeals under s. 813 are also subject to these provisions.

See s. 716 for definitions of "accused" and "court".

#### SYNOPSIS

This section governs the imposition of fines whether alone or together with other forms of punishment.

If an indictable offence is punishable by five years or less the accused may be sentenced to pay a fine in lieu of any other punishment. A fine may not be imposed in lieu

of any other punishment where the offence carries a minimum term of imprisonment. (subsec. (1)). However, if the maximum sentence is greater than five years a fine can only be imposed together with some other form of punishment (subsec. (2)). In many instances the other punishment will be a nominal one day in jail.

A term of imprisonment for non-payment of a fine shall not exceed (a) two years where the maximum punishment is less than five years, and (b) five years in all other cases (subsec. (3)).

A fine may be directed to be paid forthwith or over time and upon conditions (subsec. (4)). The court shall not order a fine to be paid forthwith unless: (a) satisfied the accused can pay the fine immediately; (b) the accused does not, in response to an inquiry from the court, request either time to pay or the fine option programme (see s. 718.1); or (c) the court, for any other reason, deems it expedient that no time be allowed (subsec. (5)).

Time to pay shall not be less than 14 clear days (subsec. (6)). No warrant of committal for imprisonment in default of payment shall issue until such time has expired (subsec. (7)). However, the accused can appear before the court and ask to be committed before the time allowed has elapsed (subsec. (9)).

If no time is allowed and the accused is committed to serve a sentence in default of payment, the warrant shall state the reasons for immediate committal (subsec. (8)).

A warrant of committal shall not issue upon the expiration of time to pay with respect to an accused who is between 16 and 21 years of age inclusive, until the court has obtained and considered a report concerning the conduct and means to pay of the accused (subsec. (10)).

The court can extend the time for payment (subsec. (11)).

## ANNOTATIONS

**Subsec. (1)** – There is no authority to impose concurrent fines upon conviction of two separate offences: *R. v. Ward* (1980), 56 C.C.C. (2d) 15 (Ont. C.A.).

**Subsec. (2)** – The phrase “any other punishment that is authorized”, includes a probation order made under s. 737(1)(b): *R. v. Desmarais* (1971), 3 C.C.C. (2d) 523 (Que. C.A.).

A probation order is a form of punishment under the Criminal Code and accordingly a fine with the addition of terms of probation is valid for an offence punishable by more than five years’ imprisonment: *R. v. Johnson* (1972), 6 C.C.C. (2d) 380, 17 C.R.N.S. 254 (B.C.C.A.); and *semble R. v. Paquet and Vieno* (1978), 43 C.C.C. (2d) 23 (Ont. C.A.).

It was held, considering the former s. 722(7) the equivalent of this subsection, that the absence of the endorsement on the warrant of the reason for immediate committal was more than a mere irregularity and invalidates the warrant: *Ex p. Andrews* (1973), 15 C.C.C. (2d) 43, [1974] 2 W.W.R. 481 (B.C.S.C.).

**Subsec. (10)** – It was held in *R. v. Hebb* (1989), 47 C.C.C. (3d) 193, 69 C.R. (3d) 1 (N.S.S.C.), that limiting the requirement for a report on ability to pay, to persons under 22 years of age, infringes s. 15 of the Charter of Rights and Freedoms and that the age-limiting phrase must therefore be removed. Thus, where there was no evidence that the judge before issuing a warrant for the arrest of the 35-year-old accused, considered her ability to pay, the warrant was quashed. *Contra Williams v. Canada (Attorney-General)* (1990), 61 C.C.C. (3d) 198 (B.C.S.C.).

**Subsec. (11)** – It was held in relation to the former s. 722(10) [which then applied to summary conviction proceedings] that even after the termination of an extension of time to pay a fine the sentencing court is not *functus* to grant another further extension of time. Furthermore, even though the trial judge’s warrant of committal had been executed and he had since died, his ministerial, not judicial, issuance of the warrant, which is nothing more than a written direction to carry out a sentence, may in effect be res-

cinded by another judge's order granting a further extension of time to pay the fine: *R. v. Yamelst* (1975), 22 C.C.C. (2d) 502, [1975] 3 W.W.R. 546 (B.C.S.C.).

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**FINE OPTION PROGRAM / Credits and other matters / Deemed payment / Federal-provincial agreement.**

**718.1** (1) An offender, other than a corporation, against whom a fine is imposed in respect of an offence may, whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine, discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose by the Lieutenant Governor in Council

(a) of the province in which the fine was imposed; or

(b) of the province in which the offender resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed.

(2) A program referred to in subsection (1) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.

(3) Credits earned for work performed as provided by subsection (1) shall, for the purposes of this Act, be deemed to be payment in respect of a fine.

(4) Where, by virtue of section 723, the proceeds of a fine belong to Her Majesty in right of Canada, an offender may discharge the fine in whole or in part in a fine option program of a province pursuant to subsection (1), where an appropriate agreement is in effect between the government of the province and the Government of Canada. R.S.C. 1985, c. 27 (1st Supp.), s. 156.

**CROSS-REFERENCES**

See ss. 723 and 724 for destination of the proceeds of fines and recovery, respectively. The imposition and enforcement of fines levied against corporate accused are governed by ss. 719 and 720. A corporate accused may not avail itself of the fine option program.

**SYNOPSIS**

This section authorizes the Lieutenant Governor in Council to establish a programme whereby an individual who has been fined can earn credits to be applied in payment of the fine by performing designated work during a period of up to two years. Governments can enter into agreements to provide for the work being done in a province other than the one where the sentence was imposed or where the fine belongs to the Government of Canada (*e.g.*, a narcotics offence).

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**FINES ON CORPORATIONS.**

**719.** Notwithstanding section 718, a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

(a) that is in the discretion of the court, where the offence is an indictable offence; or

(b) not exceeding twenty-five thousand dollars, where the offence is a summary conviction offence. R.S., c. C-34, s. 647; 1974-75-76, c. 93, s. 78; R.S.C. 1985, c. 27 (1st Supp.), s. 157.

**CROSS-REFERENCES**

A corporate accused is subject to a fine prescribed in the general punishment provisions of this section "except where otherwise provided by law".



See s. 35(1) of the Interpretation Act, R.S.C. 1985, c. I-21, for a definition of “corporation”. There is no Criminal Code definition of “corporation”.

## ANNOTATIONS

The superior court has jurisdiction to issue a *Mareva*-type injunction in support of the criminal law to preserve the assets of the accused for the payment of a possible fine should it be convicted. This jurisdiction, however, is to be exercised only in exceptional circumstances and the Crown must demonstrate (i) that the accused has assets within the jurisdiction of the court; (ii) that there exists a strong *prima facie* case the accused will likely be convicted of the offence with which it is charged, and that the amount of the fine will likely equal or exceed the value of the assets sought to be attached; and (iii) that the accused is or has been dissipating, removing or disposing of its assets for the improper purpose of making them unavailable to pay a fine in the event of conviction. Finally, the Crown must give the usual undertaking respecting damages: *R. v. Consolidated Fastfrate Transport Inc.* (1995), 99 C.C.C. (3d) 143, 125 D.L.R. (4th) 1, 24 O.R. (3d) 564 (C.A.).

## ENFORCEMENT OF FINES ON CORPORATIONS.

**720.** Where a fine that is imposed on a corporation is not paid forthwith, the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in the superior court of the province in which the trial was held, and that judgment is enforceable against the corporation in the same manner as if it were a judgment rendered against the corporation in that court in civil proceedings. R.S., c. C-34, s. 648.

## CROSS-REFERENCES

Section 724 prescribes the general recovery provisions relating to fines, pecuniary penalties and forfeitures.

See s. 723 for the destination of the proceeds of fines.

Payment of a fine may be suspended by the court of appeal under s. 683(5). Pursuant to s. 822(1), summary conviction appeals under s. 813 are also subject to these provisions.

## SYNOPSIS

This section provides that where a corporation is convicted and fined, the fine may be enforced and collected in the same way as a civil judgment of the superior court of the province.

**COMMENCEMENT OF SENTENCE / Convicted person lawfully at large / Determination of sentence / When time begins to run / Where fine imposed / Application for leave to appeal.**

**721. (1)** A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

**(2)** Any time during which a convicted person is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed pursuant to his conviction.

**(3)** In determining the sentence to be imposed on a person convicted of an offence, a justice, provincial court judge or judge may take into account any time spent in custody by the person as a result of the offence. R.S.C. 1970, c. 2 (2nd Supp.), s. 13.

**(4)** Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appealed to, commences or shall be deemed to be resumed, as the case requires, on the day on which the convicted person is arrested and taken into custody under the sentence.

(5) Notwithstanding subsection (1), where the sentence that is imposed is a fine with a term of imprisonment in default of payment; no time prior to the day of execution of the warrant of committal counts as part of the term of imprisonment.

(6) An application for leave to appeal is an appeal for the purposes of this section. R.S., c. C-34, s. 649; R.S., c. 2 (2nd Supp.), s. 13; R.S.C. 1985, c. 27 (1st Supp.), s. 203.

#### CROSS-REFERENCES

Section 687 authorizes the determination of sentence appeals by the court of appeal. Sentences imposed under s. 686(1)(b)(i) and (3) by the court of appeal, may run from the date of imposition or, alternatively, the date of the original sentence. The latter date will prevail in the event that the appeal court affirms the original sentence. Time spent by the accused in custody as a result of the offence may be considered by the appeal court in determining the imposition of a sentence, pursuant to subsec. (3). Under s. 746, certain periods of time spent in custody must be considered when sentences for treason, high treason or murder are imposed.

See ss. 731 to 733 for the location and manner of serving a sentence of imprisonment.

#### SYNOPSIS

Unless otherwise provided for by statute, a sentence commences when it is imposed (subsec. (1)). However, a term of imprisonment, whether imposed at trial or on appeal, commences or resumes (*e.g.*, where the accused is on bail pending appeal) when the accused is taken into custody (subsec. (4)).

Time spent on bail does not count as part of any sentence (subsec. (2)). Except where a "minimum" sentence is required the court may take into consideration any time spent in custody awaiting trial and/or sentence (subsec. (3)).

No time prior to the day on which a warrant of committal for non-payment of a fine is executed shall count as part of the default term (subsec. (5)).

#### ANNOTATIONS

**Commencement of sentence [subsec. (1)]** – Once a conviction is set aside, the term of imprisonment imposed for that conviction is also set aside and a sentence originally made consecutive to that sentence begins to run from the date it was imposed: *Re Zitek and The Queen* (1986), 30 C.C.C. (3d) 60 (Ont. C.A.).

**Subsec. (4)** – A conviction for escaping lawful custody was imposed where the accused was present in Court when a sentence of incarceration was imposed but then left the Court after a recess when the officer in charge briefly left the room. He was in custody within the meaning of s. 145 as he was present when sentence was pronounced and submitted to arrest by asking permission of the officer to do various things, notwithstanding he was never placed in a prisoner's dock, handcuffed or otherwise physically placed under arrest. The Court, considering subsec. (4), held that there is a distinction between the arrest of a person before trial or the arrest of a person who is tried *in absentia* and therefore not present upon pronouncement of sentence, and this case of an accused who is present in Court, being in custody at the time of his sentence: *R. v. Zajner* (1977), 36 C.C.C. (2d) 417 (Ont. C.A.).

**Premature release of prisoner** – The mere fact that a mistake has been made in the administration of sentence cannot be taken to justify a premature release and protect the prisoner from re-arrest to serve the full sentence when the mistake is discovered: *Re Law and The Queen* (1981), 63 C.C.C. (2d) 412, 24 C.R. (3d) 332 (Ont. C.A.). In that case the error resulted because the appropriate authorities were never informed that the accused had abandoned his appeal from a conviction which had resulted in a penitentiary sentence when he was re-incarcerated in a reformatory for an offence committed while on bail pending appeal. The Court however appeared to recognize that special circumstances, such as perhaps existed in *Re Stanton and The Queen* (1979), 49 C.C.C. (2d) 177

(Ont. H.C.J.), could require the Court to order an accused's release following his re-arrest. In *Re Stanton and The Queen* the accused had been released due to an error in calculation by prison authorities. The accused, who believed he had been released on parole, had in no way contributed to the error and had lived openly in the community. The Court released the accused on *habeas corpus* holding that in the circumstances the time spent at large counted against the sentence.

Time spent by the accused on probation pending a Crown appeal against a suspended sentence does not count against the sentence of imprisonment imposed by the Court of Appeal: *Re Roach and The Queen* (1982), 2 C.C.C. (3d) 73 (B.C.S.C.), approved in *Re Roach and The Queen* (No. 2) (1983), 5 C.C.C. (3d) 90, 34 C.R. (3d) 249, [1983] 3 W.W.R. 711 (B.C.C.A.).

Nor does the time that the accused was at large following his release on *habeas corpus* count against the sentence when on appeal it is found that the Judge erred in releasing him and orders his re-arrest: *Re Law and The Queen* (No. 2) (1981), 64 C.C.C. (2d) 181, 24 C.R. (3d) 345 (Ont. H.C.J.) aff'd 65 C.C.C. (2d) 512n, 25 C.R. (3d) vii (Ont. C.A.).

**Time spent at large due to non-execution of warrant** – And in *Re Lachance and The Queen* (1985), 22 C.C.C. (3d) 119 (Que. S.C.), the court held that resort could be had to ss. 7, 12 and 24(1) of the Canadian Charter of Rights and Freedoms to relieve against the unfairness of requiring an inmate to serve the remainder of a sentence which would have expired much earlier but for the incompetence of the authorities in failing to execute an outstanding warrant of committal.

To a similar effect is *R. v. Lawrence* (1989), 47 C.C.C. (3d) 462, 74 Nfld. & P.E.I.R. 271 (Nfld. S.C.), where the court quashed a committal order, the accused having done everything in his power to surrender to prison upon dismissal of his appeal and it was only six months later that arrangements were finally made so that the prison authorities would accept the accused so he could serve the balance of a five-month sentence which would have been served but for the error of the penal system administrators.

**Pre-trial custody [subsec. (3)]** – Subsection (3) does not have the effect of permitting the court to impose less than the mandatory minimum prescribed by the Code: *R. v. Brown* (1976), 36 C.R.N.S. 246 (Ont. Co. Ct.); *R. v. Mitchell* (1990), 24 M.U.R. (2d) 174 (N.B.Q.B.); *Contra, R. v. Shecter* (1972), 15 Crim. L.Q. 263 (Ont. Co. Ct.).

While there is no automatic formula for taking into account pre-trial custody, the usual practice is to give credit against sentence which is somewhat more than the actual time in pre-trial custody: *R. v. Tallman* (1989), 48 C.C.C. (3d) 81, 68 C.R. (3d) 367, 65 Alta. L.R. (C.A.).

**Imprisonment in default of payment of fine [subsec. (5)]** – Although a warrant of committal in default of payment could have been executed earlier on the accused, an accused is validly held under such warrant even though had the warrant in fact been executed earlier the term of imprisonment could have been served concurrently to other sentences he was serving at the time: *Goyette v. The Queen*, [1982] 1 S.C.R. 688 (5:0).

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**REDUCTION OF IMPRISONMENT ON PART PAYMENT / Minimum that can be accepted / To whom payment made / Application of money paid / Definition of "penalty".**

**722. (1)** Where a term of imprisonment is imposed in default of payment of a penalty, the term shall, on payment of a part of the penalty, whether the payment was made before or after the issue of a warrant of committal, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total penalty.

**(2)** No amount offered in part payment of a penalty shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof, and where a



warrant of committal has been issued, no part payment shall be accepted until any fee that is payable in respect of the warrant or its execution has been paid.

(3) Payment may be made under this section to the person who has lawful custody of the prisoner or to such other person as the Attorney General directs.

(4) A payment under this section shall, unless the order imposing the penalty otherwise provides, be applied to the payment in full of costs and charges, and thereafter to payment in full of compensation or damages that are included in the penalty, and finally to payment in full of any part of the penalty that remains unpaid.

(5) In this section, "penalty" means all the sums of money, including fines, in default of payment of which a term of imprisonment is imposed and includes the costs and charges of committing the defaulter and of conveying him to prison. R.S., c. C-34, s. 650.

#### CROSS-REFERENCES

Section 723 governs the direction of the proceeds of fines, penalties and forfeitures. In the absence of other specific provisions, penalties are recoverable under the terms of s. 724.

For cost awards in defamatory libel cases, see s. 728. For costs upon an adjournment where accused has been misled or prejudiced by variance, error or omission in an indictment, see s. 601(5) and, as a condition of change of venue of trial on the prosecutor's application, s. 599(3). Each provision applies in the absence of a general authority to award costs in proceedings on indictment. Costs may be awarded in summary conviction trial proceedings under s. 809(1). For costs in summary conviction appeals, see ss. 826, 834(1) and 839(3).

#### SYNOPSIS

This section provides that a jail sentence in default of payment of a fine shall be reduced on a daily *pro rata* basis upon any payments made either before or after the warrant of committal has been executed. However, no partial payments shall be received until such payments would be sufficient to obtain at least one day's remission of sentence and until any fee associated with the issuance of the warrant and its execution has been paid (subsecs. (1), (2)).

Unless the court orders otherwise, any payments made shall be applied first to costs and charges, then in respect of compensation or damages, and lastly to retire any fine (subsec. (4)).

#### FINES AND PENALTIES TO GO TO PROVINCIAL TREASURER / Exception / Direction for payment to municipality.

723. (1) Where a fine, penalty or forfeiture is imposed or a recognizance is forfeited and no provision, other than this section, is made by law for the application of the proceeds thereof, the proceeds belong to Her Majesty in right of the province in which the fine, penalty or forfeiture was imposed or the recognizance was forfeited, and shall be paid by the person who receives them to the treasurer of that province.

#### (2) Where

(a) a fine, penalty or forfeiture is imposed

(i) in respect of a contravention of a revenue law of Canada,

(ii) in respect of a breach of duty or malfeasance in office by an officer or employee of the Government of Canada, or

(iii) in respect of any proceedings instituted at the instance of the Government of Canada in which that government bears the costs of prosecution, or

(b) a recognizance in connection with proceedings mentioned in paragraph (a) is forfeited,

the proceeds of the fine, penalty, forfeiture or recognizance belong to Her Majesty in

right of Canada and shall be paid by the person who receives them to the Receiver General.

(3) Where a provincial, municipal or local authority bears, in whole or in part, the expense of administering the law under which a fine, penalty or forfeiture is imposed or under which proceedings are taken in which a recognizance is forfeited,

- (a) the lieutenant governor in council may direct that the proceeds of a fine, penalty, forfeiture or recognizance that belongs to Her Majesty in right of the province shall be paid to that authority; and
- (b) the Governor in Council may direct that the proceeds of a fine, penalty, forfeiture or recognizance that belongs to Her Majesty in right of Canada shall be paid to that authority. R.S., c. C-34, s. 651.

#### CROSS-REFERENCES

Subsection (1) applies in the event that no other specific provision is made by law directing the proceeds of a fine, penalty or forfeiture. Section 724 governs the recovery or enforcement of penalties. The proper direction of proceeds is set out in subssecs. (1) and (2).

#### SYNOPSIS

This section sets out how the proceeds of fines, penalties and forfeitures are dealt with.

Normally such fines, etc. are paid to the treasurer of the province in which the sentence was imposed or the forfeiture ordered (subsec. (1)).

Where the matter arises in respect of a breach of duty by an officer or employee of the Government of Canada, in connection with a breach of a federal revenue law, or is otherwise a federal prosecution, any such proceeds go to the Receiver General of Canada (subsec. (2)).

The federal and provincial governments can direct that moneys derived in this way be directed to any provincial, municipal or local authority that has had to bear part of the costs of administering the law in question (subsec. (3)).

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#### RECOVERY OF PENALTIES / Limitation.

**724. (1) Where a fine, pecuniary penalty or forfeiture is imposed by law and no other mode is prescribed for the recovery thereof, the fine, pecuniary penalty or forfeiture is recoverable or enforceable in civil proceedings by Her Majesty, but by no other person.**

**(2) No proceedings under subsection (1) shall be instituted more than two years after the time when the cause of action arose or the offence was committed in respect of which the fine, pecuniary penalty or forfeiture was imposed. R.S., c. C-34, s. 652.**

#### CROSS-REFERENCES

Sections 770 to 773 govern the enforcement of, and recovery upon, recognizances. See s. 729 for recovery of costs in defamatory libel cases and s. 194 for punitive damages recovery resulting from convictions for s. 184 or s. 193 offences.

#### SYNOPSIS

In the absence of any other prescribed method of recovery, fines, penalties and forfeitures are recoverable or enforceable by the Crown in the civil courts. There is a two-year limitation period.

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#### COMPENSATION FOR LOSS OF PROPERTY / Enforcement / Moneys found on accused.

**725. (1) A court that convicts or discharges under section 736 an accused of an offence may, on the application of a person aggrieved, at the time sentence is**

imposed, order the accused to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by that person as a result of the commission of the offence.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest. R.S., c. C-34, s. 653; R.S.C. 1985, c. 27 (1st Supp.), s. 158.

**Note:** Section 725 re-enacted by R.S.C. 1985, c. 23 (4th Supp.), s. 6 (amended 1992, c. 1, s. 58(1) by re-enacting para. (b); to come into force when para. (b) comes into force as provided by s. 58(2), however, that part of s. 58(1) which re-enacts para. (b) and s. 58(2) repealed by 1995, c. 22, ss. 14 and 15 (to come into force by the order of the Governor in Council)) is to come into force on proclamation, but, R.S.C. 1985, c. 23 (4th Supp.), s. 6 itself repealed by 1995, c. 22, s. 11 (to come into force by order of the Governor in Council). The unproclaimed text printed in *lightface italics* as amended by 1992, c. 1, s. 58 reads as follows:

#### RESTITUTION TO VICTIMS OF OFFENCES.

725. *Where an offender is convicted or discharged under section 736 of an offence, the court imposing sentence on or discharging the offender shall, on application of the Attorney General or on its own motion, in addition to any other punishment imposed on the offender, if it is applicable and appropriate in the circumstances, order that the offender shall, on such terms and conditions as the court may fix, make restitution to another person as follows:*

- (a) *in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable; or*
- (b) *in the case of bodily injury to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages, including loss of income or support, incurred as a result of the bodily injury, where the amount is readily ascertainable.*

#### CROSS-REFERENCES

Section 727 requires that an inquiry be conducted before a restitution order is made under s. 725 or 726. A party acting in good faith and without notice with respect to property obtained unlawfully may seek a restitution order under s. 726. For procedure, notice, payment and enforcement of restitution orders, see ss. 727.1 to 727.8.

A victim fine surcharge may be imposed under s. 727.9 upon conviction or discharge for a Criminal Code offence or under the Narcotic Control Act or Parts III or IV of the Food and Drugs Act.

The s. 673 definition of "sentence" includes a restitution order under s. 725 or 726 and a "victim fine surcharge" under s. 727.9. These orders may be appealed to the court of appeal under ss. 675(1)(b) and 676(1)(d), in proceedings upon indictment. See s. 785 for a definition of "sentence" which applies to summary conviction proceedings, and which does not include either restitution or "victim fine surcharge".

Section 683(5) permits the court, in appeal proceedings upon indictment, to suspend a restitution or "victim fine surcharge" pending determination of the appeal.

Operation of the orders is automatically suspended by s. 689 until expiration of the appeal period



or the accused has waived the right of appeal or until an appeal has been determined. The court of appeal may vary or annul the suspension.

## SYNOPSIS

This section authorizes the court, on application by the victim, to order the accused, at the time sentence is imposed, to compensate the victim of the crime for any loss or damage to property occasioned by the commission of the offence (subsec. (1)).

If such an order is not paid forthwith it may be enforced by the victim as a civil judgment in the superior court of the province in which it was made (subsec. (2)).

The court sentencing the accused may direct that moneys which were in the possession of the accused at the time of arrest, and which are not subject to a claim by another party, be used to satisfy the compensation order (subsec. (3)).

*(Unproclaimed provision) This section authorizes the court to order the accused, at the time sentence is imposed, to make restitution with respect to: (a) any loss or damage to property resulting from the commission of the offence or the arrest or attempted arrest of the accused; and (b) all pecuniary damages suffered by any person who sustained bodily injury as a result of the commission of the offence or the arrest or attempted arrest of the accused; provided that the amount is readily ascertainable.*

## ANNOTATIONS

In *R. v. Zelensky et al.* (1978), 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179, [1978] 2 S.C.R. 940, it was held (6:3) that this section is *intra vires* Parliament being in pith and substance part of the sentencing process. However an order for compensation should only be made with restraint and caution and in particular should not be made where there is any serious contest on legal or factual issues or on whether the person alleging himself to be aggrieved is so in fact. An order under this section is by virtue of the definition of “sentence” in s. 673 appealable as provided under the Criminal Code. The filing of the order in the provincial superior Court as provided in subsec. (2) does not put in motion any civil proceedings other than those relating to enforcement. Only the accused has the right of appeal against a compensation order, and not the person in whose favour the compensation order was made.

The mere fact that the claim is disputed is not a sufficient basis for refusing to make the order where the amount of money involved and the nature of the claim indicate that the claim could be dealt with reasonably and expeditiously: *R. v. Ghislieri* (1980), 56 C.C.C. (2d) 4, [1981] 2 W.W.R. 303 (Alta. C.A.).

The accused’s inability to pay a large compensation order is not determinative against an order under this section as where the making of such an order is the most expeditious way for the victim to fulfil a pre-condition entitling them to compensation from another source, in this case the Law Society Compensation Fund. Unlike a restitution order made as a term of a probation order, an order under this section is enforceable as a civil judgment and so entirely different considerations apply. Where there is no dispute as to the amounts payable it would not assist the accused’s rehabilitation to permit him to put the victims to additional expense by launching civil actions: *R. v. Scherer* (1984), 16 C.C.C. (3d) 30, 42 C.R. (3d) 376 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

The means of the offender will not always be the controlling factor in determining whether a compensation order should be made. Thus, in *R. v. Fitzgibbon* (1990), 55 C.C.C. (3d) 449, [1990] 1 S.C.R. 1005, 76 C.R. (3d) 378, it was held appropriate to make a compensation order against the accused, an undischarged bankrupt, who, while a lawyer, had defrauded his clients. The claims of the victims of the fraudulent acts should be paramount. Further, the Law Society, which through its compensation fund had paid back many of the accused’s victims, was a person aggrieved within the meaning of this section and a compensation order could properly be made in its favour, provincial legislation providing that the Law Society was to be subrogated to the rights of the vic-

tim to whom it paid money from its compensation fund. Finally, a victim who was only given partial repayment by the Law Society was entitled to an order under this section against the offender for the balance of the amount of which he was defrauded.

In *R. v. Gorunuk*, [1963] 1 C.C.C. 320, 40 W.W.R. 640 (B.C.C.A.), it was held that the Criminal Code is peremptory in requiring that an application for compensation must be made at the time of sentence. An order made the next day (not on adjournment) is without jurisdiction. It was held in the same Court that the magistrate still has jurisdiction if he waits a few days before deciding an application made under s. 725.

Where a convicted person, through funds raised by friends and relatives, voluntarily paid into Court prior to sentencing an amount equal to the maximum money that he could have benefited by his criminal fraud and prior to payment out of Court to the persons aggrieved he became bankrupt, the trustee in bankruptcy of his estate may not claim that money: *Re Blackhawk Downs, Inc. and Arnold et al.*, [1973] 3 O.R. 729, 38 D.L.R. (3d) 75 (H.C.J.).

Although the accused is an undischarged bankrupt, leave of the bankruptcy court is not required before a court in criminal proceedings makes a compensation order under this section. It is only when the compensation order is filed with the superior court that it becomes enforceable against the person and property of the accused. When the victim sought to enforce the order then the trustee in bankruptcy must be notified and the consent of the bankruptcy court obtained: *R. v. Fitzgibbon*, *supra*.

In order to invoke subsec. (2), the victim at the time of filing the order in the Superior Court should present evidence as to the amount of the order still outstanding and the court clerk may require such evidence before issuing a writ of execution or other civil process for enforcement of the order: *Re 103956 Canada Ltd. and Moniuk* (1981), 61 C.C.C. (2d) 285, 23 C.R. (3d) 87 (N.W.T.S.C.).

A compensation order made under this section cannot bar resort to civil suit to recover the monies owed to the victim. Double recovery would be prevented by the jurisdiction of the civil court to require a proper accounting for any sums recovered under the compensation order: *London Life Insurance Co. v. Zavitz* (1992), 12 C.R. (4th) 267, 65 B.C.L.R. (2d) 140, 5 C.P.C. (3d) 14 (C.A.).

Crown counsel may apply for an order under this section as agent for the victim. Further, Crown counsel need not produce a written application from each person aggrieved and there is no necessity that such persons appear personally or by their own privately retained solicitor. Where, however, there is some conflict or inconsistency between the role as Crown counsel and as agent for the victim then Crown counsel can so inform the victim so that he can pursue an application independently under this section: *R. v. Wilcox* (1988), 43 C.C.C. (3d) 432 (N.W.T.S.C.).

As with other aspects of the sentence hearsay evidence is admissible to prove the amount of the loss: *R. v. Wilcox* (1980), 43 C.C.C. (3d) 432, [1988] N.W.T.R. 353 (S.C.).

A compensation order may be particularly appropriate to deter acts of vandalism and can and should be used either to replace or reduce what would otherwise be a fit sentence of imprisonment: *R. v. Hoyt* (1992), 77 C.C.C. (3d) 289, 17 C.R. (4th) 338 (B.C.C.A.).

This section does not authorize an order representing loss of rents or profits from the loss of property. The order must be limited to the replacement value of the thing: *R. v. Brunner* (1995), 97 C.C.C. (3d) 31, 38 C.R. (4th) 250, [1995] 5 W.W.R. 413 (Alta. C.A.).

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#### **COMPENSATION TO BONA FIDE PURCHASERS / Enforcement / Moneys found on accused.**

**726. (1)** Where an accused is convicted or discharged under section 736 of an offence and any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, the court may, on the application of the pur-

chaser after restitution of the property to its owner, order the accused to pay to the purchaser an amount not exceeding the amount paid by the purchaser for the property.

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(3) All or any part of an amount that is ordered to be paid under subsection (1) may, if the court making the order is satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the accused and the court so directs, be taken out of moneys found in the possession of the accused at the time of his arrest. R.S., c. C-34, s. 654; R.S.C. 1985, c. 27 (1st Supp.), s. 159.

Note: Section 726 re-enacted by R.S.C. 1985, c. 23 (4th Supp.), s. 6 is to come into force on proclamation, however, R.S.C. 1985, c. 23 (4th Supp.), s. 6 itself repealed by 1995, c. 22, s. 11 (to come into force by order of the Governor in Council). The unproclaimed text printed in *lightface italics* reads as follows:

RESTITUTION TO PERSONS ACTING IN GOOD FAITH.

726. Where an offender is convicted or discharged under section 736 of an offence and

(a) any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or

(b) the offender has borrowed money on the security of that property from a person acting in good faith and without notice,

the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to pay as restitution to the person referred to in paragraph (a) or (b), on such terms as the court may fix, an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

## CROSS-REFERENCES

Restitution to victims of specified offences is authorized by s. 725. Orders under both ss. 725 and 726 may be made in respect of the same proceedings. There is no provision regarding the status of an applicant under s. 726. Such orders are made at the discretion of the court, and would usually be brought by the prosecutor on behalf of the victim.

Also see references cited under s. 725.

## SYNOPSIS

This section authorizes the court, on application by an innocent purchaser, to order the accused, at the time sentence is imposed, to compensate that innocent person who purchased property obtained by the commission of the offence from the accused (e.g., stolen goods), where such property has been returned to its lawful owner (subsec. (1)).

If such an order is not paid forthwith it may be enforced by the innocent purchaser as a civil judgment in the superior court of the province in which it was made (subsec. (2)).

The court sentencing the accused may direct that moneys which were in his or her possession at the time of arrest, and which are not subject to a claim by a third party, be used to satisfy the compensation order (subsec. (3)).

(Unproclaimed provision) This section authorizes the court to order the accused, at the time sentence is imposed, to make restitution to an innocent party who either: (a) purchased property obtained by the commission of the offence from the accused (e.g., stolen goods); or (b) lent



*money to the accused on the security of such property; where such property has been returned to its lawful owner.*

**727. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 160.]**

**Note:** Sections 727 (new provision) to 727.8 enacted by R.S.C. 1985, c. 23 (4th Supp.), s. 6 (to come into force on proclamation, however, R.S.C. 1985, c. 23 (4th Supp.), s. 6 itself repealed by 1995, c. 22, s. 11 (to come into force by order of the Governor in Council)). The unproclaimed text printed in *lightface italics* reads as follows:

*INQUIRY CONCERNING AMOUNT OF LOSS AND ABILITY OF OFFENDER TO PAY / Offender to disclose finances / Report concerning offender's ability to make restitution / Copies of report provided to parties / Time within which restitution to be made / Payment to estate.*

*727. (1) Before making an order to pay an amount as restitution under section 725 or 726 and for the purpose of determining the amount to be paid, the time for payment and the method of payment, the court shall, unless the offender acknowledges the ability to pay, conduct or cause to be conducted an inquiry concerning the present or future ability of the offender to pay the amount and, in so doing, the court shall consider*

- (a) the employment, earning ability and financial resources of the offender at the present or in the future and any other circumstances that may affect the ability of the offender to make restitution;*
- (b) any benefit, financial or otherwise, derived, directly or indirectly, by the offender as a result of the commission of the offence; and*
- (c) any harm done to, or loss suffered by, any person to whom restitution may be ordered to be made.*

*(2) The court may require the offender, for the purposes of subsection (1), to disclose to the court, orally or in writing, particulars of the financial circumstances of the offender in the manner and form prescribed by the court and that information shall not be used for any other purpose, except in a prosecution for perjury or giving contradictory evidence in any proceeding.*

*(3) A court may require that a written report be prepared and filed with the court containing information concerning*

- (a) the financial status of the offender and, in particular, the ability of the offender to make restitution; and*
- (b) the amount to be paid to any person by the offender.*

*(4) Where a report is filed with the court under subsection (3), the clerk of the court shall forthwith cause a copy of the report to be provided to the offender or counsel for the offender and the prosecutor.*

*(5) Where a court makes an order of restitution under section 725 or 726 in relation to an offender, the court may require the offender to comply with the order forthwith or within a specified period ending not later than, or in specified instalments ending not later than, three years after the day on which the order is made.*

*(6) Where a person to whom an amount is ordered to be paid under section 725 or 726 dies before the order is fully complied with, the amount shall be paid to the estate of such person.*

**CROSS-REFERENCES**

*Under s. 727.2, parties potentially benefiting from a restitution order may receive notice of the order before it is made.*

*A restitution order may be paid out of funds found in the possession of the accused upon his arrest, pursuant to s. 727.1. Restitution orders have priority over forfeitures and fines under s. 727.3. See ss. 727.5 to*

727.7 for enforcement provisions. Subject to s. 727.4, payment schedules may be extended. Section 727.8 describes the reduction of default terms by reduced payment.

## SYNOPSIS

This section sets out the procedures open to a court in deciding what compensation or restitution order is appropriate.

Unless the accused acknowledges the ability to pay, the court shall conduct, or cause to be conducted, an inquiry with respect to: (a) the accused's financial situation (both present and future); (b) any financial or other benefit derived by the accused from the commission of the offence; and (c) the harm done to or loss suffered by any person in whose favour an order may be made (subsec. (1)).

The accused may be required to provide particulars of his or her financial situation. Such information shall remain confidential except in a subsequent prosecution for perjury or giving contradictory evidence (subsec. (2)).

If the court directs the preparation of a written report copies are to be provided to the accused and the prosecutor (subsecs. (3), (4)).

The court can order payment to be made forthwith or by instalments over not more than three years (subsec. (5)).

If the person in whose favour an order is made dies, any amount which remains owing shall be paid to his or her estate (subsec. (6)).

## MONEYS FOUND ON OFFENDER.

727.1 All or any part of an amount that is ordered to be paid under section 725 or 726 may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

## CROSS-REFERENCES

Restitution or forfeiture of property obtained by crime is authorized by s. 491.1.

A dispute as to ownership or possession of monies found in possession of the accused upon his arrest may preclude their application to a restitution order.

Also see references cited under ss. 725 and 727.

## SYNOPSIS

The court sentencing the accused may direct that moneys in the possession of the accused at the time of arrest, and which are not subject to a claim by a third party, be used to satisfy a restitution order.

NOTICE TO INTERESTED PERSONS / Notice of orders under section 725 and 726 / Service of notices / Order of restitution to be recorded.

727.2 (1) Before making an order of restitution under section 725 or 726, the court may direct that notice be given to any person who may be the beneficiary of such an order and to such other persons having an interest in the order as the court thinks fit.

(2) Where a court makes an order of restitution under section 725 or 726, it shall cause notice of the terms of the order or a copy of the order to be given to the person who is to be the beneficiary of the order.

(3) Any notice or copy of an order required to be given pursuant to this section or section 727.4 shall be given or served in such manner as the court directs or as may be prescribed by rules of court made under section 482.

(4) Where a court makes an order of restitution under section 725 or 726, it shall enter the terms

*of the order in the record of the proceedings or, where the proceedings are not recorded, the order and the terms thereof shall be in writing.*

#### CROSS-REFERENCES

*Form and substance of notices are governed by rules of court made pursuant to s. 482(3)(a) and (c).*

*Also see references cited under ss. 725 and 727.*

#### SYNOPSIS

*Before making any order the court may direct notice to be given to any potential beneficiary, or to any person whom it thinks may have an interest in the matter (subsec. (1)). Either notice, or a copy of any order made, shall be given to every beneficiary (subsec. (2)).*

*Where the proceedings are not recorded, any order made must be in writing (subsec. (4)).*

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#### PRIORITY TO RESTITUTION.

*727.3 Where the court finds it applicable and appropriate in the circumstances of a case to make, in relation to an offender, an order of restitution under section 725 or 726, and*

*(a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or*

*(b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means and ability to comply with both the order of restitution and the order to pay the fine,*

*the court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.*

#### CROSS-REFERENCES

*Restitution orders under ss. 725 and 726 are given priority by this section.*

*See s. 192 for forfeiture upon conviction dealing with electro-magnetic, acoustic, mechanical or other device.*

*Section 164(4) and (6) contain similar provisions respecting obscene publications. Also see ss. 491 and 491.1 regarding weapons and property obtained by crime, respectively. For fines in indictable matters, see ss. 718 to 720 and ss. 722 to 724.*

*Also see references under ss. 725 and 727.*

#### SYNOPSIS

*This section provides that the court shall give priority to the making of a restitution order and thereafter will consider ordering forfeiture or imposing a fine.*

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#### EXTENSION OF TIME FOR PAYMENT OF ORDERS OF RESTITUTION / Notice to beneficiary / Maximum extension for payment of restitution.

*727.4 (1) Subject to subsection (2), where an order of restitution made under section 725 or 726 specifies a period within which or instalments in which payment is to be made, the court that made the order may, unless an information has been laid under section 727.6, on an application by or on behalf of the offender, extend the period or vary the instalments, subject to rules of court made under section 482.*

*(2) Before extending the period within which or varying the instalments in which payment is to be made pursuant to an order of restitution made under section 725 or 726, the court may direct that notice be given to, and may hear, the beneficiary of the order.*

*(3) A court shall not extend the period within which payment of restitution is to be made pursuant to subsection (1) to a date later than the expiration of the fourth year after the day on which the order of restitution was made under section 725 or 726, as the case may be.*



**CROSS-REFERENCES**

*The court of appeal may suspend a restitution order pending determination of the appeal in respect thereof.*

*The court may deal with restitution orders under s. 689 pursuant to its plenary authority.*

*Also see references cited under ss. 725 and 727.*

**SYNOPSIS**

*This section provides that the court can lengthen the time for an accused to fulfil the terms of a restitution order.*

*Providing that no information alleging a failure to comply, or a default with respect to the order, has been laid (see s. 727.6(1)) the accused can apply for an extension of time or a variation in instalments (subsec. (1)). The court can direct that the beneficiary be given notice of the hearing in this connection and the beneficiary may also be heard at this hearing (subsec. (2)).*

*Time may not be extended beyond four years from the date the original order was made (subsec. (3)).*

**ENFORCEMENT OF ORDERS OF RESTITUTION.**

*727.5 Where an order of restitution made under section 725 or 726 is not complied with forthwith, the beneficiary of the order may, by filing the order, enter it as a judgment in the superior court of the province in which the trial was held and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.*

**CROSS-REFERENCES**

*See s. 720 for a similar provision regarding the enforcement of fines imposed on corporate defendants.*

*For the recovery of penalties in civil proceedings by the Crown, see s. 724. Sections 770 to 773 govern the enforcement of recognizances.*

*The court of appeal may suspend a restitution order pending determination of the appeal in respect thereof. The court may deal with restitution orders under s. 689 under its plenary authority.*

*Also see references cited under ss. 725 and 727.*

**SYNOPSIS**

*If a restitution order is not complied with forthwith it may be enforced by the beneficiary as a civil judgment in the superior court of the province in which it was made.*

*IDEM / When default in payment of restitution / Limitation / Hearing / Disposition after hearing / Effect of judgment / Where reasonable excuse / Notice / Maximum extension for payment of restitution / Service of term of imprisonment / Endorsement of order as varied.*

*727.6 (1) Any person who, on reasonable grounds, believes that an offender has failed or refused to comply with, or defaulted under, an order of restitution made under section 725 or 726 may lay an information in writing and under oath before a justice who shall receive the information, and the matter shall be dealt with by the court that made the order or any other court that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order or, with the consent of the prosecutor and the offender, by any other court of criminal jurisdiction or superior court of criminal jurisdiction.*

*(2) The payment of an amount by way of restitution is in default when any part of the amount is due and unpaid on the day fixed or provided for payment under the terms of the order of restitution.*

*(3) No proceedings under subsection (1) shall be instituted more than six years after the date of the alleged failure or refusal to comply or alleged default.*

(4) *The justice who receives an information under subsection (1) shall require the offender to appear before the court that, pursuant to subsection (1), is to deal with the matter.*

(5) *At a hearing held pursuant to this section, the court shall hear the prosecutor and the offender and, where the court is satisfied that the offender has failed or refused, without reasonable excuse, the proof of which lies on the offender, to comply with the order of restitution made in relation to that offender, the court shall*

- (a) direct that the order be filed and entered as a judgment for the unpaid amount of the order in the superior court of the province in which the trial was held; and*
- (b) if it is appropriate in the circumstances, impose on the offender a term of imprisonment not exceeding two years, where the order was made in respect of an indictable offence, or not exceeding six months, where the order was made in respect of a summary conviction offence.*

(6) *A judgment entered in a court pursuant to paragraph (5)(a) is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.*

(7) *At a hearing held pursuant to this section, where an offender establishes that the offender had a reasonable excuse for failing or refusing to comply with the order of restitution made in relation to that offender, the court may, subject to subsections (8) and (9), extend any term of the order, including the period within which payment of restitution is to be made, and vary any other term of the order except the amount ordered to be paid.*

(8) *Before exercising any of the powers provided for in subsection (7), the court may direct that notice be given to, and may hear, the beneficiary of the order of restitution.*

(9) *A court shall not extend the period within which payment of restitution is to be made pursuant to subsection (7) to a date later than the expiration of the fourth year after the day on which the order of restitution was made under section 725 or 726, as the case may be.*

(10) *Any term of imprisonment imposed under this section shall be served consecutively to any other term of imprisonment that is being or is to be served by the offender unless the court orders otherwise.*

(11) *Where, under subsection (7), the court makes any changes or additions to an order or the terms or conditions thereof or changes the period for which an order is to remain in force, it shall endorse the order accordingly and cause the offender to be informed of its action and to be given a copy of the order so endorsed.*

#### CROSS-REFERENCES

*In proceedings under s. 727.6, the accused may be compelled to appear by the provisions of s. 727.7. An order under subsec. (5) or (7) may not be appealed as of right.*

*Also see references cited under ss. 725 and 727.*

#### SYNOPSIS

*This section deals with what occurs when a restitution order has not been complied with.*

*Where reasonable grounds exist to believe that an accused has failed or refused to comply with, or defaulted under, an order, an information may be laid before a justice of the peace, within six years of the alleged breach. The matter shall thereafter be dealt with by the court which made the order, or any other court that would have had jurisdiction to make the order having regard to the election of the accused. By consent the allegation may be heard by a court of criminal jurisdiction or a superior court of criminal jurisdiction (see s. 2) (subsecs. (1), (3)).*

*If at the hearing of the matter the court is satisfied that a breach has occurred, it shall: (a) direct that the order be filed as a judgment in the superior court for the unpaid balance; and (b) if appropriate, sentence the accused to a period of imprisonment. The maximum term is two*

years if the order was made in respect of an indictable offence; six months if in summary conviction proceedings (subsec. (5)).

If the accused establishes a “reasonable excuse” for failing to abide by the conditions of the order the court may extend the period of time or vary any other term of the order, except the amount to be paid. The court can direct that notice be given to the beneficiary before making any variation and may hear the beneficiary. Time may not be extended beyond four years from the date the original order was made (subsec. (7), (7.1), (8)).

Unless otherwise ordered, any period of incarceration imposed in respect of a breach of a restitution order shall be served consecutive to any other sentence (subsec. (9)).

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#### COMPELLING APPEARANCE.

727.7 The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice and with respect to release and detention apply, with such modifications as the circumstances require, to proceedings under section 727.6 and in particular, but without limiting the generality of the foregoing,

- (a) a peace officer may arrest without warrant a person bound by an order made under section 725 or 726 who has contravened the order or who, on reasonable grounds, is believed to have contravened the order, where the peace officer has reasonable grounds to believe that, if the person is not so arrested, the person will fail to attend court in order to be dealt with according to law; and
- (b) as if the references in those provisions of Parts XVI and XVIII to an “offence” were references to a “contravention of an order to make restitution”.

#### CROSS-REFERENCES

See s. 727.6 for the conduct of a default hearing.

Also see references cited under ss. 725 and 727.

#### SYNOPSIS

The normal rules and procedures relating to compelling the appearance of the accused and release apply to an information under s. 727.6(1). Further, a police officer may arrest without warrant for such a contravention of an order if he or she believes, on reasonable grounds, that such action is necessary to ensure the accused will attend court.

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REDUCTION OF IMPRISONMENT ON PARTIAL PAYMENT / Minimum that can be accepted / To whom payment made / Application of money paid / Priority to restitution.

727.8 (1) Where a term of imprisonment is imposed under section 727.6 for failure or refusal to pay an amount by way of restitution pursuant to an order made under section 725 or 726, the term shall, on the payment of part of the amount, whether the payment was made before or after the issue of a warrant of committal, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total amount in respect of which the offender was imprisoned.

(2) No amount offered in partial payment shall be accepted unless it is sufficient to secure a reduction of sentence of one day, or a multiple thereof, and where a warrant of committal has been issued, no partial payment shall be received until any fee that is payable in respect of the warrant or its execution has been paid.

(3) Payment may be made under this section to the person who has lawful custody of the offender or to such other person as the Attorney General directs.

(4) Subject to subsection (5), a payment under this section shall be applied first to the payment in full of the amount by way of restitution and thereafter to the payment in full of the costs and charges of committing and conveying the offender to prison.



(5) *Where a term of imprisonment is imposed for failure or refusal to pay both a fine and an amount by way of restitution, a payment under this section shall be applied first to the payment in full of any part of the amount to be paid by way of restitution that remains unpaid, and thereafter to payment in full of any part of the fine that remains unpaid.*

**CROSS-REFERENCES**

*See references cited under ss. 722, 725 and 727.*

**SYNOPSIS**

*This section provides that a jail sentence imposed for breach of a restitution order shall be reduced on a daily pro rata basis upon any payments made either before or after the warrant of committal has been executed. However, no partial payments shall be received until such payments would be sufficient to obtain at least one day's remission of sentence and until any fee associated with the issuance of the warrant and its execution has been paid (subsecs. (1), (2)).*

*Payments made under this section shall be applied first to the payment in full of any restitution, then to any fine that is outstanding and, lastly, to any costs and charges of committing and conveying the accused to prison (subsecs. (4), (5)).*

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**VICTIM FINE SURCHARGE / Exception / Written reasons for not making order / Amounts applied to aid victims / Regulations / Enforcement.**

**727.9 (1)** Subject to subsection (2), where an offender is convicted or discharged under section 736 of an offence under this Act, Part III or IV of the *Food and Drugs Act* or the *Narcotic Control Act*, the court imposing sentence on or discharging the offender shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge in an amount not exceeding

(a) fifteen per cent of any fine that is imposed on the offender for that offence or, where no fine is imposed on the offender for that offence, ten thousand dollars, or

(b) such lesser amount as may be prescribed by, or calculated in the manner prescribed by, regulations made by the Governor in Council,

subject to such terms and conditions as may be prescribed by regulations made by the Governor in Council.

**NOTE:** The portion preceding para. (a) replaced 1996, Bill C-8, s. 75 (to come into force by order of the Governor in Council). The text of that portion, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefore printed in *lightface italics* and reads as follows:

*Victim fine surcharge.*

*727.9 (1) Subject to subsection (2), where an offender is convicted or discharged under section 736 of an offence under this Act or the Controlled Drugs and Substances Act, the court imposing sentence on or discharging the offender shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge in an amount not exceeding*

(2) **Where the offender establishes to the satisfaction of the court that undue hardship to the offender or the dependants of the offender would result from the making of an order under subsection (1), the court is not required to make the order.**

(3) **Where the court does not make an order under subsection (1), the court shall**

(a) **provide the reasons why the order is not being made; and**

(b) **enter the reasons in the record of the proceedings or, where the proceedings are not recorded, provide written reasons.**

(4) **A victim fine surcharge imposed under subsection (1) shall be applied for the purposes of providing such assistance to victims of offences as the Lieutenant Governor**

in Council of the province in which the surcharge is imposed may direct from time to time.

(5) The Governor in Council may, for the purposes of subsection (1), make regulations prescribing the maximum amount or the manner of calculating the maximum amount of a victim fine surcharge to be imposed under that subsection, not exceeding the amount referred to in paragraph (1)(a), and any terms and conditions subject to which the victim fine surcharge is to be imposed.

(6) Subsections 718(3) to (11) apply and section 718.1 does not apply in respect of a victim fine surcharge imposed under subsection (1). R.S.C. 1985, c. 23 (4th Supp.), s. 6.

### *Transitional provision*

**Note:** R.S.C. 1985, c. 23 (4th Supp.), s. 8 provides as follows:

8. Section 727.9 of the Criminal Code, as enacted by section 6 of this Act, does not apply to any proceedings in respect of an offence committed before the coming into force of that section.

**NOTE:** Section 727.9 was enacted by R.S.C. 1985, c. 23 (4th Supp.), s. 6, however, s. 6 now repealed by 1995, c. 22, s. 11 (to come into force by order of the Governor in Council).

### CROSS-REFERENCES

The definition of “sentence” in s. 785 of Part XXVII does not include “victim fine surcharge”. Under s. 673, a “victim fine surcharge” is a “sentence” for the purposes of indictable offence appeals. The court of appeal may order the suspension of a “victim fine surcharge” pending determination of the appeal relating thereto under s. 683(5). Such order may follow the filing of a notice of appeal or notice of application for leave to appeal. The stay provisions of s. 689 do not apply to a “victim fine surcharge”. Provisions governing the imposition of imprisonment terms in default of payment, terms of payment and committal upon default are incorporated by the provisions of s. 718(3) to (11).

### SYNOPSIS

This section authorizes the imposition of victim fine surcharges in addition to any other penalty.

An accused convicted of an offence under the Criminal Code or of certain offences under the Food and Drugs and Narcotic Control Acts shall be ordered to pay an additional fine not exceeding: (a) 15% of any fine imposed or, if no fine is imposed, \$10,000; or (b) such lesser amount as may be prescribed by regulation (subsec. (1)).

If the accused establishes undue hardship the court can decline to impose the surcharge (subsec. (2)) but must give and record or write reasons in this regard (subsec. (3)).

Moneys collected are to be applied to assisting victims of crime (subsec. (4)).

The normal rules relating to fines apply with the exception that the fine option programme is not available (see ss. 718(3) to (11), 718.1) (subsec. (6)).

The Governor General in Council has the power to make regulations with respect to the amount or manner of calculating the surcharge (within the limits set out in subsec. (1)(a)) and the terms and conditions concerning its imposition (subsec. (5)).

### ANNOTATIONS

This provision is a valid exercise of the criminal law power under s. 91(27) of the Constitution Act, 1867: *R. v. Crowell* (1992), 76 C.C.C. (3d) 413, 16 C.R. (4th) 249, 115 N.S.R. (2d) 355 (C.A.).

**COSTS TO SUCCESSFUL PARTY IN CASE OF LIBEL.**

**728.** The person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount to be fixed by order of the court. R.S., c. C-34, s. 656.

**CROSS-REFERENCES**

See ss. 297 to 317 respecting defamatory libel. In the absence of a general authority in proceedings upon indictment, costs may be awarded under s. 599(3) as a condition of a change of venue on application by the prosecutor or upon an adjournment under s. 601(5). Under s. 683(3), costs are not allowable on appeals of conviction for indictable offences. Sections 684 and 694.1 permit costs relating to legal assistance.

For award of costs provisions in summary conviction proceedings, see s. 809 for trials and ss. 826, 834(1) and 839(3) on appeal.

The definition of "sentence" in s. 673 does not include an award of costs under s. 728.

Section 729 governs recovery of costs under s. 728.

**SYNOPSIS**

This section provides for costs to be paid to the successful party by the other party in proceedings by indictment for defamatory libel. The court shall fix reasonable costs.

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**HOW RECOVERED.**

**729.** Where costs that are fixed under section 728 are not paid forthwith, the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in the superior court of the province in which the trial was held, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered against him in that court in civil proceedings. R.S., c. C-34, s. 657.

**CROSS-REFERENCES**

For similar recovery or enforcement mechanisms, see ss. 720 and 724 for fines; see s. 727.5 for restitution orders and s. 727.9(6) for "victim fine surcharges".

The definition of "sentence" in s. 673 does not include an award of costs under s. 728.

**SYNOPSIS**

This section provides that costs to a successful party in a prosecution for defamatory libel may be enforced and collected in the same manner as a civil judgment of the superior court of the province.

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***Imprisonment*****IMPRISONMENT WHEN NO OTHER PROVISION.**

**730.** Every one who is convicted of an indictable offence for which no punishment is specially provided is liable to imprisonment for a term not exceeding five years. R.S., c. C-34, s. 658.

**CROSS-REFERENCES**

Where an offence is punishable by five years imprisonment or more, the accused is entitled to trial by jury under the guarantee of s. 11(f) of the Charter.

See ss. 126 and 127 for general punishment provisions for disobedience of a statute or lawful court order.



Those sections do not apply to orders respecting money payments. Maximum punishment prescribed in ss. 126 and 127 is two years, subject to specific contrary provisions.

**IMPRISONMENT FOR LIFE OR MORE THAN TWO YEARS / Subsequent term less than two years / Imprisonment for term less than two years / Sentence to penitentiary of person serving sentence elsewhere / Transfer to penitentiary / Only definite portion of certain sentences to be counted / Idem / Newfoundland.**

**731. (1)** Except where otherwise provided, a person who is sentenced to imprisonment for

(a) life,

(b) a term of two years or more, or

(c) two or more terms of less than two years each that are to be served one after the other and that, in the aggregate, amount to two years or more,

shall be sentenced to imprisonment in a penitentiary.

(2) Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, he shall be sentenced to and shall serve that term in a penitentiary, but if the previous sentence of imprisonment in a penitentiary is set aside, he shall serve that term in accordance with subsection (3).

(3) A person who is sentenced to imprisonment and who is not required to be sentenced as provided in subsection (1) or (2) shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or other place of confinement within the province in which he is convicted, other than a penitentiary, in which the sentence of imprisonment may be lawfully executed.

(4) Where a person is sentenced to imprisonment in a penitentiary while he is lawfully imprisoned in a place other than a penitentiary, he shall, except where otherwise provided, be sent immediately to the penitentiary and shall serve in the penitentiary the unexpired portion of the term of imprisonment that he was serving when he was sentenced to the penitentiary as well as the term of imprisonment for which he was sentenced to the penitentiary.

(5) Where, at any time, a person who is imprisoned in a prison or place of confinement other than a penitentiary is subject to two or more terms of imprisonment, each of which is for less than two years, that are to be served one after the other, and the aggregate of the unexpired portions of those terms at that time amounts to two years or more, he shall be transferred to a penitentiary to serve those terms, but if any one or more of such terms is set aside and the unexpired portions of the remaining term or terms on the day on which he was transferred under this section amounted to less than two years, he shall serve that term or terms in accordance with subsection (3).

(6) [*Repealed*. 1992, c. 20, s. 200(1).]

(7) [*Repealed*. 1992, c. 20, s. 200(1).]

(8) For the purposes of subsection (3), “penitentiary” does not, until a day to be fixed by order of the Governor in Council, include the facility mentioned in subsection 15(2) of the *Corrections and Conditional Release Act*. R.S., c. C-34, s. 659; 1974-75-76, c. 93, s. 79, 1976-77, c. 53, s. 13; 1992, c. 1, s. 58; 1992, c. 20, s. 200.

#### CROSS-REFERENCES

See s. 2 for definition of “prison”. Section 144 makes prison-break an indictable offence. See ss. 145(1), 146 and 147 for escape offences. Service of sentences for escape are governed by s. 149.

The Solicitor General of Canada may contract with provincial authorities for the confinement of persons sentenced to less than two years in federal institutions, under the Penitentiary Act, R.S.C.

1985, c. P-5, s. 18(1). Inmates in a federal institution may be transferred to a provincial institution upon agreement between the Solicitor General and the provincial government under the Prisons and Reformatories Act, R.S.C. 1985, c. P-20, s. 5(1).

See the Penitentiary Act, s. 16 dealing with the provincial penitentiary at St. John's, Newfoundland referred to in subsection (8).

A convicted person is delivered to the keeper of a prison under s. 734, following sentencing and the issuance and execution of a warrant of committal.

Correctional statutes and regulations, made under s. 732, govern the actual institution and manner of service of a sentence.

## SYNOPSIS

This section sets out the rules used to determine whether a prisoner will be incarcerated in a federal or provincial institution.

Single or aggregate sentences of two years or more, including life sentences, will normally be served in the federal penitentiary system (subsecs. (1), (2), (5)). (Note: A sentence of two years less one day is sometimes imposed for the purpose of keeping an inmate in the provincial system, i.e., "provincial time" (subsec. (3)).

Where a prisoner in a prison other than a penitentiary is sentenced to a term in a penitentiary that prisoner shall be transferred forthwith to a penitentiary, where he or she shall serve both the unexpired portion of the previous sentence and the present sentence (subsec. (4)).

Where a definite/indeterminate sentence is imposed only the definite portion thereof shall be considered in determining whether the prisoner shall be incarcerated in a federal institution (subsec. (6)).

Where a prisoner is transferred to a penitentiary other than under a federal/provincial agreement any indeterminate portion of his or her sentence shall cease to have any effect (subsec. (7)).

## ANNOTATIONS

**Subsec. (1)** – By virtue of this subsection a person given a sentence of two years or more must be sentenced to a penitentiary and the Court has no power to direct that the sentence be served at a provincial mental health centre such as the centre at Penetanguishene in Ontario. Where the trial Judge wishes an accused to receive treatment at such a centre he should impose the sentence pursuant to this subsection and recommend in the certificate of sentence that the prisoner receive treatment at the centre: *R. v. Deans* (1977), 37 C.C.C. (2d) 221, 39 C.R.N.S. 338 (Ont. C.A.). Folld: *Re R. and McCullough* (1983), 3 C.C.C. (3d) 432, 43 A.R. 237 (C.A.).

Except where he is considering imposing the minimum penitentiary sentence, the trial Judge is not required to impose a reformatory sentence because the accused might be the object of reprisals in the penitentiary: *R. v. Demers* (1981), 63 C.C.C. (2d) 351 (Que. C.A.).

**Subsec. (2)** – An accused while serving the remanet of a sentence in a penitentiary who is sentenced to a term of imprisonment of less than two years is properly imprisoned in a penitentiary to serve the latter sentence as well: *Olson v. The Queen* (1980), 50 C.C.C. (2d) 275, [1980] 1 S.C.R. 808, 106 D.L.R. (3d) 561.

This subsection applies and requires the additional term of imprisonment to be served in the penitentiary even where it is imposed for violations of provincial statutes: *Durand v. Forget et al.* (1980), 24 C.R. (3d) 119 (Que. S.C.).

Moreover, the penitentiary authorities are required to accept the warrants of committal for provincial offences which a peace officer attempts to execute. The calculation of the sentence to be served for those offences however depends on the applicable provincial legislation and may result in a consecutive sentence for those offences: *Dempsey v. A.-G. Can. et al.* (1986), 25 C.C.C. (3d) 193, 51 C.R. (3d) 248, [1986] 3 F.C. 129 (C.A.).

The sentence of an accused on mandatory supervision has not expired and if he is sen-

tenced to imprisonment while on mandatory supervision then this sentence must be served in the penitentiary even if the new sentence is less than two years and the accused's mandatory supervision remains unrevoked: *Re Dinardo and The Queen* (1982), 67 C.C.C. (2d) 505, 38 O.R. (2d) 308 (C.A.).

In determining whether the aggregate of the sentences is two years or more, the amount of earned remission standing to the inmate's credit must be taken into account: *Re Shiminousky and The Queen* (1981), 64 C.C.C. (2d) 187, 33 B.C.L.R. 1 (S.C.).

**Subsec. (3)** – A trial judge may recommend or refuse to recommend the accused's eligibility for release on a temporary absence programme established under provincial legislation but he cannot make an order denying the accused such release. That is a decision to be made by an official designated under applicable provincial legislation: *R. v. Laycock* (1989), 51 C.C.C. (3d) 65, 17 M.V.R. (2d) 1 (Ont. C.A.).

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#### REPORT BY COURT TO CORRECTIONAL SERVICE.

**731.1.** A court that sentences or commits a person to penitentiary shall forward to the Correctional Service of Canada its reasons and recommendations relating to the sentence or committal, any relevant reports that were submitted to the court, and any other information relevant to administering the sentence or committal; 1992, c. 20, s. 201.

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#### SENTENCE SERVED ACCORDING TO REGULATIONS / Hard labour improperly ordered.

**732. (1)** A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced, and a reference to hard labour in a conviction or sentence shall be deemed to be reference to the employment of prisoners that is provided for in the enactments or rules.

**(2)** A conviction or sentence that imposes hard labour shall not be quashed or set aside on the ground only that the enactment that creates the offence does not authorize the imposition of hard labour, but shall be amended accordingly. R.S., c. C-34, s. 660.

#### CROSS-REFERENCES

A sentence is served in either a federal penitentiary or a provincial correctional institution depending on the determination in s. 731.

Also see references cited under s. 731.

#### SYNOPSIS

This section eliminates judicial impositions of hard labour in sentences, stating that terms are to be served in accordance with the regulations of the institution with respect to employment of prisoners. However, a sentence which does refer to hard labour shall not be invalid, but shall be amended.

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#### TRANSFER OF YOUNG PERSON TO PLACE OF CUSTODY / Removal of young person from place of custody / Definitions.

**733. (1)** Where a young person is sentenced to imprisonment under this or any other Act of Parliament, the young person may, with the consent of the provincial director, be transferred to a place of custody for any portion of his term of imprisonment, but in no case shall the young person be kept in a place of custody under this section after he attains the age of twenty years.

**(2)** Where the provincial director certifies that a young person transferred to a place of custody under subsection (1) can no longer be held therein without significant dan-



ger of escape or of detrimentally affecting the rehabilitation or reformation of other young persons held therein, the young person may be imprisoned during the remainder of his term of imprisonment in any place where he might, but for subsection (1), have been imprisoned.

(3) For the purposes of this section, the expressions "adult", "provincial director" and "young person" have the meanings assigned by subsection 2(1) of the *Young Offenders Act* and the expression "place of custody" means "open custody" or "secure custody" within the meaning assigned by subsection 24(1) of that Act. 1980-81-82-83, c. 110, s. 75; R.S.C. 1985, c. 24 (2nd Supp.), s. 46.

#### CROSS-REFERENCES

See the Interpretation Act, R.S.C. 1985, c. I-21, s. 30, for provision respecting determination of age. The s. 2(1) reference to a "young person" means a person who is or appears to be at least 12 years of age and less than 18 years of age, subject to evidence to the contrary. A person who is or appears to be less than 12 years of age is a "child", subject to evidence to the contrary. A person who is neither a "young person" or a "child" is considered an "adult".

#### SYNOPSIS

This section integrates some of the custody provisions of the Young Offenders Act (the "YOA") with the Criminal Code. Subsection (1) provides that a young person (as defined by the YOA) sentenced to imprisonment under the Code or other penal Act can be sent to a "place of custody" established under the YOA, but cannot remain there after reaching 20 years of age. Under subsec. (2), provision is made for the removal of a young person from a "place of custody" to a provincial or federal adult institution where the prisoner poses a significant risk of escape or is a bad influence on other young prisoners.

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### *Delivery of Accused to Keeper of Prison*

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#### EXECUTION OF WARRANT OF COMMITTAL.

**734.** A peace officer or other person to whom a warrant of committal authorized by this or any other Act of Parliament is directed shall arrest the person named or described therein, if it is necessary to do so in order to take that person into custody, convey that person to the prison mentioned in the warrant and deliver him, together with the warrant, to the keeper of the prison who shall thereupon give to the peace officer or other person who delivers the prisoner a receipt in Form 43 setting out the state and condition of the prisoner when delivered into his custody. R.S., c. C-34, s. 661; R.S.C. 1985, c. 27 (1st Supp.), s. 161.

#### CROSS-REFERENCES

Depending on the circumstances, warrants for committal may be in Form 8 or Forms 19 to 27.

See ss. 25 to 31 for protection of law enforcement and administration personnel.

#### SYNOPSIS

This section gives a peace officer who has received a warrant of committal the power to arrest the person named in the warrant, if necessary, and the power to convey that person to the prison named in the warrant. The keeper of the prison shall receive the prisoner, along with the warrant, and provide the peace officer with a receipt which sets out the state and condition of the prisoner on delivery.

## *Absolute and Conditional Discharges, Suspended Sentences, Intermittent Sentences and Probation*

REPORT BY PROBATION OFFICER / Victim impact statement / Procedure for victim impact statement / Other evidence concerning victim admissible / Definition of “victim” / Copies to be provided.

735. (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing sentence or in determining whether the accused should be discharged pursuant to section 736.

(1.1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 736 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.

(1.2) A statement referred to in subsection (1.1) shall be

- (a) prepared in writing in the form and in accordance with the procedures established by a program designated for the purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction; and
- (b) filed with the court.

(1.3) A statement of a victim of an offence prepared and filed in accordance with subsection (1.2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 736.

(1.4) For the purpose of this section, “victim”, in relation to an offence,

- (a) means the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, and
- (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1.1), includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.

(2) Where a report or statement is filed with the court under subsection (1) or (1.2), the clerk of the court shall forthwith cause a copy of the report or statement to be provided to the offender or counsel for the offender and to the prosecutor. R.S. c. C-34, s. 662; 1972, c. 13, s. 57; R.S.C. 1985, c. 23 (4th Supp.), s. 7.

### CROSS-REFERENCES

For a description of the grounds on which conditional or absolute discharges may be granted, see s. 736. Provisions concerning probation orders may be found in ss. 737 to 740.

### SYNOPSIS

This section provides for the use of pre-sentence reports and victim impact statements in the sentencing process.

The court can request that a probation officer prepare a report with respect to an accused other than a corporation (subsec. (1)). This can be at the instance of the accused, the Crown or on the court's own motion. These will contain the personal history of the accused (i.e., family background, education, marital or other relationships, employment

history, previous convictions, etc.) and any other information concerning the accused which the officer preparing the report thinks will assist the judge.

The court may also consider (a) a statement from the victim prepared in accordance with procedures established by the Lieutenant Governor in Council (subsecs. (1.1), (1.2)) or, (b) such other evidence concerning the victim as the court sees fit to receive (subsec. (1.3)).

If the victim is dead or otherwise unable to make a statement the same can be based on information provided by a spouse, relative or other person responsible for the victim or his or her dependants (subsec. (1.4)(b)).

A copy of any report or statement filed with the court shall also be provided to the accused and the prosecutor (subsec. (2)).

## ANNOTATIONS

**Pre-sentence reports** – Where the accused challenges or denies a statement in the pre-sentence report which the trial Judge considers relevant then proof of this information should be given, with the onus being upon the Crown to prove the accuracy of the information. Otherwise the challenged information must be disregarded. A statement in the pre-sentence report that the accused is suspected of other crimes which were not the subject of charges should not be considered by the trial Court: *R. v. Morelli* (1977), 37 C.C.C. (2d) 392 (Ont. Prov. Ct.).

A statement by the accused, who did not testify, that the commission of the offence was accidental, was not properly included in the pre-sentence report. Further, statements in the report are not evidence and not admissible to set aside the conviction: *R. v. Urbanovich and Brown* (1985), 19 C.C.C. (3d) 43 (Man. C.A.).

**Victim impact statement** – The definition of “victim” in subsec. (1.4) refers to the direct victim. It is only when subsec. (1.4)(b) applies that the court may receive a victim impact statement from someone else. Thus, in this case, the trial judge should not have received a victim impact statement from the accused’s estranged wife who witnessed the assault upon her male friend: *R. v. Curtis* (1992), 69 C.C.C. (3d) 385 (N.B.C.A.).

Neither this provision nor s. 2(b) of the Charter gives a victim the right to make oral submissions regarding the length of sentence: *R. v. Coelho v. British Columbia* (1995), 41 C.R. (4th) 324 (B.C.S.C.).

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**CONDITIONAL AND ABSOLUTE DISCHARGE / Period for which appearance notice, etc., continues in force / Effect of discharge / Where person bound by probation order convicted of offence.**

736. (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or for life, the court before which he appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order.

(2) Subject to the provisions of Part XVI, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XVI pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by him continues in force, subject to its terms, until a disposition in respect of him is made under subsection (1) unless, at the time he pleads guilty or is found guilty, the court, judge or justice orders that he be taken into custody pending such a disposition.

(3) Where a court directs under subsection (1) that an offender be discharged of an



offence, the offender shall be deemed not to have been convicted of the offence except that

- (a) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;
  - (b) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and
  - (c) the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.
- (4) Where an accused who is bound by the conditions of a probation order made at a time when he was directed to be discharged under this section is convicted of an offence, including an offence under section 740, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 738(4), at any time when it may take action under that subsection, revoke the discharge, convict the accused of the offence to which the discharge relates and impose any sentence that could have been imposed if the accused had been convicted at the time he was discharged, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the accused be discharged. 1972, c. 13, s. 57; 1974-75-76, c. 93, s. 80, c. 105, s. 20; R.S.C. 1985, c. 27 (1st Supp.), s. 162.

#### CROSS-REFERENCES

The accused's right of appeal from conviction in proceedings by indictment are governed by s. 675(1)(a) and in summary conviction proceedings by ss. 813(a) and 830(1). The Crown's right of appeal from acquittal in proceedings by indictment is governed by s. 676(1)(a) and in summary conviction proceedings by ss. 813(b) and 830(1). Sections 673 and 785(1) define an order under subsec. (1) as a "sentence". Parts XXI and XXVII, deal with appeals.

Section 607(1)(b) permits the special plea of *autrefois convict* with its use determined by ss. 607 to 610.

See s. 737 for the contents and form of the probation order and s. 738 for the coming into force of the order. Section 739 governs the transfer of orders. Under s. 740(1), failure or refusal to comply with the order constitutes a summary conviction offence.

#### SYNOPSIS

This section provides the court with a sentencing option which results in the accused not having a criminal record in connection with the offence in question.

If an accused other than a corporation is convicted of an offence for which no minimum punishment is prescribed, or for which the maximum is less than 14 years, the court can, if it considers it to be in the best interests of the accused and not contrary to the public interest, discharge the accused either absolutely or on conditions (subsec. (1)).

An absolute discharge takes effect immediately and the accused is deemed not to have been convicted. A conditional discharge requires that the accused enter into a probation order for a period of time and does not become absolute until that time has passed. If the accused breaches the terms of the probation order he or she may be brought back before the court which can then formally enter a conviction and impose sentence (subsecs. (3), (4)). Such a conviction may not be appealed if an appeal has already been taken from the order directing a discharge (subsec. (4)).

Both the accused and the Crown (and the informant in summary conviction matters) have the right to appeal a discharge (subsec. (3)(a), (b)).

A discharge will support a plea of *autrefois convict* (subsec. (3)(c)).

Subsection (2) provides that until discharged an accused who remains at large follow-

ing a finding of guilt, will continue to be bound by the terms and conditions of his or her release.

## ANNOTATIONS

**Principles in imposing discharge** – In *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, 22 C.R.N.S. 350 (Ont. C.A.) the Court gave some guidelines as to when a discharge is appropriate, as follows:

The granting of some form of discharge must be “in the best interests of the accused”. I take this to mean that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him may have significant repercussions. It must not be “contrary to the public interest” to grant some form of discharge. One element thereby brought in will be the necessity or otherwise of a sentence which will be a deterrent to others who may be minded to commit a like offence – a standard part of the criteria for sentencing.

In *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450, 22 C.R.N.S. 342 (B.C.C.A.) the Court draws the following conclusions as to the application of this section:

- (1) The section may be used in respect of *any* offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
- (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.
- (3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the Court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.
- (4) The second condition precedent is that the Court must consider that a grant of discharge is not contrary to the public interest.
- (5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.
- (6) In the context of the second condition the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.
- (7) The powers given by s. 662.1 [now s. 736] should not be exercised as an alternative to probation or suspended sentence.
- (8) Section 662.1 [now s. 736] should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

In considering whether a discharge should be granted the Court may consider whether the accused has been granted a discharge on a previous occasion: *R. v. Tan* (1974), 22 C.C.C. (2d) 184, [1975] 2 W.W.R. 747 (B.C.C.A.).

However, a previous experience with a diversion programme which did not entail any finding or admission of guilt is not the equivalent of a previous discharge and does not of itself disqualify the accused from receiving a discharge: *R. v. Drew* (1978), 45 C.C.C. (2d) 212, 7 C.R. (3d) S-21 (B.C.C.A.).

A discharge should not be granted where it would otherwise clearly not be mandated merely because it is urged by the accused that the immigration authorities might not be sympathetic to his situation: *R. v. Melo* (1975), 26 C.C.C. (2d) 510, 30 C.R.N.S. 328 (Ont. C.A.).

In *R. v. Myers* (1977), 37 C.C.C. (2d) 182 (Ont. C.A.) it was held that the trial Judge adopted too narrow a test when he refused a discharge because the registering of a conviction would have no immediate effect upon the accused's employment.

In *R. v. Culley* (1977), 36 C.C.C. (2d) 433 (Ont. C.A.) it was held that the trial Judge erred in refusing a discharge to a mature accused because he was of the view that the discharge provisions are primarily applicable to young offenders and on appeal a discharge was granted to a 26 year old accused for possession of a small quantity of marijuana where the registering of conviction would have serious repercussions to his future employment.

**Procedure** – The formal oral conviction by the trial Judge upon the jury's verdict of guilty being rendered does not preclude the Court from granting a discharge to the accused. Further, the phrase "in the proceedings commenced against him" relates to the proceedings only in respect of which he was found guilty and therefore, where an accused is found guilty of possession of a narcotic only, after a trial on a charge of possession for the purpose of trafficking, the accused can be discharged upon the charge of possession notwithstanding that the offence originally charged carries a maximum penalty of life imprisonment: *R. v. Sampson* (1975), 23 C.C.C. (2d) 65, 7 O.R. (2d) 65 (C.A.).

It is not possible to include as a condition of a probation order that the accused pay a fine: *R. v. Carroll* (1995), 38 C.R. (4th) 238, 92 W.A.C. 138 (B.C.C.A.).

**Constitutional considerations** – The subsequent conviction and sentence of an accused initially granted a conditional discharge, as a result of his commission of an offence while on probation, does not violate the guarantee against double jeopardy in s. 11(h) of the Charter of Rights and Freedoms: *R. v. Elendiuk* (1986), 27 C.C.C. (3d) 94, 22 C.R.R. 24 (Alta. C.A.).

**Note:** Sections 736.1 to 736.18 enacted by 1991, c. 43, s. 6 (to come into force by order of the Governor in Council), however, s. 736.17 re-enacted by 1992, c. 20, s. 229 (to come into force when 1991, c. 43, s. 6 comes into force), but 1991, c. 43, s. 6 repealed by 1995, c. 22, s. 12 (to come into force by order of the Governor in Council). The unproclaimed text printed in *lightface italics* reads as follows:

**DEFINITIONS** / "assessment report" / "hospital order" / "medical practitioner" / "treatment facility".

736.1. In this section and sections 736.11 to 736.18,

"assessment report" means a written report made pursuant to an assessment order made under section 672.11 by a psychiatrist who is entitled under the laws of a province to practise psychiatry or, where a psychiatrist is not practicably available, by a medical practitioner;

"hospital order" means an order by a court under section 736.11 that an offender be detained in a treatment facility;

"medical practitioner" means a person who is entitled to practise medicine by the laws of a province;

"treatment facility" means any hospital or place for treatment of the mental disorder of an offender, or a place within a class of such places, designated by the Governor in Council, the lieutenant governor in council of the province in which the offender is sentenced or a person to whom authority has been delegated in writing for that purpose by the Governor in Council or that lieutenant governor in council.

**COURT MAY MAKE A HOSPITAL ORDER** / Limitation on hospital order / Form / Warrant of committal.

736.11. (1) A court may order that an offender be detained in a treatment facility as the initial



part of a sentence of imprisonment where it finds, at the time of sentencing, that the offender is suffering from a mental disorder in an acute phase and the court is satisfied, on the basis of an assessment report and any other evidence, that immediate treatment of the mental disorder is urgently required to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to any person.

(2) A hospital order shall be for a single period of treatment not exceeding sixty days, subject to any terms and conditions that the court considers appropriate.

(3) A hospital order may be in Form 51.

(4) A court that makes a hospital order shall issue a warrant for committal of the offender, which may be in Form 8.

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#### RECOMMENDED TREATMENT FACILITY / Court chooses treatment facility.

736.12. (1) In a hospital order, the court shall specify that the offender be detained in a particular treatment facility recommended by the central administration of any penitentiary, prison or other institution to which the offender has been sentenced to imprisonment, unless the court is satisfied, on the evidence of a medical practitioner, that serious harm to the mental or physical health of the offender would result from travelling to that treatment facility or from the delay occasioned in travelling there.

(2) Where the court does not follow a recommendation referred to in subsection (1), it shall order that the offender be detained in a treatment facility that is reasonably accessible to the place where the accused is detained when the hospital order is made or to the place where the court is located.

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#### CONDITION.

736.13. No hospital order may be made unless the offender and the person in charge of the treatment facility where the offender is to be detained consent to the order and its terms and conditions, but nothing in this section shall be construed as making unnecessary the obtaining of any authorization or consent to treatment from any other person that is or may be required otherwise than under this Act.

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#### EXCEPTION.

736.14. No hospital order may be made in respect of an offender

- (a) who is convicted of or is serving a sentence imposed in respect of a conviction for an offence for which a minimum punishment of imprisonment for life is prescribed by law;
- (b) who has been found to be a dangerous offender pursuant to section 753;
- (c) where the term of imprisonment to be served by the offender does not exceed sixty days;
- (d) where the term of imprisonment is imposed
  - (i) on the offender in default of payment of a fine or of a victim fine surcharge imposed under subsection 727.9(1), or
  - (ii) under section 727.6 for failure or refusal to pay an amount by way of restitution pursuant to an order made under section 725 or 726; or
- (e) where the sentence of imprisonment imposed on the offender is ordered under paragraph 737(1)(c) to be served intermittently.

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#### OFFENDER TO SERVE REMAINDER OF SENTENCE / Transfer from one treatment facility to another.

736.15. (1) An offender shall be sent or returned to a prison to serve the portion of the offender's sentence that remains unexpired where

- (a) the hospital order expires before the expiration of the sentence; or

(b) the consent to the detention of the offender in the treatment facility pursuant to the hospital order is withdrawn either by the offender or by the person in charge of the treatment facility.

(2) Before the expiration of a hospital order in respect of an offender, the offender may be transferred from the treatment facility specified in the hospital order to another treatment facility where treatment of the offender's mental disorder is available, if the court authorizes the transfer in writing and the person in charge of the treatment facility consents.

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#### DETENTION TO COUNT AS SERVICE OF TERM.

736.16. Each day that an offender is detained under a hospital order shall be treated as a day of service of the term of imprisonment of the offender, and the offender shall be deemed, for all purposes, to be lawfully confined in a prison during that detention.

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#### APPLICATION OF SECTION 12 OF CORRECTIONS AND CONDITIONAL RELEASE ACT.

736.17. Notwithstanding section 12 of the Corrections and Conditional Release Act, an offender in respect of whom a hospital order is made and who is sentenced or committed to a penitentiary may, during the period for which that order is in force, be received in a penitentiary before the expiration of the time limited by law for an appeal and shall be detained in the treatment facility specified in the order during that period.

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#### COPY OF WARRANT AND ORDER GIVEN TO PRISON AND HOSPITAL.

736.18. Where a court makes a hospital order in respect of an offender, the court shall cause a copy of the order and of the warrant of committal issued pursuant to subsection 736.11(4) to be sent to the central administration of the penitentiary, prison or other institution where the term of imprisonment imposed on the offender is to be served and to the treatment facility where the offender is to be detained for treatment.

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#### MAKING OF PROBATION ORDER / Conditions in probation order / Form and period of order / Proceedings on making of order.

737. (1) Where an accused is convicted of an offence, the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,

- (a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released on the conditions prescribed in a probation order;
- (b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed in a probation order; or
- (c) where it imposes a sentence of imprisonment on the accused, whether in default of payment of a fine or otherwise, that does not exceed ninety days, order that the sentence be served intermittently at such times as are specified in the order and direct that the accused, at all times when he is not in confinement pursuant to the order, comply with the conditions prescribed in a probation order.

(2) The following conditions shall be deemed to be prescribed in a probation order, namely, that the accused shall keep the peace and be of good behaviour and shall appear before the court when required to do so by the court, and, in addition, the court may prescribe as conditions in a probation order that the accused shall do any one or more of the following things as specified in the order, namely,

- (a) report to and be under the supervision of a probation officer or other person designated by the court;
  - (b) provide for the support of his spouse or any other dependants whom he is liable to support;
  - (c) abstain from the consumption of alcohol either absolutely or on such terms as the court may specify;
  - (d) abstain from owning, possessing or carrying a weapon;
  - (e) make restitution or reparation to any person aggrieved or injured by the commission of the offence for the actual loss or damage sustained by that person as a result thereof;
  - (f) remain within the jurisdiction of the court and notify the court or the probation officer or other person designated under paragraph (a) of any change in his address or his employment or occupation;
  - (g) make reasonable efforts to find and maintain suitable employment; and
  - (h) comply with such other reasonable conditions as the court considers desirable for securing the good conduct of the accused and for preventing a repetition by him of the same offence or the commission of other offences.
- (3) A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force.
- (4) Where the court makes a probation order, it shall
- (a) cause the order to be read by or to the accused;
  - (b) cause a copy of the order to be given to the accused; and
  - (c) inform the accused of the provisions of subsection 738(4) and the provisions of section 740. R.S., c. C-34, s. 663; 1972, c. 13, s. 58, 1974-75-76, c. 93, s. 81.

#### CROSS-REFERENCES

Section 738 governs the coming into force of the probation order with transfer of the order to another jurisdiction being provided for by s. 739. Under s. 740(1), the failure or refusal to comply with the order is a summary conviction offence. Sections 673 and 785(1) define dispositions under subsec. (1) as "sentences" under the appeal provisions, Parts XXI and XXVII.

Sections 100(1) and 100(2) are mandatory and discretionary provisions, respectively, regarding orders prohibiting an accused from having firearms, ammunition or explosive substances in his possession. Section 737(2)(d) allows the court to impose a probationary condition requiring the accused to abstain from owning, carrying or possessing a weapon. Under s. 737(2)(e), the court may specify in the order that the accused make restitution or reparation to any person aggrieved or injured by the commission of the offence. Provisions for orders of restitution are made under ss. 725 to 727.9.

#### SYNOPSIS

This section deals with the making of probation orders either in lieu of or in addition to other forms of punishment.

Having regard to the circumstances of the offence and the offender the court may order that an accused be bound by the terms of a probation order where: (a) no minimum sentence is prescribed by law, and the court suspends the sentence; (b) the accused is fined; or (c) a sentence not exceeding two years is imposed.

In addition, an accused sentenced to a term of not greater than 90 days on an intermittent basis (*e.g.*, weekends) shall be subject to such an order while he or she is not in custody (subsec. (1)).

Subsection (2) sets out the standard conditions which are part of every order and delineates the other types of conditions that may be included by the court.

Where a probation order is made the court shall cause the order to be read by or to the accused and direct that a copy be given to the accused. The accused is to be informed of the consequences of breaching the order (see ss. 738(4), 740) (subsec. (4)).



## ANNOTATIONS

**Suspended sentence [subsec. 1(a)]** – The court has no power to suspend sentence under subsec. (1)(a) and impose a fine in addition to probation: *R. v. St. James* (1981), 20 C.R. (3d) 389 (Que. C.A.); *R. v. Polywjanyj* (1982), 1 C.C.C. (3d) 161 (Ont. C.A.); *R. v. Kelly* (1995), 104 C.C.C. (3d) 95 (Nfld. C.A.).

As it is not the sentence itself, but its passing that is suspended a Court in exercising this power should not mention any fixed term of proposed incarceration, for in addition, to do so would place the Court in the position of binding itself should the accused be subsequently brought before it for sentence: *R. v. Sangster* (1973), 21 C.R.N.S.339 (Que. C.A.).

**Power to make probation order [subsec. (1)(b)]** – Probation may be imposed in addition to either a fine or imprisonment, but not in addition to both: *R. v. Smith* (1972), 7 C.C.C. (2d) 468 (N.W.T.T.C.); *R. v. Blaquiere* (1975), 24 C.C.C. (2d) 168 (Ont. C.A.); *R. v. St. James* (1981), 20 C.R. (3d) 389 (Que. C.A.).

Where, however, the court imposes an intermittent sentence under subsec. (1)(c), it may impose a fine, in addition to the mandatory probation order prescribed by that paragraph, for the times when the accused is not in confinement: *R. v. Cartier* (1990), 57 C.C.C. (3d) 569 (Que. C.A.).

Having regard to the intention manifested by para. (1)(b), a probation order should not be made where the combined period of imprisonment to which the accused will be subject would exceed two years, even if a particular single sentence does not exceed two years and could thus technically be joined with a probation order: *R. v. Currie* (1982), 65 C.C.C. (2d) 415, 27 C.R. (3d) 118 (Ont. C.A.). Similarly: *R. v. Hackett* (1986), 30 C.C.C. (3d) 159 (B.C.C.A.). And where a subsequent consecutive term of imprisonment is imposed which brings the total length of imprisonment to over two years, then the probation term attached to the original sentence becomes illegal: *R. v. Miller* (1987), 36 C.C.C. (3d) 100, 58 C.R. (3d) 396 (Ont. C.A.).

Where a judge imposes consecutive terms of imprisonment, the total term must not exceed two years if the judge also intends to impose a term of probation: *R. v. Amaralik* (1984), 16 C.C.C. (3d) 22 (N.W.T.C.A.).

One probation order may not be made consecutive to another: *R. v. Hunt* (1982), 2 C.C.C. (3d) 126, 55 N.S.R. (2d) 68 (S.C. App. Div.).

**Terms of probation [subsec. (2)] / Principles generally** – The \$1,000 Court costs ordered to be paid as a term of probation was tantamount to the levying of a fine and as such was illegal as the trial Court had decreed the suspension of the passing of sentence: *R. v. Pawlowski* (1971), 5 C.C.C. (2d) 87, 16 C.R.N.S.313 (Man. C.A.).

In *R. v. Caja and Billings* (1977), 36 C.C.C. (2d) 401 (Ont. C.A.) it was held that a term of probation that the accused, who were convicted of theft, not apply for unemployment insurance was not authorized by the Criminal Code and the term was struck out. As well a term that the accused not take drugs or associate with drug users was also struck out, there being no indication that drugs were involved in the commission of the offence or that the accused used drugs.

**Restitution and compensation [subsec. (2)]** – Before making an order for reparations the Court should be satisfied that the accused has the ability to make the payments and the amount of reparations should only be for actual loss or damage sustained by the victim: *R. v. Dashner* (1973), 15 C.C.C. (2d) 139, 25 C.R.N.S. 340 (B.C.C.A.); *R. v. Debaat* (1992), 15 C.R. (4th) 226 (B.C.C.A.).

Subsection (2)(e) is *intra vires* Parliament for while the power to make a restitution order under this section affects property and civil rights, in pith and substance it is legislation in relation to sentencing and therefore within Parliament's criminal law power. The making of a restitution order under this subsection would not affect the victim's rights to also have civil damages assessed against the accused. However, the Court has no power under this section to award compensation to the victim for "pain and suffering".

The Court's power to order the accused to make restitution or reparations is limited to those damages which are relatively concrete and easily ascertainable in the nature of what would be special damages in a civil action: *R. v. Groves* (1977), 37 C.C.C. (2d) 429, 79 D.L.R. (3d) 561 (Ont. H.C.J.).

A trial Judge may not delegate his sentencing function by empowering a probation officer to determine the method of making restitution of a fixed amount: *R. v. Shorten and Shorten* (1975), 29 C.C.C. (2d) 528, [1976] 3 W.W.R. 187 (B.C.C.A.).

**Community service** – Paragraph (h) authorizes the imposition of voluntary community service as a term of probation: *R. v. Shaw and Brehn* (1977), 36 C.R.N.S. 358 (Ont. C.A.).

**Prohibition on driving** – A condition of a probation order, such as a prohibition on driving, may not be imposed as an additional punishment: *R. v. Ziatas* (1973), 13 C.C.C. (2d) 287 (Ont. C.A.) although in a proper case the Judge may make a suspension of a driver's licence under para. (h): *R. v. Lavender* (1981), 59 C.C.C. (2d) 551 (B.C.C.A.).

**Treatment** – A probation order requiring the accused to reside at a community training residence and participate in the programme at the residence does not constitute the unlawful imposition of a term of imprisonment, notwithstanding the residence is designated as a correctional facility and the rules of the residence do not permit the person to be absent without permission: *R. v. Degan* (1985), 20 C.C.C. (3d) 293 (Sask. C.A.).

While a term that the young accused attend for treatment, for a severe personality disorder and a serious drug problem, at a particular treatment centre was a reasonable condition within the meaning of para. (h), where the centre is outside of Canada such a condition should only be imposed in exceptional cases. Moreover, as there might be some doubt as to the legality of such a condition since it could be viewed as imposing a term of exile on the accused, the condition can only be imposed where the accused consents: *R. v. Chisholm* (1985), 18 C.C.C. (3d) 518 (N.S.S.C. App. Div.), leave to appeal to S.C.C. refused *loc. cit.*

A term of a probation order, compelling an accused to take psychiatric treatment or medication, is an unreasonable restraint upon the liberty or security of the person and contrary to the principles of fundamental justice as guaranteed by s. 7 of the Charter. Such a restraint will only constitute a reasonable limit in exceptional circumstances. It may be that, in the result, in some circumstances a probation order will not offer the public sufficient protection and only a period of incarceration will suffice. On the other hand, a probation order could contain terms requiring the accused to take reasonable steps to maintain himself in such a condition that his mental illness will not likely cause him to be a danger to himself or to others or to commit other offences; such an order could require the accused to attend for recommended medical counselling and treatment, though he need not submit to any treatment or medication to which he does not consent: *R. v. Rogers* (1990), 61 C.C.C. (3d) 481, 2 C.R. (4th) 192 (B.C.C.A.).

In *R. v. Kieling* (1991), 64 C.C.C. (3d) 124 (Sask. C.A.) the court held that a judge has no power to impose a term requiring the accused to take medication. The power to make such a term is not given expressly and is not a reasonable condition within the meaning of subsec. (2)(h) which must be interpreted as referring to conditions which do not have negative consequences and do not present a risk to the accused.

However, compare *R. v. Hynes* (1991), 64 C.C.C. (3d) 421, 89 Nfld. & P.E.I.R. 316 (Nfld. C.A.) where the court reduced a sentence of imprisonment because the original sentence was disproportionate and could not be justified merely because of the accused's mental problems. In such circumstances, a probation order incorporating rehabilitative measures including a term that the accused abide by all directions given with respect to psychiatric treatment and for the taking of medically prescribed drugs, was justified.

**Banishment and similar terms** – In *R. v. Malboeuf* (1982), 68 C.C.C. (2d) 544, [1982] 4 W.W.R. 573 (Sask. C.A.) the Court considered a term of probation which had the effect

of banishing the accused from his home community. In the result, the Court quashed the term but stated *obiter* that while such terms should not be encouraged they might not be inappropriate in every case. There should, however, at least be an indication that communities have entered into arrangements sanctioning or providing for an exchange of undesirable individuals.

It was not inappropriate to impose a term of probation on a young accused, with a record for drug offences, that he refrain from entering an area of the city which was notorious for drug trafficking: *R. v. Pedersen* (1986), 31 C.C.C. (3d) 574 (B.C. Co. Ct.).

**Other terms** – It is inappropriate to impose what is in effect a custodial term as a condition of probation, for example that the accused attend at the local jail for a number of consecutive hours on a certain number of days in a month: *R. v. L* (1986), 50 C.R. (3d) 398 (Alta. C.A.).

In a proper case, it was open to the court to make it a term of probation that the accused be strictly confined to his home except for absences for employment or otherwise as may be approved by a probation officer. Such a term may be an appropriate alternative to imprisonment: *R. v. M. (D.E.S.)* (1993), 80 C.C.C. (3d) 371, 21 C.R. (4th) 55, 40 W.A.C. 305 (B.C.C.A.).

In *R. v. McLeod* (1993), 81 C.C.C. (3d) 83, 109 Sask. R. 8 (C.A.) the court discussed the principles which should apply in imposing terms of intensive probation and electronic monitoring where the need for general deterrence did not require a sentence of imprisonment.

**Intermittent sentence [subsec. (1)(c)]** – The Judge must clearly and definitely set out those periods when the accused is to be incarcerated and may not merely order that the sentence be served on days of the accused's own choosing: *R. v. Downe, Smith and Dow* (1978), 44 C.C.C. (2d) 468, 17 Nfld. & P.E.I.R. 87 (P.E.I.S.C. *in banco*).

The limit of 90 days is the length of the sentence, not the time period within which it must be served: *R. v. Lyall* (1974), 18 C.C.C. (2d) 381, [1974] 6 W.W.R.479 (B.C.C.A.).

There is no power to impose consecutive 90-day sentences to be served intermittently: *R. v. Fletcher* (1982), 2 C.C.C. (3d) 221 (Ont. C.A.); *R. v. Aubin* (1992), 72 C.C.C. (3d) 189 (Que. C.A.); *R. v. Drost* (1996), 29 W.C.B. (2d) 530 (N.B.C.A.).

Where the Court exercises its discretion under subsec. (1)(c) the period of probation may not exceed the period of time during which the accused is serving the intermittent sentence: *Demedeiros v. The Queen* (1979), 12 C.R. (3d) 113 (B.C.C.A.); *R. v. Thomas (No. 2)* (1980), 53 C.C.C. (2d) 285 (B.C.C.A.). *Contra*: *R. v. Weber* (1980), 52 C.C.C. (2d) 468 (Ont. C.A.) where the Court held that the Judge may impose an additional term of probation under subsec. (1)(b) even where he imposes an intermittent sentence together with the mandatory period of probation required by this subsection.

Notwithstanding para. (1)(b), where the court imposes an intermittent sentence under subsec. (1)(c), it may also impose a fine, in addition to the mandatory probation order prescribed by that latter paragraph, for the times when the accused is not in confinement: *R. v. Cartier, supra*.

**Formalities in probation order [subsecs. (3) and (4)]** – An accused is not bound by a probation order which does not specify within it the period for which it is to remain in force: *R. v. Foulston* (1983), 6 C.C.C. (3d) 236, 26 Sask. R. 271 (Q.B.).

The provisions of subsec. (4) are administrative and are delegable once the probation order is made by the presiding Judge. The accused need not be informed of the consequences of a breach of probation by the Judge personally: *R. v. Sterner* (1982), 64 C.C.C. (2d) 160n, [1982] 1 S.C.R. 173, 14 Sask. R. 79 (S.C.C.) (7:0), affg 60 C.C.C. (2d) 68, 9 Sask. R. 264 (C.A.).



**COMING INTO FORCE OF ORDER / Duration of order and limit on term of order / Modification of order / Modification of order where person bound convicted of offence / Compelling appearance of person bound.**

**738. (1) A probation order comes into force**

**(a) on the date on which the order is made; or**

**(b) where the accused is sentenced to imprisonment under paragraph 737(1)(b) otherwise than in default of payment of a fine, on the expiration of that sentence.**

**(2) Subject to subsection (4),**

**(a) where an accused who is bound by a probation order is convicted of an offence, including an offence under section 740, or is imprisoned under paragraph 737(1)(b) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the accused for the time being to comply with the order; and**

**(b) no probation order shall continue in force for more than three years from the date on which the order came into force.**

**(3) Where a court has made a probation order, the court may at any time, on application by the accused or the prosecutor, require the accused to appear before it and, after hearing the accused and the prosecutor,**

**(a) make any changes in or additions to the conditions prescribed in the order that in the opinion of the court are rendered desirable by a change in the circumstances since the conditions were prescribed,**

**(b) relieve the accused, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any condition described in any of paragraphs 737(2)(a) to (h) that is prescribed in the order, or**

**(c) decrease the period for which the probation order is to remain in force, and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order, inform the accused of its action and give him a copy of the order so endorsed.**

**(4) Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 740, and**

**(a) the time within which an appeal may be taken against that conviction has expired and he has not taken an appeal,**

**(b) he has taken an appeal against that conviction and the appeal has been dismissed, or**

**(c) he has given written notice to the court that convicted him that he elects not to appeal his conviction or has abandoned his appeal, as the case may be, in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the accused to appear before it and, after hearing the prosecutor and the accused,**

**(d) where the probation order was made under paragraph 737(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or**

**(e) make such changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable, and the court shall thereupon endorse the probation order accordingly and, if it changes or adds to the conditions prescribed in the order or extends the period for which the order is to remain in force, inform the accused of its action and to give him a copy of the order so endorsed.**

**(5) The provisions of Parts XVI and XVIII with respect to compelling the appearance**

of an accused before a justice apply with such modifications as the circumstances require to proceedings under subsections (3) and (4). R.S., c. C-34, s. 664.

#### CROSS-REFERENCES

The definitions of “sentence” under ss. 673 and 785 include dispositions under subsecs. (3) and (4) for the appeal provisions, Parts XXI and XXVII.

Section 11(i) of the Charter allows the accused the benefit of the lesser punishment in cases where the offence’s punishment is varied between commission of offence and the time of sentencing. This principle can be applied by s. 738(4)(d) which deals with the revocation of a probation order and imposition of sentence in its place.

#### SYNOPSIS

This section deals with matters such as the duration of probation orders and modifications thereto.

A probation order takes effect when it is made except where the accused is also sentenced to a period of imprisonment. In the latter situation it comes into force when the accused is released from custody (subsec. (1)). No order shall remain in force for more than three years (subsec. (2)(b)).

Except to the extent that the accused is not in a position to comply with the terms of a probation order, it continues in force notwithstanding the fact that the accused is subsequently convicted of an offence or imprisoned for non-payment of a fine (subsec. (2)(a)).

The court may, upon the application of either the Crown or the accused, change the conditions of the order or decrease its term (subsec. (3)).

Where an accused bound by an order is convicted of an offence he or she may be brought back before the court which made the order (on the application of the prosecutor) at which time the court may: (a) revoke the order and pass any sentence which might have previously been imposed; or (b) modify the conditions of the order or extend its term for up to one year (subsec. (4)).

The normal rules with respect to compelling the accused to attend before the court apply with respect to proceedings to modify the order or “re-sentence” the accused (subsec. (5)).

#### ANNOTATIONS

**Variations of terms of probation [subsec. (3)]** – In *R. v. Muise* (1980), 56 C.C.C. (2d) 191, 44 N.S.R. (2d) 324 (S.C. App. Div.) an order varying the terms was set aside on appeal by the Crown where the variation was made by the trial Judge on an *ex parte* application by the accused without the Crown being given an opportunity to make representations.

Where the probation order is made by the Court of Appeal on a sentence appeal pursuant to s. 687 then both the Court of Appeal and by virtue of s. 687(2) the original sentencing Judge has jurisdiction to vary the order. Where the application to vary is made to the Court of Appeal any panel of Judges of that Court may make the variation not necessarily the same panel which heard the original appeal: *R. v. H.* (1983), 6 C.C.C. (3d) 382, [1983] 5 W.W.R. 94 *sub nom. A. - G. Alta. v. H.* (Alta. C.A.).

On an application by the accused to vary the terms of probation it is not open to the judge to revoke the suspended sentence and impose a term of imprisonment. Prior to revocation of the suspended sentence there must be an application by the prosecutor so as to give the accused notice and enable him to make proper answer and defence: *R. v. Lake* (1986), 27 C.C.C. (3d) 305 (N.S.C.A.).

**Revocation of probation [subsec. (4)]** – A probationee’s conviction of a provincial offence must be proven either by his admission or in the normal manner and he must be given an opportunity to present his case and give his explanation before the Court may adjudicate upon a breach of probation complaint: *R. v. Borland*, [1970] 2 C.C.C. 172, 5 C.R.N.S. 251 (N.W.T.T.C.).

Unless there is proper transfer procedure only the original convicting Court should revoke a suspended sentence and impose sentence: *R. v. Graham* (1975), 27 C.C.C. (2d) 475 (Ont. C.A.).

Where an application is made by a prosecutor under subsec. (4) the basic principles of natural justice apply. Accordingly, although the Criminal Code does not require an information on oath, the minimum requirement is that the accused, before being brought before the Judge, should be given reasonable notice in writing of the Crown's intention to take such proceedings, which notice should clearly articulate the nature of the proceedings, the grounds upon which the Crown intends to rely in support of its application, the nature of the order sought, and the hearing date. As well, the accused must be given a fair opportunity to make full answer and defence. Further, in imposing sentence under this subsection the Judge must consider that although it may be that the accused by his conduct has forfeited his right to leniency the function of the trial Judge is then to impose a sentence proportionate to the offence which the accused had committed. It is wrong therefore for the Judge at the time he suspends the passing of sentence to indicate that if the probation is breached he will be given any particular term, such as a penitentiary term of imprisonment: *R. v. Tuckey* (1977), 34 C.C.C. (2d) 572 (Ont. C.A.).

Where the Court revokes the probation order because of commission of an offence while on probation it has no power to make the sentence consecutive to the sentence imposed for the offence which brought about the termination of the probation: *R. v. Oakes* (1977), 37 C.C.C. (2d) 84 (Ont. C.A.) and *Ex p. Risby* (1975), 24 C.C.C. (2d) 211, [1975] W.W.D. 880 (B.C.S.C.); *R. v. Clermont* (1986), 30 C.C.C. (3d) 571 (Que. C.A.), affd 45 C.C.C. (3d) 480, [1988] 2 S.C.R. 171 (5:0).

Once the probation order has expired the Court has no jurisdiction to revoke it and impose sentence, even where the act giving rise to the Crown's application occurred during the currency of the probation order: *Re R. and Paquette* (1980), 53 C.C.C. (2d) 281 (Alta. Q.B.). On the other hand, if the probation is revoked prior to its expiration, the Judge may adjourn the imposition of sentencing and impose sentence at a time beyond the period when the probation order would have expired had it not been revoked: *Re Montanaro and The Queen* (1980), 55 C.C.C. (2d) 143, 15 C.R. (3d) 346 (Que. C.A.).

At least where the original probation order only contained the statutory terms and terms requiring the accused to abstain from consumption of alcohol, to report to a probation officer and to notify the officer and the Court of change of address or employment, then revocation of the order and imposition of a sentence of imprisonment under para. (d) would not violate the protection against double punishment in s. 11(h) of the Charter of Rights and Freedoms: *R. v. Linklater* (1983), 9 C.C.C. (3d) 217 (Y.T.C.A.).

#### TRANSFER OF ORDER / Where court unable to act.

739. (1) Where an accused who is bound by a probation order becomes a resident of, or is convicted or discharged under section 736 of an offence including an offence under section 740 in a territorial division, other than the territorial division where the order was made, the court that made the order may, on the application of the prosecutor, and, if both such territorial divisions are not in the same province, with the consent of

(a) the Attorney General of Canada, in the case of proceedings in relation to an offence that were instituted at the instance of the Government of Canada and conducted by or on behalf of that Government, or

(b) in any other case, the Attorney General of the province in which the order was made,

transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the accused, have had jurisdiction to make the order in that other territorial division if the accused had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be



dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

(2) Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probation order may be exercised by any other court that has equivalent jurisdiction in the same province. R.S., c. C-34, s. 665; 1974-75-76, c. 93, s. 82; R.S.C. 1985, c. 27 (1st Supp.), s. 163.

#### CROSS-REFERENCES

See Cross-References cited under s. 738.

#### SYNOPSIS

This section provides a mechanism for transferring probation orders from one jurisdiction to another. Where it is sought to transfer the order from one province to another consent must be obtained from (a) the Attorney General of Canada with respect to federal prosecutions, or (b) the Attorney General of the province in which the order was made in all other cases (subsec. (1)).

If the judge who made the order or the one to whom it has been transferred is unable to act, the court's powers may be exercised by any other court that has equivalent jurisdiction in the same province (subsec. (2)).

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#### FAILURE TO COMPLY WITH ORDER / Where accused may be tried and punished.

**740. (1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.**

**(2) An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province. R.S., c. C-34, s. 666.**

#### CROSS-REFERENCES

Section 737(4) provides that the court must inform the accused of the contents of this section and s. 738(4) when making a probation order. The Crown is permitted to apply to have the probation order of the original conviction revoked (or varied) and a sentence imposed as required under s. 738(4).

This section creates a specific exception to s. 478(1) which provides that a court in one province cannot try an offence committed entirely in another province.

#### ANNOTATIONS

**Mens rea** – Where the accused simply did not have the financial capacity to pay the restitution ordered as part of a probation order then it could not be said that he “wilfully” breached the order and a charge under this section must be dismissed: *R. v. Sugg* (1986), 28 C.C.C. (3d) 569 (N.S.C.A.).

Where the Crown, in order to prove an offence under this section, relies on the commission of a criminal offence, proof of commission of that offence constitutes the *actus reus* of the offence under this section but is not itself even *prima facie* proof of an intent to breach the probation order. An honest but mistaken belief by the accused that he was not committing the criminal offence alleged to constitute the breach means that he cannot be said to have wilfully failed or refused to comply with the probation order. In this

respect s. 19, which provides that ignorance of the law is no defence, is of no application since knowledge by the accused that his act is contrary to law is an element of the *mens rea* of the offence under this section: *R. v. Docherty* (1989), 51 C.C.C. (3d) 1, [1989] 2 S.C.R. 941, 72 C.R. (3d) 1, 17 M.V.R. (2d) 161 (7:0).

**Proof of breach of probation order** – Where an accused fails to comply with the term of a probation order requiring him to make compensation by a certain date then the offence under this section is complete on that date and the six-month limitation period prescribed by s. 786(2) runs from that date rather than the date that the probation order expires: *R. v. Brown* (1984), 13 C.C.C. (3d) 469, 48 Nfld. & P.E.I.R. 172 (Nfld. S.C.T.D.).

Once the Crown proves failure to comply with a term of probation order requiring the accused to make periodic payments of restitution, the accused, in the absence of an explanation, runs the risk of conviction. There is no onus on the Crown to lead evidence to negative a possible defence such as inability to pay: *R. v. Collard* (1987), 39 C.C.C. (3d) 471, 49 Man. R. (2d) 175, [1987] 6 W.W.R. 564 (C.A.).

Breach of the statutory term that the accused “keep the peace and be of good behaviour” so as to amount to an offence under this section may include conduct not amounting to a criminal offence. This would include conduct which might violate a provincial or municipal enactment: *R. v. Stone* (1985), 22 C.C.C. (3d) 249 (Nfld. S.C.T.D.).

**Proof of validity of probation order [Also see notes under s. 737]** – The Crown must prove compliance with s. 737(4): *R. v. Piche* (1976), 31 C.C.C. (2d) 150, [1976] 5 W.W.R. 459 (Sask. Q.B.).

A signed acknowledgement by the accused on the probation order that he has been advised of the provisions referred to in s. 737(4) is direct evidence that that subsection has been complied with unless contradicted by other evidence and there is no need to call the Court official at the accused's trial for an offence under this section to prove compliance: *R. v. McNamara* (1982), 66 C.C.C. (2d) 24, 36 O.R. (2d) 308 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, O.R. *loc. cit.*

An accused may not be convicted of the offence under this section where there has not been full compliance with the provisions of subsec. 737(4)(c). Thus even though the accused was informed of the provisions of this section as she was not informed of the provisions of subsec. 738(4) she was not bound by the probation order and could not therefore be convicted of a breach of that order: *R. v. Bara* (1981), 58 C.C.C. (2d) 243 (B.C.C.A.) (2:1).

The mere filing of a notice of appeal does not operate to stay or suspend the operation of the sentence imposed at trial and thus an accused may be convicted of this offence notwithstanding that at the time of the alleged failure to comply the underlying conviction was under appeal: *R. v. Trabulsey* (1993), 84 C.C.C. (3d) 240, 15 O.R. (3d) 52 (Gen. Div.).

**Double jeopardy** – The rule against multiple convictions enunciated in *Kienapple v. The Queen* (1974), 15 C.C.C. (2d) 524, 44 D.L.R. (3d) 351, [1975] 1 S.C.R. 729 has no application although the accused was previously convicted of an offence which was alleged to be the foundation for the charge under this section: *R. v. Pinkerton* (1979), 46 C.C.C. (2d) 284, 7 C.R. (3d) 39, [1979] 3 W.W.R. 241 (B.C.C.A.).

The double jeopardy guarantee in s. 11(h) of the Canadian Charter of Rights and Freedoms is not offended by the accused's conviction for the offence under this section although it is based on his conviction for another offence, break and enter, under the Criminal Code: *Daniels v. The Queen* (1985), 44 C.R. (3d) 184 (Sask. Q.B.).

**Sentencing** – Where an accused has been convicted of an offence while on probation and the fact that he was on probation was taken into account at that time the trial Judge in imposing sentence for breach of probation arising out of the same circumstances is bound to consider the punishment imposed previously for the same conduct and accord-

ingly does not err by imposing a nominal sentence for the breach of probation charge. Any sentence other than a nominal one would come close to violating the fundamental principle that no one is to undergo double punishment: *R. v. Chinn* (1977), 38 C.C.C. (2d) 45, [1978] 1 W.W.R. 418 (Alta. Dist. Ct.).

**Jurisdiction** – By virtue of subsec. (2), notwithstanding the probation order had never been transferred to Saskatchewan, the courts of that province had jurisdiction to try an offence under this section where the breach took place in Saskatchewan although the probation order was made in Manitoba: *R. v. Michelle* (1986), 28 C.C.C. (3d) 572 (Sask. Q.B.).

741. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 163.]

## Dispositions Against Young Persons

TRANSFER OF JURISDICTION / Whether sentence to be served concurrently or consecutively / Remaining portion deemed to constitute one sentence.

741.1 (1) Where a person is or has been sentenced for an offence while subject to a disposition made under paragraph 20(1)(j), (k) or (k.1) of the *Young Offenders Act*, on the application of the Attorney General or the Attorney General's agent, a court of criminal jurisdiction may, unless to so order would bring the administration of justice into disrepute, order that the remaining portion of the disposition made under that Act be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

(2) Where an order is made under subsection (1), in respect of a disposition made under paragraph 20(1)(k) or (k.1) of the *Young Offenders Act*, the remaining portion of the disposition to be served pursuant to the order shall be served concurrently with the sentence referred to in subsection (1), where it is a term of imprisonment, unless the court making the order orders that it be served consecutively.

(3) For greater certainty, the remaining portion of the disposition referred to in subsection (2) shall, for the purposes of section 139 of the *Corrections and Conditional Release Act* and section 731 of this Act, be deemed to constitute one sentence of imprisonment. R.S.C. 1985, c. 24 (2nd Supp.), s. 47; 1992, c. 11, s. 14; 1992, c. 20, s. 202; 1995, c. 19, s. 37.

### CROSS-REFERENCES

Section 20(1)(i) of the *Young Offenders Act* allows a young person to be placed on probation for a specified period not exceeding two years in accordance with s. 23. Section 20(1)(k) of that Act provides for custody orders of up to two years in most cases and three years if the offence is punishable by imprisonment for life under the Criminal Code or other federal Act. The definition of "Attorney General" can be located in s. 2.

The phrase "would bring the administration of justice into disrepute" is also contained in s. 24 of the Charter. This section deals with the exclusion of evidence.

### SYNOPSIS

This section deals with situations where a person bound by a probation order or subject to a custodial sentence imposed under the *Young Offenders Act* is before a court as an adult to be sentenced for another offence.

The court, upon application by the Crown, can order that any remaining portion of the disposition made by the youth court be dealt with under the provisions of the Crimi-



nal Code (subsec. (1)), but only if such an order would not bring the administration of justice into disrepute.

Unless otherwise ordered the remaining portion of the youth court custodial sentence will be served concurrently (subsec. (2)). Both sentences are treated as one order for the purposes of determining: (a) where the prisoner is to be incarcerated (see s. 731); and (b) parole (subsec. (3)).

## *Eligibility for Parole*

### **POWER OF COURT TO DELAY PAROLE / Principles that are to guide the court.**

**741.2.** (1) Notwithstanding subsection 120(1) of the *Corrections and Conditional Release Act*, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.

(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles. 1992, c. 20, s. 203; 1995, c. 42, s. 75.

### **CROSS-REFERENCES**

Section 120 of the *Corrections and Conditional Release Act* sets out the normal periods of parole eligibility which, in most circumstances, will be one-third of the sentence or seven years, whichever is the lesser. Section 120(4) and (5) of the Act set out the manner for calculating parole ineligibility where an offender while serving sentence for one offence, for which no order has been made under this section, is sentenced for a further offence in which an order is made under this section.

Schedules I and II to the *Corrections and Conditional Release Act* are as follows:

### **SCHEDULE I**

1. An offence under any of the following provisions of the Criminal Code:

- (a) paragraph 81(2)(a) (causing injury with intent);
- (b) section 85 (use of firearm during commission of offence);
- (c) subsection 86(1) (pointing a firearm);
- (d) section 144 (prison breach);
- (e) section 151 (sexual interference);
- (f) section 152 (invitation to sexual touching);
- (g) section 153 (sexual exploitation);
- (h) section 155 (incest);
- (i) section 159 (anal intercourse);
- (j) section 160 (bestiality, compelling, in presence of or by child);
- (k) section 170 (parent or guardian procuring sexual activity by child);
- (l) section 171 (householder permitting sexual activity by or in presence of child);
- (m) section 172 (corrupting children);
- (n) subsection 212(2) (living off the avails of prostitution by a child);
- (o) subsection 212(4) obtaining sexual services of a child);
- (p) section 236 (manslaughter);
- (q) section 239 (attempt to commit murder);

- (r) section 244 (causing bodily harm with intent);
- (s) section 246 (overcoming resistance to commission of offence);
- (t) section 266 (assault);
- (u) section 267 (assault with a weapon or causing bodily harm);
- (v) section 268 (aggravated assault);
- (w) section 269 (unlawfully causing bodily harm);
- (x) section 270 (assaulting a peace officer);
- (y) section 271 (sexual assault);
- (z) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (z.1) section 273 (aggravated sexual assault);
- (z.2) section 279 (kidnapping);
- (z.3) section 344 (robbery)
- (z.4) section 433 (arson - disregard for human life);
- (z.5) section 434.1 (arson - own property);
- (z.6) section 436 (arson by negligence); and
- (z.7) paragraph 465(1)(a) (conspiracy to commit murder).

2. An offence under any of the following provisions of the *Criminal Code*, as they read immediately before July 1, 1990:

- (a) section 433 (arson);
- (b) section 434 (setting fire to other substance); and
- (c) section 436 (setting fire by negligence).

3. An offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1983:

- (a) section 144 (rape)
- (b) section 145 (attempt to commit rape);
- (c) section 149 (indecent assault on female);
- (d) section 156 (indecent assault on male);
- (e) section 245 (common assault); and
- (f) section 246 (assault with intent).

## SCHEDULE II

1. An offence under any of the following provisions of the *Narcotic Control Act*:

- (a) section 4 (trafficking);
- (b) section 5 (importing and exporting);
- (c) section 6 (cultivation);
- (d) section 19.1 (possession of property obtained by certain offences); and
- (e) section 19.2 (laundering proceeds of certain offences).

2. An offence under any of the following provisions of the *Food and Drugs Act*:

- (a) section 39 (trafficking in controlled drug);
- (b) section 44.2 (possession of property obtained by trafficking in controlled drug);
- (c) section 44.3 (laundering proceeds of trafficking in controlled drug);
- (d) section 48 (trafficking in restricted drug);
- (e) section 50.2 (possession of property obtained by trafficking in restricted drug); and
- (f) section 50.3 (laundering proceeds of trafficking in restricted drug).

## SYNOPSIS

This section gives the court the power to set the period of parole ineligibility for certain specified offences. Those offences, generally speaking, are the various sexual offences, crimes of violence and various drug offences. The period of parole ineligibility can only be increased to one-half of the sentence imposed, or 10 years whichever is less.

## ANNOTATIONS

In view of s. 11(i) of the Charter, this section does not apply to offences committed prior to the effective date of this section [November 1, 1992]: *R. v. Boone* (1993), 88 Man. R. (2d) 110 (C.A.); *R. v. C. (T.J.)* (1993), 86 C.C.C. (3d) 181, 51 W.A.C. 183, 88 Man. R. (2d) 183, 18 C.R.R. (2d) 340 (C.A.); *R. v. Lambert* (1994), 93 C.C.C. (3d) 88, 123 Nfld. & P.E.I.R. 347, 26 C.R.R. (2d) 367 (Nfld. C.A.), leave to appeal to S.C.C. refused 94

C.C.C. (3d) vii; *R. v. Ferris* (1994), 93 C.C.C. (3d) 497, 35 C.R. (4th) 52, 153 N.B.R. (2d) 241 (C.A.); *R. v. Richard* (1994), 94 C.C.C. (3d) 285, 135 N.S.R. (2d) 318 (C.A.).

An order may be made under this section where the accused was convicted of an offence listed in Schedules I and II of the Corrections and Conditional Release Act and sentenced to life imprisonment (where life imprisonment is not a minimum punishment): *R. v. Shorting* (1995), 102 C.C.C. (3d) 385, [1996] 1 W.W.R. 252 (Man. C.A.).

This section does not apply to the offence of breaking and entering and committing an indictable offence pursuant to s. 348(1)(b) even if the indictable offence committed, which in this case was aggravated assault, is a listed offence as s. 348(1)(b) is not a listed offence: *R. v. Nichol* (1995), 102 C.C.C. (3d) 441, 86 O.A.C. 47 (C.A.).

The word "trafficking" following the phrase "section 4" in s. 1(a) of Schedule II to the Corrections and Conditional Release Act is inserted for ease of reference only and Parliament clearly intended that both the trafficking offence and possession for the purpose of trafficking contrary to s. 4 of the Narcotic Control Act be subject to the same penalty, including the possibility of an order under this section: *R. v. Dankyi* (1993), 86 C.C.C. (3d) 368, 25 C.R. (4th) 395, [1993] R.J.Q. 2767 (C.A.).

The scope of permissible sentences for an offence such as possession of narcotics for the purpose of trafficking is itself wide enough to accommodate the best and the worst cases and thus an order under this section can only be justified as an exceptional measure reserved for particular circumstances requiring an additional form of denunciation, deterrence or incapacitation. The trial judge must clearly enunciate the specific reasons for increasing the ordinary period of ineligibility for parole: *R. v. Dankyi*, *supra*.

The phrase "the expression of society's denunciation of the offence" is not so vague as to offend principles of fundamental justice: *R. v. Warren* (1994), 95 C.C.C. (3d) 86, 85 W.A.C. 81, 128 Sask. R. 81 (C.A.).

This section should only be invoked as an exceptional measure where the Crown has satisfied the court on clear evidence that an increase in the period of parole ineligibility is required. There should be an articulable reason for invoking this section and the trial judge should give clear and specific reasons for the order. General concerns, such as the frequency of commission of the particular offence in the community, will not justify an order under this section: *R. v. Goulet* (1995), 97 C.C.C. (3d) 61, 22 O.R. (3d) 118, 37 C.R. (4th) 373 (C.A.).

The application of this provision is not limited to cases where there are special circumstances, unusual circumstances or particularly aggravating factors. The trial judge should first determine the fit sentence and then go on to consider whether an increase in parole ineligibility is warranted. A judge may make an order pursuant to this provision only if convinced that the objectives of society's denunciation or specific or general deterrence will not be met unless the possibility of early release on full parole is barred having regard to the circumstances of the offence, the character and circumstances of the offender, the likelihood of rehabilitation within the regular period of parole ineligibility and the need to protect society: *R. v. Matwiy* (unreported, February 15, 1996, Alta. C.A.) [096/058/046-35 pp.].

## ***Imprisonment for Life***

### **SENTENCE OF LIFE IMPRISONMENT.**

**742.** Subject to s. 742.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

- (a) in respect of a person who has been convicted of high treason or first degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;



- (a.1) in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described under this Act, that he be sentenced to imprisonment for life without eligibility for parole until he has served twenty-five years of his sentence;
- (b) in respect of a person who has been convicted of second degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 744; and
- (c) in respect of a person who has been convicted of any other offence, that he be sentenced to imprisonment for life with normal eligibility for parole. R.S., c. C-34, s. 669; 1974-75-76, c. 105, s. 21; R.S.C. 1985, c. 27 (1st Supp.), s. 165; 1992, c. 11, s. 15.

#### CROSS-REFERENCES

See s. 46(1) for the definition of “high treason” and s. 47(1) for its punishment. Sections 229 and 230 define murder with s. 231 providing the classification of murder for the purpose of sentencing.

Under s. 743, where a jury finds the accused guilty of second degree murder, the judge presiding at the trial must put to them the statutory questions concerning their recommendations as to parole ineligibility. Section 744 then is applied by the judge to set the period of ineligibility for parole.

An accused may apply for judicial review under s. 745 if the period of ineligibility is greater than 15 years and the person has served at least 15 years of the sentence.

In calculating the period of imprisonment for the purposes of ss. 742, 744 and 745, any time spent in custody before sentencing and after the date of arrest is to be included by s. 746.

See s. 747 which limits parole for those with parole ineligibilities.

In the case of a young person transferred to ordinary courts, a different sentencing regime applies, see ss. 742.1, 743.1 and 744.1.

#### SYNOPSIS

The parole ineligibility periods with respect to life sentences are: (a) 25 years for persons convicted of high treason or first degree murder (para. (a)); (b) 25 years for persons convicted of second degree murder who have previously been convicted of murder (para. (a.1)); (c) 10 years for persons convicted of second degree murder, unless the court has substituted a greater period not to exceed 25 years (para. (b)); and (d) the normal periods in all other cases (para. (c)) (*i.e.*, pursuant to provincial or federal legislation, as the case may be, especially the Parole Act and Regulations).

#### ANNOTATIONS

The mandatory minimum sentence prescribed by para. (a) for a planned and deliberate murder does not infringe s. 12 of the Charter of Rights and Freedoms: *R. v. Cairns* (1989), 51 C.C.C. (3d) 90 (B.C.C.A.).

The combined effect of s. 231(5) and para. (a), requiring that a person convicted of first degree murder where the murder is committed while committing one of the offences, such as kidnapping, specified in s. 231(5) must be sentenced to life imprisonment without eligibility for parole for 25 years, does not infringe ss. 7, 9 and 12 of the Charter: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449, [1990] 6 W.W.R. 137, 76 Alta. L.R. (2d) 43 (S.C.C.) (7:0).

To a similar effect, see *R. v. Bowen* (1990), 59 C.C.C. (3d) 515, 2 C.R. (4th) 225, [1991] 1 W.W.R. 466 (C.A.) and *R. v. Lefebvre* (1992), 45 Q.A.C. 47 (C.A.), leave to appeal to S.C.C. refused June 18, 1992, upholding the validity of these provisions in relation to the first degree murder of a police officer as prescribed by s. 231(4).

Paragraph (a.1) applies only where the accused was convicted of the earlier murder prior to commission of the murder for which he is now being sentenced: *R. v. Harris*

(1993), 86 C.C.C. (3d) 284, 25 C.R. (4th) 389 (Que. C.A.); *R. v. Okkuatsiak* (1994), 91 C.C.C. (3d) 83, 120 Nfld. & P.E.I.R. 79 (Nfld. S.C.).

The mandatory sentence prescribed by para. (b) does not offend s. 12 of the Charter of Rights and Freedoms: *R. v. Mitchell* (1987), 39 C.C.C. (3d) 141, 81 N.S.R. (2d) 57 (S.C. App. Div.); *R. v. Latimer* (1995), 99 C.C.C. (3d) 481, 126 D.L.R. (4th) 203, [1995] 8 W.W.R. 609 (Sask. C.A.).

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## PERSONS UNDER EIGHTEEN.

**742.1.** The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served

- (a) such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;
- (b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
- (c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence. 1992, c. 11, s. 16; 1995, c. 19, s. 38.

## SYNOPSIS

This section sets out the sentence for a young person who has been transferred to the ordinary courts on a charge of first degree or second degree murder. The provisions of this section apply to such young persons, rather than the provisions of s. 742. In the case of a trial by jury, the judge is required to put a question to the jury in the terms set out in s. 743.1. The judge then takes the jury's recommendation into account in fixing the period of parole ineligibility between five and ten years pursuant to s. 744.1. Note that if the accused is not transferred to the ordinary courts, then the provisions of s. 20(1)(k.1) of the Young Offenders Act apply and the offender is liable to a disposition of up to five years less one day.

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## RECOMMENDATION BY JURY.

**743.** Subject to section 743.1, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five. R.S., c. C-34, s. 670; 1974-75-76, c. 105, s. 21; 1992, c. 11, s. 16.

## CROSS-REFERENCES

In setting out the parole ineligibility period under s. 744, the judge is to take into consideration the

recommendation of the jury. Judicial review under s. 745 is available when the ineligibility period is set at more than 15 years.

See s. 474 for limits on parole during the ineligibility period.

In the case of a young person transferred to ordinary courts, a different sentencing regime applies, see ss. 742.1, 743.1 and 744.1.

## ANNOTATIONS

The jury is only to be asked for a recommendation where it finds the accused guilty after hearing all the evidence and counsels' addresses, not where it returns a verdict following the accused's guilty plea in the course of the trial: *R. v. Larter and Burt* (1982), 2 C.C.C. (3d) 240, 39 Nfld. & P.E.I.R. 178 (P.E.I.S.C. App. Div.); *R. v. Kivell* (1985), 21 C.C.C. (3d) 299 (B.C.C.A.). *Contra*: *R. v. Oughton* (February 11, 1985) unreported (Ont. C.A.).

The jury's recommendation under this section is to be based solely on the evidence leading to the conviction and the jury should hear no further evidence or argument for the purposes of a recommendation under this section. This section in effect constitutes a complete code: *R. v. Nepoose* (1988), 46 C.C.C. (3d) 421, 69 C.R. (3d) 59 (Alta. C.A.).

The fact that the jury makes no recommendation under this section is a factor to be taken into account but the Judge is still faced with the responsibility of imposing a fit sentence having regard to the factors set out in s. 744: *R. v. Jordan* (1983), 7 C.C.C. (3d) 143 (B.C.C.A.), leave to appeal to S.C.C. refused Dec. 5, 1983.

The jury's recommendation under this section need not be unanimous and the trial judge ought not to express to the jury a preference for a unanimous recommendation: *R. v. Brenn* (1989), 8 W.C.B. (2d) 822 (Ont. C.A.).

To the contrary is *R. v. Ameeriar* (1990), 60 C.C.C. (3d) 431 (Que. C.A.), where the court held that the trial judge properly directed the jury that any recommendation must be unanimous and that, if they failed to make a recommendation, the jury should indicate whether this was because they were not unanimous or because they all agreed not to make any recommendation. Where the jury failed to make a recommendation because they were not unanimous, then the trial judge was not required to treat that finding as if it were a recommendation that the period of parole ineligibility ought not to be increased.

The fact that counsel is not permitted to make submissions to the jury does not infringe s. 7 of the Charter. Further, since the jury is merely making a recommendation, they need not be unanimous: *R. v. Okkuatsiak* (1993), 80 C.C.C. (3d) 251, 20 C.R. (4th) 400, 105 Nfld. & P.E.I.R. 85 (C.A.).

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## PERSONS UNDER SIXTEEN.

**743.1.** Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole. 1992, c. 11, s. 16; 1995, c. 19, s. 39.



## SYNOPSIS

This section sets out the question to be asked of the jury which has found a young person guilty of first degree or second degree murder. The provisions of this section apply to such young persons, rather than the provisions of s. 743. The judge then takes the jury's recommendation into account in fixing the period of parole ineligibility between five and ten years pursuant to s. 744.1. The sentence itself is life imprisonment as prescribed by s. 742.1. Note that if the accused is not transferred to the ordinary courts, then the provisions of s. 20(1)(k.1) of the Young Offenders Act apply and the offender is liable to a disposition of up to five years less one day.

## INELIGIBILITY FOR PAROLE.

**744.** Subject to section 744.1, at the time of the sentencing under paragraph 742(b) of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 743, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five), without eligibility for parole, as the judge deems fit in the circumstances. R.S., c. C-34, s. 671; 1974-75-76, c. 105, s. 21; R.S.C. 1985, c. 27 (1st Supp.), s. 166; 1992, c. 11, s. 16.

## CROSS-REFERENCES

See s. 743 for the statutory question which the judge addresses to the jury in order to obtain the jury's recommendation. Also see references cited under ss. 742 and 743.

In the case of a young person transferred to ordinary courts, a different sentencing regime applies, see ss. 742.1, 743.1 and 744.1.

## SYNOPSIS

In sentencing an accused convicted of second degree murder, the trial judge or, if necessary, another judge of the same court, may increase the mandatory 10-year parole ineligibility period up to 25 years. (See s. 743 with respect to asking the jury for a recommendation in this regard.)

## ANNOTATIONS

**Jurisdiction and procedure** – In *R. v. Leahy* (1978), 44 C.C.C. (2d) 479 (Ont. C.A.) the Court in setting aside the order of parole non-eligibility stated that the case was of a type in which the specific reasons of the trial Judge should have been clearly enunciated.

Notwithstanding there is no jury recommendation under s. 743 where the Court of Appeal substitutes a conviction of second degree murder on an appeal by the accused from his conviction for first degree murder the Court of Appeal has power to set a period of parole non-eligibility which exceeds 10 years: *R. v. Kjeldsen* (1980), 53 C.C.C. (2d) 55, [1980] 3 W.W.R. 411 (Alta. C.A.).

A Judge also has jurisdiction to increase the number of years of parole ineligibility where the accused pleads guilty to a charge of second degree murder: *R. v. O'Brien* (1982), 66 C.C.C. (2d) 374 (B.C.C.A.), and *semble*, *Bennett v. The Queen* (1982), 70 C.C.C. (2d) 575, 142 D.L.R. (3d) 575, [1982] 2 S.C.R. 582.

The approach of the appellate court in considering an appeal against an order made under this section is the same as an appeal against sentence under s. 687 which requires the court to consider the fitness of the order. Thus, while the trial judge's decision is not to be taken lightly, it is for the appellate court to determine what is fit having regard to the facts before the trial judge and any relevant new facts placed before the court: *R. v. Walford* (1984), 12 C.C.C. (3d) 257 (B.C.C.A.).

**Principles in setting period of parole ineligibility** – As a general rule, the period of

parole ineligibility shall be for 10 years but this can be ousted by a determination of the trial judge that, according to the criteria set out in s. 744, the accused should wait a longer period before having his suitability to be released into the general public assessed. Denunciation, future dangerousness and general as well as specific deterrence are relevant criteria in making the determination. An extension of the period of parole ineligibility would not be unusual, although it may well be that, in the median number of cases, a period of 10 years might still be imposed. The power to extend the period of parole ineligibility need not be used sparingly: *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193, 106 W.A.C. 37, 129 D.L.R. (4th) 657 (S.C.C.).

#### IDEM.

**744.1.** At the time of the sentencing under section 742.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 743.1, by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances. 1992, c. 11, s. 16; 1995, c. 19, s. 40.

#### SYNOPSIS

This section sets out the factors to be considered by the judge in sentencing a young person who has been transferred to the ordinary courts and has been convicted of first degree or second degree murder. The provisions of this section apply to such young persons, rather than the provisions of s. 744. In the case of a trial by jury, the judge is required to put a question to the jury in the terms set out in s. 743.1. The judge then takes the jury's recommendation into account in fixing the period of parole ineligibility between five and ten years. Note that if the accused is not transferred to the ordinary courts then the provisions of s. 20(1)(k.1) of the Young Offenders Act apply and the offender is liable to a disposition of up to five years less one day.

#### ANNOTATIONS

Although s. 746 does not in its terms apply to accused sentenced under this section, it would appear that the federal authorities have accepted that s. 746(a) should apply to such accused in determining the period of imprisonment served: *R. v. A. (C.)* (unreported June 2, 1993, Ont. Ct. (Gen. Div.)) [court file No. 643/93].

#### APPLICATION FOR JUDICIAL REVIEW / Judicial hearing / Renewal of application / Reduction / Rules / Definition of "Appropriate Chief Justice" / Territories.

**745. (1)** Where a person has served at least fifteen years of his sentence

- (a) in the case of a person who has been convicted of high treason or first degree murder, or
- (b) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until he has served more than fifteen years of his sentence,

he may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in his number of years of imprisonment without eligibility for parole.

**(2)** Upon receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of

imprisonment without eligibility for parole ought to be reduced having regard to the character of the applicant, his conduct while serving his sentence, the nature of the offence for which he was convicted and such other matters as the judge deems relevant in the circumstances and the determination shall be made by no less than two-thirds of the jury.

(3) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in his number of years of imprisonment without eligibility for parole.

(4) Where the jury hearing an application under subsection (1) determines that the applicant's number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,

- (a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or
- (b) terminate the ineligibility for parole.

(5) The appropriate Chief Justice in each province or territory may make such rules in respect of applications and hearings under this section as are required for the purposes of this section.

(6) For the purposes of this section, the "appropriate Chief Justice" is

- (a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court;
- (b) in relation to the Province of Quebec, the Chief Justice of the Superior Court;
- (c) in relation to the Provinces of Nova Scotia and British Columbia, the Chief Justice of the Supreme Court;
- (d) in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, respectively, the Chief Justice of the Court of Queen's Bench;
- (e) in relation to the Provinces of Prince Edward Island and Newfoundland, the Chief Justice of the Supreme Court, Trial Division; and
- (f) in relation to the Yukon Territory and the Northwest Territories, respectively, the Chief Justice of the Court of Appeal thereof.

**NOTE:** Subsec. (6)(f) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (f) *in relation to the Yukon Territory, the Northwest Territories and Nunavut, respectively, the Chief Justice of the Court of Appeal.*

(7) For the purposes of this section, when the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction to empanel a jury to hear an application in respect of a conviction that took place in the Yukon Territory or the Northwest Territories, the appropriate Chief Justice may designate the judge from the Court of Appeal or the Supreme Court of the Yukon Territory or Northwest Territories, as the case may be. R.S., c. C-34, s. 672; 1974-75-76, c. 105, s. 21; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 14; 1992, c. 51, s. 39.

**NOTE:** Subsec. (7) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Territories.*

*(7) For the purposes of this section, when the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction to empanel a jury to hear an application in respect of a conviction that took place in the Yukon Territory, the Northwest Territories or Nunavut,*



*the appropriate Chief Justice may designate the judge from the Court of Appeal or the Supreme Court of the Yukon Territory, the Northwest Territories or Nunavut, as the case may be.*

#### CROSS-REFERENCES

Ineligibility orders can be appealed under ss. 675(2) and 676(4). There is no right of appeal from determinations made under this section.

Also see references cited under ss. 742 and 743.

#### SYNOPSIS

This section provides for a review of the parole ineligibility period with respect to certain life sentences, namely: (a) those imposed following conviction for treason or first degree murder, where the inmate will not be eligible for parole until having served 25 years; and (b) those imposed following conviction for second degree murder where the period of ineligibility is 15 years or more; after at least 15 years have been served (subsec. (1)).

The Chief Justice, upon the application of a prisoner, will assign a judge to hear the matter with a jury. The jury will consider the character and conduct of the applicant, the nature of the offence and such other matters as the judge deems relevant. The issue shall be decided by a two-thirds majority (subsec. (2)).

If the application is dismissed the jury will fix a time at or after which another application to the Chief Justice may be made (subsec. (3)).

If the application is allowed the jury can either reduce or terminate the period of ineligibility (subsec. (4)).

#### ANNOTATIONS

The purpose of the review procedure under this section is to re-examine a decision in light of new information or factors which could not have been known initially. It follows that the primary purpose of the hearing is to call attention to changes which have occurred in the applicant's situation and which might justify imposing a less harsh penalty upon the applicant. The jury's decision is not essentially different from the ordinary decision regarding length of a sentence. The section gives the jury a broad discretionary power. Accordingly, there is no need to analyze the judge's charge to the jury in the detail that would be appropriate in the case of a trial. The Supreme Court's function is essentially to determine whether the applicant was given a fair hearing at trial. Since the jury's duty is to make a discretionary decision, the concepts of burden of proof, proof on the balance of probabilities, or proof beyond a reasonable doubt are of very limited value in such a hearing. The jury must instead make what, in its discretion, it deems to be the best decision on the evidence. For the applicant to obtain a reduction in the period of parole ineligibility, the applicant need not succeed with respect to all three factors set out in subsec. (2). It was improper for Crown counsel in questioning witnesses and in his closing address to attempt to discredit the review process by calling attention to the fact that the victim had no opportunity as the applicant did to have her suffering reduced and because the 25 years ineligibility period was a bargain compared with the death penalty. The possible reduction of the ineligibility period after 15 years is a choice made by Parliament which the jury must accept. It is not open to the prosecution to call this choice into question by suggesting to the jury that it is an abnormal procedure, excessively indulgent and contrary to what it argues was Parliament's intent. It was also improper to invite the jury to consider isolated cases in which prisoners committed murder after being paroled. The jury must consider only the applicant's case and must not try the cases of other inmates or determine whether the existing system of parole is effective. While it is possible to invite the jury to take the deterrent aspect of the penalty into account, this should be done in the context of a general submission on the various functions performed by the penalty. It was also an error in this case for the judge to limit his discussion of the applicant's character to matters prior to or contemporaneous with the murder: *R. v. Swietlinski*, [1994] 3 S.C.R. 481, 92 C.C.C. (3d) 449, 33 C.R. (4th) 295.

On this hearing, the offender is no longer a person charged with an offence within the meaning of s. 11 of the Charter of Rights and Freedoms and therefore the legal rights set out therein have no application. As well, since the procedure does not involve a deprivation of liberty, the offender already being deprived of his liberty, s. 7 of the Charter does not apply. In any event, it was held that rules established by the Chief Justice of Ontario pursuant to subsec. (5) provided for a fair hearing of the issue *R. v. Vaillancourt* (1988), 43 C.C.C. (3d) 238, 66 C.R. (3d) 66 (Ont. H.C.J.).

An application for a review under this section may not be brought until 15 years of the inmate's sentence has elapsed. The inmate is not entitled to bring an application after 12 years in an attempt to take advantage of the provisions of s. 747(2) respecting day parole and temporary absence: *R. v. Frederick* (1989), 52 C.C.C. (3d) 433 (Ont. H.C.J.).

No appeal lies to the Court of Appeal from the determination made by the jury under this section: *R. v. Vaillancourt* (1989), 49 C.C.C. (3d) 544, 71 C.R. (3d) 43, 33 O.A.C. 234 (C.A.), leave to appeal to S.C.C. refused 53 C.C.C. (3d) vii.

However, the inmate may apply directly to the Supreme Court of Canada for leave to appeal pursuant to s. 40 of the Supreme Court Act, R.S.C. 1985, c. S-26: *R. v. Vaillancourt* (1990), 76 C.C.C. (3d) 384n, 57 O.A.C. 320n (S.C.C.).

The prohibition on comment as to the accused's failure to testify in s. 4 of the Canada Evidence Act does not apply to proceedings under this section and the prosecutor may invite the jury to draw an adverse inference from the prisoner's silence at the hearing: *Poulin v. Quebec (Attorney General)* (1991), 68 C.C.C. (3d) 472 (Que. S.C.).

The procedural provisions pertaining to jury selection should be applied in selecting a jury under this section, including the procedure for challenge for cause: *R. v. Nichols* (1992), 71 C.C.C. (3d) 385 (Alta. Q.B.).

A judge should be cautious in admitting victim impact statements, for to focus the jury on the victim, some 15 years after the crime was committed, is to invite the jury to assess the appropriateness of the applicant's sentence in terms of its retribution, denunciation and punishment goals. To the extent that the impact on the victim is relevant to the factor of the nature of the offence, this relevance will usually, but not always, have been exhausted at the applicant's initial sentencing hearing. However, it would be permissible for a judge presiding at a hearing to receive victim impact statements in exercising the discretion to permit the jury to hear evidence of such other matters as the judge deems relevant in the circumstances: *R. v. Swietlinski*, *supra*.

## TIME SPENT IN CUSTODY.

746. In calculating the period of imprisonment served for the purposes of section 742, 742.1, 744, 744.1 or 745, there shall be included any time spent in custody between,

- (a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which that person was arrested and taken into custody in respect of the offence for which he was sentenced to imprisonment for life and the day the sentence was imposed; or
- (b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which that person was arrested and taken into custody in respect of the offence for which he was sentenced to death and the day the sentence was commuted or deemed to have been commuted to a sentence of imprisonment for life. R.S., c. C-34, s. 673; 1974-75-76, c. 105, s. 21; 1995, c. 19, s. 41.

## CROSS-REFERENCES

See s. 721(3) which allows the judge, in determining sentence, to consider the time spent in custody prior to sentencing.

Also see references cited under ss. 742 and 743.

## SYNOPSIS

This section provides that for the purposes of parole proceedings with respect to persons sentenced to life imprisonment, the calculation of time served shall include time spent in custody prior to sentence or, in the case of those sentenced to death, prior to commutation or deemed commutation of sentence. The former provision only applies to those sentenced to life imprisonment after July 25, 1976.

## ANNOTATIONS

Where there has been a delay in execution of the arrest warrant, although the police were aware of the accused's whereabouts and the warrant was capable of being executed, then the judge, in setting the period of parole ineligibility, should take that into account. Where this delay was not taken into account and the circumstances demonstrate an abuse of process and infringement of s. 7 of the Charter, it is open to a court to subsequently grant a remedy under s. 24(1) of the Charter by, for example, treating the accused as if he had been arrested on the date on which the warrant was issued and calculating the date of eligibility for judicial review under s. 745 accordingly: *Parker v. Canada (Solicitor General)* (1990), 57 C.C.C. (3d) 68, 73 O.R. (2d) 193, 78 C.R. (3d) 209 (H.C.J.).

Although this section does not in its terms apply to accused sentenced under s. 744.1, it would appear that the federal authorities have accepted that para. (a) should apply to such accused: *R. v. A. (C.)* (unreported, June 2, 1993, Ont. Ct. (Gen. Div.)) [court file No. 643/93].

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**PAROLE PROHIBITED / Absence with or without escort and day parole / Idem.**

747. (1) Unless Parliament otherwise provides by an enactment making express reference to this section, a person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall not be considered for parole or released pursuant to a grant of parole under the *Corrections and Conditional Release Act* or any other Act of Parliament until the expiration or termination of the specified number of years of imprisonment.

(2) Subject to subsection (3), in respect of a person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three of those years

- (a) no day parole may be granted under the *Corrections and Conditional Release Act*;
- (b) no absence without escort may be authorized under that Act or the *Prisons and Reformatories Act*; and
- (c) except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts.

(3) Notwithstanding the *Corrections and Conditional Release Act*, in the case of any person convicted of first degree murder or second degree murder who was under the age of eighteen at the time of the commission of the offence and who is sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but one fifth of the period of imprisonment the person is to serve without eligibility for parole,

- (a) no day parole may be granted under the *Corrections and Conditional Release Act*;
- (b) no absence without escort may be authorized under that Act or the *Prisons and Reformatories Act*; and
- (c) except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts. R.S.,



c. C-34, s. 674; 1974-75-76, c. 105, s. 21; 1992, c. 11, s. 17; 1992, c. 20, s. 228; 1995, c. 42, s. 76.

**NOTE:** 1992, c. 20, s. 204, which re-enacted s. 747, repealed by 1995, c. 42, s. 61.

#### CROSS-REFERENCES

Section 746 states that parole ineligibility for the purposes of ss. 742, 744 and 745 includes the time spent in custody before sentencing. As this section is not included, there is some question as to how the ineligibility period is to be calculated.

Section 745 may be used to vary the original period of parole ineligibility.

#### SYNOPSIS

This section states that no prisoner shall be paroled under any other Act prior to the expiry of his or her term of ineligibility for parole under the Code, unless an enactment of Parliament referring to this section provides for such parole (subsec. (1)). There shall be no day parole or absence without escort prior to three years before the expiry of the ineligibility period. However, there may be absence with escort for humanitarian reasons prior to that time with the approval of the National Parole Board (subsec. (2)).

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### *Disabilities*

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**PUBLIC OFFICE VACATED ON CONVICTION / When disability ceases / Disability to contract / Application for restoration of privileges / Order of restoration / Removal of disability.**

**748. (1)** Where a person is convicted of an indictable offence for which he is sentenced to imprisonment for a term exceeding five years and holds, at the time he is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

**(2)** A person to whom subsection (1) applies is, until he undergoes the punishment imposed on him or the punishment substituted therefor by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage.

**(3)** No person who is convicted of an offence under section 121, 124 or 418 has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

**(4)** A person to whom subsection (3) applies may, at any time before a pardon is granted to the person under section 4.1 of the *Criminal Records Act*, apply to the Governor in Council for the restoration of one or more of the capacities lost by the person by virtue of that subsection.

**(5)** Where an application is made under subsection (4), the Governor in Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to him in whole or in part and subject to such conditions as he considers desirable in the public interest.

**(6)** Where a conviction is set aside by competent authority, any disability imposed by this section is removed. R.S., c. C-34, s. 682; 1974-75-76, c. 93, s. 83, c. 105, s. 22; 1992, c. 22, s. 12.

#### CROSS-REFERENCES

See s. 749 for the granting of pardons by the Governor in Council. Under s. 750, the Governor in

Council may order the remission of all or part of a pecuniary penalty, fine or forfeiture. The royal mercy may be granted by Her Majesty and is not limited by anything in the Criminal Code under s. 751.

### SYNOPSIS

This section provides that no person shall assume or hold public office or employment, or vote, if they have been sentenced to a term of imprisonment exceeding five years until they have served that term or been given a free pardon. Also, a person convicted of certain corrupt crimes against the Crown is disqualified from ever contracting with (directly or indirectly) or being employed by the Crown again, unless, on application, a restoration of capacity is granted by the Governor in Council.

## *Pardon*

**TO WHOM PARDON MAY BE GRANTED / Free or conditional pardon / Effect of free pardon / Punishment for subsequent offence not affected.**

**749. (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.**

**(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.**

**(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.**

**(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted. R.S., c. C-34, s. 683.**

### CROSS-REFERENCES

Application may also be made to the Solicitor General of Canada for a pardon pursuant to the Criminal Records Act, R.S.C. 1985, c. C-47. The effect of the pardon is contained by s. 5 of the Act with revocation of the pardon governed by s. 7.

Remission of pecuniary penalties, fines or forfeiture by the Governor in Council is dealt with by s. 750.

By s. 751, there is no limit in this Act on Her Majesty's royal prerogative of mercy.

In the case of disabilities under s. 748, before the granting of a pardon, the Governor in Council may allow, by s. 748(4), the restoration of any capacities lost by virtue of that section.

See s. 690 which allows the Minister of Justice, on an application for mercy by a person convicted in proceedings by indictment or sentenced to preventative detention under Part XXIV, to order a new trial or hearing or to refer the matter to the court of appeal or to direct a reference.

### SYNOPSIS

This section states that Her Majesty may extend the royal mercy and the Governor in Council may grant free or conditional pardons to those imprisoned or convicted under this Act. Where there is a free pardon, the person is deemed never to have committed the offence, but a free or conditional pardon does not mitigate any sentence the person might receive on conviction for another offence.

### ANNOTATIONS

Where an accused has been previously pardoned and is then convicted of a further

offence, for the purposes of sentencing he is to be treated as a first offender: *R. v. Spring* (1977), 35 C.C.C. (2d) 308 (Ont. C.A.).

An inmate who seeks to review the validity of revocation of his conditional pardon by way of *habeas corpus* may be admitted to bail pending the hearing of the application. The onus is on the Crown to show cause why the inmate should not be admitted to bail. The onus would also ultimately be on the Crown to show breach of the conditions and that the pardon was terminated thereby, or the Governor in Council was justified on the facts in confirming that the pardon was at an end, as a result of the breach: *Re Reddekopp and The Queen* (1983), 6 C.C.C. (3d) 241, 33 C.R. (3d) 389 (Ont. H.C.J.).

In *Reference re: Milgaard (Can.)* (1992), 71 C.C.C. (3d) 260, 90 D.L.R. (4th) 1, [1992] 3 W.W.R. 385 (S.C.C.) the Governor in Council had referred the accused's case to the Supreme Court of Canada to determine whether the continued conviction of the accused for murder constituted a miscarriage of justice. The court held that the continued conviction of the accused would constitute a miscarriage of justice if, on the basis of the judicial record, the Reference Case and such further evidence as the court in its discretion received, the court was satisfied beyond a reasonable doubt that the accused was innocent. If the court was of that view, then it would consider advising the Governor in Council to exercise his power under subsec. (2) to grant a free pardon to the accused. Even if the record did not establish that there had been a miscarriage of justice, the court might still consider advising the Minister of Justice that granting of a conditional pardon under subsec. (2) may be warranted, having regard to all the circumstances. [Also see note of this case under s. 690, *supra*.]

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#### REMISSION BY GOVERNOR IN COUNCIL / Terms of remission.

**750. (1) The Governor in Council may order the remission, in whole or in part, of a pecuniary penalty, fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable.**

**(2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted. R.S., c. C-34, s. 685.**

#### CROSS-REFERENCES

Section 749(2) to (4) govern the granting of pardons by the Governor in Council. Application may also be made to the Solicitor General of Canada for a pardon pursuant to the Criminal Records Act, R.S.C. 1985, c. C-47.

By virtue of s. 749(1), mercy under the royal prerogative, may be extended to persons sentenced to imprisonment under any federal Act.

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#### ROYAL PREROGATIVE.

**751. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy. R.S., c. C-34, s. 686.**

#### CROSS-REFERENCES

See s. 749(1) which allows mercy under the royal prerogative to be extended to persons sentenced to imprisonment.

Pardons may also be granted by the Governor in Council under s. 749(2) to (4) and by the Solicitor General pursuant to the Criminal Records Act, R.S.C. 1985, c. C-47, for the granting of pardons.

See s. 750 which allows the Governor in Council to order the remission of pecuniary penalties, fines or forfeitures.

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**NOTE:** Part XXIII (ss. 716 to 751) replaced by 1995, c. 22, s. 6 (to come into force by



order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

## PART XXIII / SENTENCING

### Interpretation

DEFINITIONS / "Accused" / "Alternative measures" / "Court" / "Fine".

716. *In this Part,*

"accused" includes a defendant;

"alternative measures" means measures other than judicial proceedings under this Act used to deal with a person who is eighteen years of age or over and alleged to have committed an offence;

"court" means

- (a) a superior court of criminal jurisdiction,
- (b) a court of criminal jurisdiction,
- (c) a justice or provincial court judge acting as a summary conviction court under Part XXIII, or
- (d) a court that hears an appeal;

"fine" includes a pecuniary penalty or other sum of money, but does not include restitution.

### Alternative Measures

WHEN ALTERNATIVE MEASURES MAY BE USED / Restriction on use / Admissions not admissible in evidence / No bar to proceedings / Laying of information, etc.

717. (1) *Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:*

- (a) *the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province;*
- (b) *the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;*
- (c) *the person, having been informed of the alternative measures, fully and freely consents to participate therein;*
- (d) *the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;*
- (e) *the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;*
- (f) *there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and*
- (g) *the prosecution of the offence is not in any way barred at law.*

(2) *Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person*

- (a) *denies participation or involvement in the commission of the offence; or*
- (b) *expresses the wish to have any charge against the person dealt with by the court.*

(3) *No admission, confession or statement accepting responsibility for a given act or omission*

*made by a person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.*

*(4) The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but, if a charge is laid against that person in respect of that offence,*

- (a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and*
- (b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.*

*(5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.*

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#### RECORDS OF PERSONS DEALT WITH.

*717.1. Sections 717.2 to 717.4 apply only in respect of persons who have been dealt with by alternative measures, regardless of the degree of their compliance with the terms and conditions of the alternative measures.*

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#### POLICE RECORDS / Disclosure by peace officer / Idem.

*717.2. (1) A record relating to any offence alleged to have been committed by a person, including the original or a copy of any fingerprints or photographs of the person, may be kept by any police force responsible for, or participating in, the investigation of the offence.*

*(2) A peace officer may disclose to any person any information in a record kept pursuant to this section that it is necessary to disclose in the conduct of the investigation of an offence.*

*(3) A peace officer may disclose to an insurance company any information in a record kept pursuant to this section for the purpose of investigating any claim arising out of an offence committed or alleged to have been committed by the person to whom the record relates.*

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#### GOVERNMENT RECORDS / Private records.

*717.3. (1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency*

- (a) for the purposes of an investigation of an offence alleged to have been committed by a person;*
- (b) for use in proceedings against a person under this Act; or*
- (c) as a result of the use of alternative measures to deal with a person.*

*(2) Any person or organization may keep records containing information obtained by the person or organization as a result of the use of alternative measures to deal with a person alleged to have committed an offence.*

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#### DISCLOSURE OF RECORDS / Subsequent disclosure / Information, copies / Evidence / Idem.

*717.4. (1) Any record that is kept pursuant to section 717.2 or 717.3 may be made available to*

- (a) *any judge or court for any purpose relating to proceedings relating to offences committed or alleged to have been committed by the person to whom the record relates;*
  - (b) *any peace officer*
    - (i) *for the purpose of investigating any offence that the person is suspected on reasonable grounds of having committed, or in respect of which the person has been arrested or charged, or*
    - (ii) *for any purpose related to the administration of the case to which the record relates;*
  - (c) *any member of a department or agency of a government in Canada, or any agent thereof, that is*
    - (i) *engaged in the administration of alternative measures in respect of the person, or*
    - (ii) *preparing a report in respect of the person pursuant to this Act; or*
  - (d) *any other person who is deemed, or any person within a class of persons that is deemed, by a judge of a court to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is*
    - (i) *desirable in the public interest for research or statistical purposes, or*
    - (ii) *desirable in the interest of the proper administration of justice.*
- (2) *Where a record is made available for inspection to any person under subparagraph (1)(d)(i), that person may subsequently disclose information contained in the record, but may not disclose the information in any form that would reasonably be expected to identify the person to whom it relates.*
- (3) *Any person to whom a record is authorized to be made available under this section may be given any information contained in the record and may be given a copy of any part of the record.*
- (4) *Nothing in this section authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.*
- (5) *A record kept pursuant to section 717.2 or 717.3 may not be introduced into evidence, except for the purposes set out in paragraph 721(3)(c), more than two years after the end of the period for which the person agreed to participate in the alternative measures.*

## Purpose and Principles of Sentencing

### PURPOSE.

718. *The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:*

- (a) *to denounce unlawful conduct;*
- (b) *to deter the offender and other persons from committing offences;*
- (c) *to separate offenders from society, where necessary;*
- (d) *to assist in rehabilitating offenders;*
- (e) *to provide reparations for harm done to victims or to the community; and*
- (f) *to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.*

### FUNDAMENTAL PRINCIPLE.

718.1. *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*



**OTHER SENTENCING PRINCIPLES.**

**718.2.** *A court that imposes a sentence shall also take into consideration the following principles:*

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,*
  - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,*
  - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or child, or*
  - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim*

*shall be deemed to be aggravating circumstances;*

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;*
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;*
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and*
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.*

## Punishment Generally

**DEGREES OF PUNISHMENT** / Discretion respecting punishment / Imprisonment in default where term not specified / Cumulative punishments / Idem.

**718.3.** *(1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence.*

*(2) Where an enactment prescribes a punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts a person who commits the offence, but no punishment is a minimum punishment unless it is declared to be a minimum punishment.*

*(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.*

*(4) Where an accused*

- (a) is convicted while under sentence for an offence, and a term of imprisonment whether in default of payment of a fine or otherwise, is imposed,*
- (b) is convicted of an offence punishable with both fine and imprisonment and both are imposed, or*
- (c) is convicted of more offences than one before the same court at the same sittings, and*
  - (i) more than one fine is imposed,*
  - (ii) terms of imprisonment for the respective offences are imposed, or*

(iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence,

the court that convicts the accused may direct that the terms of imprisonment that are imposed by the court or result from the operation of subsection 734(4) shall be served consecutively.

(5) Where an offender who is under a conditional sentence imposed under section 742.1 is convicted of a second offence that was committed while the offender was under the conditional sentence,

(a) a sentence of imprisonment imposed for the second offence shall be served consecutively to the conditional sentence; and

(b) the offender shall be imprisoned until the expiration of the sentence imposed for the second offence, or for any longer period resulting from the operation of subparagraph 742.6(9)(c)(i) or paragraph 742.6(9)(d).

COMMENCEMENT OF SENTENCE / Time at large excluded from term of imprisonment / Determination of sentence / When time begins to run / When fine imposed / Application for leave to appeal.

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

(2) Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

(4) Notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appealed to, commences or shall be deemed to be resumed, as the case may be, on the day on which the convicted person is arrested and taken into custody under the sentence.

(5) Notwithstanding subsection (1), where the sentence that is imposed is a fine with a term of imprisonment in default of payment, no time prior to the day of execution of the warrant of committal counts as part of the term of imprisonment.

(6) An application for leave to appeal is an appeal for the purposes of this section.

## Procedure of Evidence

### SENTENCING PROCEEDINGS.

720. A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

REPORT BY PROBATION OFFICER / Provincial regulations / Content of report / Idem.

721. (1) Subject to regulations made under subsection (2), where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged pursuant to section 730.

(2) The lieutenant governor in council of a province may make regulations respecting the types of offences for which a court may require a report, and respecting the content and form of the report.

(3) *Unless otherwise specified by the court, the report must, wherever possible, contain information on the following matters:*

- (a) *the offender's age, maturity, character, behaviour, attitude and willingness to make amends;*
- (b) *the history of previous dispositions under the Young Offenders Act and of previous findings of guilt under this Act and any other Act of Parliament;*
- (c) *the history of any alternative measures used to deal with the offender, and the offender's response to those measures; and*
- (d) *any matter required, by any regulation made under subsection (2), to be included in the report.*

(4) *The report must also contain information on any other matter required by the court, after hearing argument from the prosecutor and the offender, to be included in the report, subject to any contrary regulation made under subsection (2).*

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VICTIM IMPACT STATEMENT / Procedure for victim impact statement / Other evidence concerning victim admissible / Definition of "victim".

722. (1) *For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.*

(2) *A statement referred to in subsection (1) must be*

- (a) *prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and*
- (b) *filed with the court.*

(3) *A statement of a victim of an offence prepared and filed in accordance with subsection (2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 730.*

(4) *For the purposes of this section, "victim", in relation to an offence.*

- (a) *means the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and*
- (b) *where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person.*

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#### COPIES OF DOCUMENTS.

722.1. *The clerk of the court shall provide a copy of a document referred to in section 721 or subsection 722(1), as soon as practicable after filing, to the offender or counsel for the offender, as directed by the court, and to the prosecutor.*

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SUBMISSIONS ON FACTS / Submission of evidence / Production of evidence / Compel appearance / Hearsay evidence.

723. (1) *Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed.*

(2) *The court shall hear any relevant evidence presented by the prosecutor or the offender.*



(3) *The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.*

(4) *Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.*

(5) *Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person*

- (a) has personal knowledge of the matter;*
- (b) is reasonably available; and*
- (c) is a compellable witness.*

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#### INFORMATION ACCEPTED / Jury / Disputed facts.

724. (1) *In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.*

(2) *Where the court is composed of a judge and jury, the court*

- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and*
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.*

(3) *Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,*

- (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;*
- (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;*
- (c) either party may cross-examine any witness called by the other party;*
- (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and*
- (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.*

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#### OTHER OFFENCES / No further proceedings.

725. (1) *In determining the sentence, a court*

- (a) shall consider, if it is possible and appropriate to do so, any other offences of which the offender was found guilty by the same court, and shall determine the sentence to be imposed for each of those offences;*
- (b) shall consider, with the consent of the offender and the Attorney General, any outstanding charges against the offender to which the offender consents to plead guilty and pleads guilty, if the court has jurisdiction to try those charges, and shall determine the sentence to be imposed for each charge, unless the court is of the opinion that a separate prosecution for the other offence is necessary in the public interest; and*
- (c) may consider any facts forming part of the circumstances of the offence that could constitute the basis for a separate charge.*

(2) *The court shall note any facts considered in determining the sentence under paragraph (1)(c) on the information or indictment and no further proceedings may be taken with respect to the other offence unless the conviction for the offence of which the offender has been found guilty is set aside or quashed on appeal.*

**OFFENDERS MAY SPEAK TO SENTENCE.**

*726. Before determining the sentence to be imposed, the court shall ask whether the offender, if present, has anything to say.*

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**RELEVANT INFORMATION.**

*726.1. In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.*

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**REASONS FOR SENTENCE.**

*726.2. When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.*

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**PREVIOUS CONVICTION / Procedure / Where hearing ex parte / Corporations / Section does not apply.**

*727. (1) Subject to subsections (3) and (4), where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, no greater punishment shall be imposed on the offender by reason thereof unless the prosecutor satisfies the court that the offender, before making a plea, was notified that a greater punishment would be sought by reason thereof.*

*(2) Where an offender is convicted of an offence for which a greater punishment may be imposed by reason of previous convictions, the court shall, on application by the prosecutor and on being satisfied that the offender was notified in accordance with subsection (1), ask whether the offender was previously convicted and, if the offender does not admit to any previous convictions, evidence of previous convictions may be adduced.*

*(3) Where a summary conviction court holds a trial pursuant to subsection 803(2) and convicts the offender, the court may, whether or not the offender was notified that a greater punishment would be sought by reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the offender and, if any such conviction is proved, may impose a greater punishment by reason thereof.*

*(4) Where, pursuant to section 623, the court proceeds with the trial of a corporation that has not appeared and pleaded and convicts the corporation, the court may, whether or not the corporation was notified that a greater punishment would be sought [by] reason of a previous conviction, make inquiries and hear evidence with respect to previous convictions of the corporation and, if any such conviction is proved, may impose a greater punishment by reason thereof.*

*(5) This section does not apply to a person referred to in paragraph 745(b).*

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**SENTENCE JUSTIFIED BY ANY COUNT.**

*728. Where one sentence is passed on a verdict of guilty on two or more counts of an indictment, the sentence is good if any of the counts would have justified the sentence.*

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**PROOF OF CERTIFICATE OF ANALYST / Definition of "analyst" / Notice of intention to produce certificate / Proof of service / Attendance for examination / Requiring attendance of analyst.**

**729. (1) In**

- (a) a prosecution for failure to comply with a condition in a probation order that the accused not have in possession or use drugs, or*
- (b) a hearing to determine whether the offender breached a condition of a conditional sentence that the offender not have in possession or use drugs,*

a certificate purporting to be signed by an analyst stating that the analyst has analyzed or examined a substance and stating the result of the analysis or examination is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

(2) In this section, “analyst” means a person designated as an analyst under the Food and Drugs Act or under the Narcotic Control Act.

(3) No certificate shall be admitted in evidence unless the party intending to produce it has, before the trial or hearing, as the case may be, given reasonable notice and a copy of the certificate to the party against whom it is to be produced.

(4) Service of any certificate referred to in subsection (1) may be proved by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served it.

(5) Notwithstanding subsection (4), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service.

(6) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for cross-examination.

## Absolute and Conditional Discharges

ABSOLUTE AND CONDITIONAL DISCHARGE / Period for which appearance notice, etc., continues in force / Effect of discharge / Where person bound by probation order convicted of offence.

730. (1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against the accused, by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

(2) Subject to Part XVI, where an accused who has not been taken into custody or who has been released from custody under or by virtue of any provision of Part XVI pleads guilty of or is found guilty of an offence but is not convicted, the appearance notice, promise to appear, summons, undertaking or recognizance issued to or given or entered into by the accused continues in force, subject to its terms, until a disposition in respect of the accused is made under subsection (1) unless, at the time the accused pleads guilty or is found guilty, the court, judge or justice orders that the accused be taken into custody pending such a disposition.

(3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that

(a) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;

(b) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and



(c) *the offender may plead autrefois convict in respect of any subsequent charge relating to the offence.*

(4) *Where an offender who is bound by the conditions of a probation order made at a time when the offender was directed to be discharged under this section is convicted of an offence, including an offence under section 733.1, the court that made the probation order may, in addition to or in lieu of exercising its authority under subsection 732.2(5), at any time when it may take action under that subsection, revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time of discharge, and no appeal lies from a conviction under this subsection where an appeal was taken from the order directing that the offender be discharged.*

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## Probation

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### MAKING OF PROBATION ORDER / *Idem.*

731. (1) *Where a person is convicted of an offence, a court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission,*

- (a) *if no minimum punishment is prescribed by law, suspend the passing of sentence and direct that the offender be released on the conditions prescribed in a probation order; or*
- (b) *in addition to fining or sentencing the offender to imprisonment for a term not exceeding two years, direct that the offender comply with the conditions prescribed in a probation order.*

(2) *A court may also make a probation order where it discharges an accused under subsection 730(1).*

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### FIREARM, ETC., PROHIBITIONS / *Idem.*

731.1. (1) *Before making a probation order, the court shall consider whether section 100 is applicable.*

(2) *For greater certainty, a condition of a probation order referred to in paragraph 732.1(3)(d) does not affect the operation of section 100.*

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### INTERMITTENT SENTENCE / Application to vary intermittent sentence / Court may vary intermittent sentence if subsequent offence.

732. (1) *Where the court imposes a sentence of imprisonment of ninety days or less on an offender convicted of an offence, whether in default of payment of a fine or otherwise, the court may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and the availability of appropriate accommodation to ensure compliance with the sentence, order*

- (a) *that the sentence be served intermittently at such times as are specified in the order; and*
- (b) *that the offender comply with the conditions prescribed in a probation order when not in confinement during the period that the sentence is being served and, if the court so orders, on release from prison after completing the intermittent sentence.*

(2) *An offender who is ordered to serve a sentence of imprisonment intermittently may, on giving notice to the prosecutor, apply to the court that imposed the sentence to allow it to be served on consecutive days.*

(3) *Where a court imposes a sentence of imprisonment on a person who is subject to an intermittent sentence in respect of another offence, the unexpired portion of the intermittent sentence shall be served on consecutive days unless the court otherwise orders.*

DEFINITIONS / “Change” / “Optional conditions” / Compulsory conditions of probation order / Optional conditions of probation order / Form and period of order / Proceedings on making order.

732.1. (1) *In this section and section 732.2,*

“change”, in relation to optional conditions, includes deletions and additions;

“optional conditions” means the conditions referred to in subsection (3).

(2) *The court shall prescribe, as conditions of a probation order, that the offender do all of the following:*

- (a) *keep the peace and be of good behaviour;*
- (b) *appear before the court when required to do so by the court; and*
- (c) *notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.*

(3) *The court may prescribe, as additional conditions of a probation order, that the offender do one or more of the following:*

- (a) *report to a probation officer;*
  - (i) *within two working days, or such longer period as the court directs, after the making of the probation order, and*
  - (ii) *thereafter, when required by the probation officer and in the manner directed by the probation officer;*
- (b) *remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;*
- (c) *abstain from*
  - (i) *the consumption of alcohol or other intoxicating substances, or*
  - (ii) *the consumption of drugs except in accordance with a medical prescription;*
- (d) *abstain from owning, possessing or carrying a weapon;*
- (e) *provide for the support or care of dependants;*
- (f) *perform up to 240 hours of community service over a period not exceeding eighteen months;*
- (g) *if the offender agrees, and subject to the program director's acceptance of the offender, participate actively in a treatment program approved by the province; and*
- (h) *comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender's successful reintegration into the community.*

(4) *A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force.*

(5) *A court that makes a probation order shall*

- (a) *cause to be given to the offender*
  - (i) *a copy of the order,*
  - (ii) *an explanation of the substance of subsections 732.2(3) and (5) and section 733.1, and*
  - (iii) *an explanation of the procedure for applying under subsection 732.2(3) for a change to the optional conditions; and*
- (b) *take reasonable measures to ensure that the offender understands the order and the explanations given to the offender under paragraph (a).*

COMING INTO FORCE OF ORDER / Duration of order and limit on term of order / Changes to probation order / Judge may act in chambers / Where person convicted of offence / Compelling appearance of person bound.

732.2. (1) *A probation order comes into force*

- (a) *on the date on which the order is made;*
  - (b) *where the offender is sentenced to imprisonment under paragraph 73(1)(b) or was previously sentenced to imprisonment for another offence, as soon as the offender is released from prison or, if released from prison on conditional release, at the expiration of the sentence of imprisonment; or*
  - (c) *where the offender is under a conditional sentence, at the expiration of the conditional sentence.*
- (2) *Subject to subsection (5),*
- (a) *where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1, or is imprisoned under paragraph 731(1)(b) in default of payment of a fine, the order continues in force except in so far as the sentence renders it impossible for the offender for the time being to comply with the order; and*
  - (b) *no probation order shall continue in force for more than three years after the date on which the order came into force.*

(3) *A court that makes a probation order may at any time, on application by the offender, the probation officer or the prosecutor, require the offender to appear before it and, after hearing the offender and one or both of the probation officer and the prosecutor,*

- (a) *make any changes to the optional conditions that in the opinion of the court are rendered desirable by a change in the circumstances since those conditions were prescribed,*
- (b) *relieve the offender, either absolutely or on such terms or for such period as the court deems desirable, of compliance with any optional condition, or*
- (c) *decrease the period for which the probation order is to remain in force,*

*and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions, inform the offender of its action and give the offender a copy of the order so endorsed.*

(4) *All the functions of the court under subsection (3) may be exercised in chambers.*

(5) *Where an offender who is bound by a probation order is convicted of an offence, including an offence under section 733.1, and*

- (a) *the time within which an appeal may be taken against that conviction has expired and the offender has not taken an appeal,*
- (b) *the offender has taken an appeal against that conviction and the appeal has been dismissed, or*
- (c) *the offender has given written notice to the court that convicted the offender that the offender elects not to appeal the conviction or has abandoned the appeal, as the case may be,*

*in addition to any punishment that may be imposed for that offence, the court that made the probation order may, on application by the prosecutor, require the offender to appear before it and, after hearing the prosecutor and the offender,*

- (d) *where the probation order was made under paragraph 731(1)(a), revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or*
- (e) *make such changes to the optional conditions as the court deems desirable, or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable,*

*and the court shall thereupon endorse the probation order accordingly and, if it changes the optional conditions or extends the period for which the order is to remain in force, inform the offender of its action and give the offender a copy of the order so endorsed.*



(6) *The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) and (5).*

TRANSFER OF ORDER / Where court unable to act.

733. (1) *Where an offender who is bound by a probation order becomes a resident of, or is convicted or discharged under section 730 of an offence including an offence under section 733.1 in, a territorial division other than the territorial division where the order was made, the court that made the order may,*

- (a) *on the application of a probation officer, and*
- (b) *if both such territorial divisions are not in the same province, with the consent of the Attorney General of the province in which the order was made,*

*transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order in that other territorial division if the offender had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.*

(2) *Where a court that has made a probation order or to which a probation order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the probation order may be exercised by any other court that has equivalent jurisdiction in the same province.*

FAILURE TO COMPLY WITH PROBATION ORDER / Where accused may be tried and punished.

733.1. (1) *An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with that order is guilty of*

- (a) *an indictable offence and is liable to imprisonment for a term not exceeding two years; or*
- (b) *an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding eighteen months, or to a fine not exceeding two thousand dollars, or both.*

(2) *An accused who is charged with an offence under subsection (1) may be tried and punished by any court having jurisdiction to try that offence in the place where the offence is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the offence is alleged to have been committed, no proceedings in respect of that offence shall be instituted in that place without the consent of the Attorney General of that province.*

## Fines and Forfeiture

POWER OF COURT TO IMPOSE FINE / Offender's ability to pay / Meaning of default of payment / Imprisonment in default of payment / Determination of term / Moneys found on offender / Provincial regulations.

734. (1) *A court that convicts a person, other than a corporation, of an offence, except an offence that is punishable by a maximum term of imprisonment, may, in addition to or in lieu of any other sanction that the court is authorized to impose, fine the offender, subject to subsection (2), by making an order under section 734.1.*

(2) *A court may fine an offender under this section only if the court is satisfied that the offender is able to pay the fine, or discharge it under section 736.*

(3) *For the purposes of this section and sections 734.1 to 737, a person is in default of payment*

*of a fine if the fine has not been paid in full by the time set out in the order made under section 734.1.*

*(4) Where an offender is fined under this section, a term of imprisonment, determined in accordance with subsection (5), shall be deemed to be imposed in default of payment of the fine.*

- (5) The length, in days, of the term of imprisonment referred to in subsection (4) is the lesser of*
- (a) a fraction of which*
    - (i) the numerator is the aggregate of*
      - (A) the unpaid amount of the fine, and*
      - (B) the costs and charges of committing and conveying the defaulter to prison, calculated in accordance with regulations made under subsection (7), and*
      - (ii) the denominator is equal to eight times the provincial minimum hourly wage, at the time of default, in the province in which the fine was imposed, rounded down to the nearest whole number of days, and*
    - (b) the maximum term of imprisonment, expressed in days, that the court could itself impose on conviction.*

*(6) All or any part of a fine imposed under this section may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.*

*(7) The lieutenant governor in council of a province may make regulations respecting the calculation of the costs and charges referred to in clause (5)(a)(i)(B) and in paragraph 734.8(1)(b).*

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#### TERMS OF ORDER IMPOSING FINE.

*734.1. A court that fines an offender under section 734 shall do so by making an order that clearly sets out*

- (a) the amount of the fine;*
- (b) the manner in which the fine is to be paid;*
- (c) the time or times by which the fine, or any portion thereof, must be paid; and*
- (d) such other terms respecting the payment of the fine as the court deems appropriate.*

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#### PROCEEDINGS ON MAKING ORDER.

*734.2. A court that makes an order under section 734.1 shall*

- (a) cause to be given to the offender*
  - (i) a copy of the order,*
  - (ii) an explanation of the substance of sections 734 to 734.8 and 736,*
  - (iii) an explanation of available programs referred to in section 736 and of the procedure for applying for admission to such programs, and*
  - (iv) an explanation of the procedure for applying under section 734.3 for a change in the terms of the order; and*
- (b) take reasonable measures to ensure that the offender understands the order and the explanations given to the offender under paragraph (a).*

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#### CHANGE IN TERMS OF ORDER.

*734.3. A court that makes an order under section 734.1, or a person designated, either by name or by title of office, by that court, may, on application by or on behalf of the offender, subject to any rules made by the court under section 482, change any term of the order except the amount of the fine, and any reference in this section and sections 734, 734.1, 734.2 and 734.6 to an order shall be read as including a reference to the order as changed pursuant to this section.*

PROCEEDS TO GO TO PROVINCIAL TREASURER / Proceeds to go to Receiver General for Canada / Direction for payment to municipality.

734.4. (1) *Where a fine or forfeiture is imposed or a recognizance is forfeited and no provision, other than this section, is made by law for the application of the proceeds thereof, the proceeds belong to Her Majesty in right of the province in which the fine or forfeiture was imposed or the recognizance was forfeited, and shall be paid by the person who receives them to the treasurer of that province.*

(2) *Where*

(a) *a fine or forfeiture is imposed*

(i) *in respect of a contravention of a revenue law of Canada,*

(ii) *in respect of a breach of duty or malfeasance in office by an officer or employee of the Government of Canada, or*

(iii) *in respect of any proceedings instituted at the instance of the Government of Canada in which that government bears the costs of prosecution, or*

(b) *a recognizance in connection with proceedings mentioned in paragraph (a) is forfeited,*

*the proceeds of the fine, forfeiture or recognizance belong to Her Majesty in right of Canada and shall be paid by the person who receives them to the Receiver General.*

(3) *Where a provincial, municipal or local authority bears, in whole or in part, the expense of administering the law under which a fine or forfeiture is imposed or under which proceedings are taken in which a recognizance is forfeited,*

(a) *the lieutenant governor in council of a province may direct that the proceeds of a fine, forfeiture or recognizance that belongs to Her Majesty in right of the province shall be paid to that authority; and*

(b) *the Governor in Council may direct that the proceeds of a fine, forfeiture or recognizance that belongs to Her Majesty in right of Canada shall be paid to that authority.*

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LICENCES, PERMITS, ETC.

734.5. *Where an offender is in default of payment of a fine,*

(a) *the person responsible, by or under an Act of the legislature of the province to whom the proceeds of the fine belong by virtue of subsection 734.4(1), for issuing or renewing a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender; or*

(b) *where the proceeds of the fine belong to Her Majesty in right of Canada by virtue of subsection 734.4(2), the person responsible, by or under an Act of Parliament, for issuing or renewing a licence, permit or other similar instrument in relation to the offender may refuse to issue or renew the licence, permit or other instrument until the fine is paid in full, proof of which lies on the offender.*

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CIVIL ENFORCEMENT OF FINES FORFEITURE / Effect of filing order.

734.6. (1) *Where*

(a) *an offender is in default of payment of a fine, or*

(b) *a forfeiture imposed by law is not paid as required by the order imposing it,*

*then, in addition to any other method provided by law for recovering the fine or forfeiture,*

(c) *the Attorney General of the province to whom the proceeds of the fine or forfeiture belong, or*

(d) *the Attorney General of Canada, where the proceeds of the fine or forfeiture belong to Her Majesty in right of Canada.*



may, by filing the order, enter as a judgment the amount of the fine or forfeiture, and costs, if any, in any civil court in Canada that has jurisdiction to enter a judgment for that amount.

(2) An order that is entered as a judgment under this section is enforceable in the same manner as if it were a judgment obtained by the Attorney General of the province or the Attorney General of Canada, as the case may be, in civil proceedings.

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WARRANT OF COMMITTAL / Reasons for committal / Compelling appearance of person bound / Effect of imprisonment.

734.7. (1) Where time has been allowed for payment of a fine, the court shall not issue a warrant of committal in default of payment of the fine

(a) until the expiration of the time allowed for payment of the fine in full; and

(b) unless the court is satisfied

(i) that the mechanisms provided by section 734.5 and 734.6 are not appropriate in the circumstances, or

(ii) that the offender has, without reasonable excuse, refused to pay the fine or discharge it under section 736.

(2) Where no time has been allowed for payment of a fine and a warrant committing the offender to prison for default of payment of the fine is issued, the court shall state in the warrant the reason for immediate committal.

(3) The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under paragraph (1)(b).

(4) The imprisonment of an offender for default of payment of a fine terminates the operation of sections 734.5 and 734.6 in relation to that fine.

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DEFINITION OF "PENALTY" / Reduction of imprisonment on part payment / Minimum that can be accepted / To whom payment made / Application of money paid.

734.8. (1) In this section, "penalty" means the aggregate of

(a) the fine, and

(b) the costs and charges of committing and conveying the defaulter to prison, calculated in accordance with regulations made under subsection 734(7).

(2) Where a person is imprisoned in default of payment of a fine, the term of imprisonment shall, on payment of a part of the penalty, whether the payment was made before or after the issue of a warrant of committal, be reduced by the number of days that bears the same proportion to the number of days in the term as the part paid bears to the total penalty.

(3) No amount offered in part payment of a penalty shall be accepted unless it is sufficient to secure a reduction of sentence of one day, or a multiple thereof, and where a warrant of committal has been issued, no part payment shall be accepted until any fee that is payable in respect of the warrant or its execution has been paid.

(4) Payment may be made under this section to the person who has lawful custody of the prisoner or to such other person as the Attorney General directs.

(5) A payment under this section shall be applied firstly to the payment in full of costs and charges, secondly to the payment in full of any victim fine surcharge imposed under subsection 737(1), and thereafter to payment of any part of the fine that remains unpaid.

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FINES ON CORPORATIONS / Civil enforcement of fines.

735. (1) A corporation that is convicted of an offence is liable, in lieu of any imprisonment

that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,

- (a) that is in the discretion of the court, where the offence is an indictable offence; or
- (b) not exceeding twenty-five thousand dollars, where the offence is a summary conviction offence.

(2) Section 734.6 applies, with such modifications as the circumstances require, where a fine imposed under subsection (1) or under any other Act of Parliament is not paid forthwith.

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FINE OPTION PROGRAM / Credits and other matters / Deemed payment / Federal-provincial agreement.

736. (1) An offender who is fined under section 734 may, whether or not the offender is serving a term of imprisonment imposed in default of payment of the fine, discharge the fine in whole or in part by earning credits for work performed during a period not greater than two years in a program established for that purpose by the lieutenant governor in council

- (a) of the province in which the fine was imposed, or
- (b) of the province in which the offender resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed.

if the offender is admissible to such a program.

(2) A program referred to in subsection (1) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.

(3) Credits earned for work performed as provided by subsection (1) shall, for the purposes of this Act, be deemed to be payment in respect of a fine.

(4) Where, by virtue of subsection 734.4(2), the proceeds of a fine belong to Her Majesty in right of Canada, an offender may discharge the fine in whole or in part in a fine option program of a province pursuant to subsection (1), where an appropriate agreement is in effect between the government of the province and the Government of Canada.

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VICTIM FINE SURCHARGE / Exception / Written reasons for not making order / Amounts applied to aid victims / Regulations / Enforcement.

737. (1) Subject to subsection (2), where an offender is convicted or discharged under section 730 of an offence under this Act or Part III or IV of the Food and Drugs Act or the Narcotic Control Act, the court imposing sentence on or discharging the offender shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge in an amount not exceeding

- (a) fifteen per cent of any fine that is imposed on the offender for that offence or, where no fine is imposed on the offender for that offence, ten thousand dollars, or
- (b) such lesser amount as may be prescribed by, or calculated in the manner prescribed by, regulations made by the Governor in Council under subsection (5),

subject to such terms and conditions as may be prescribed by those regulations.

(2) Where the offender establishes to the satisfaction of the court that undue hardship to the offender or the dependants of the offender would result from the making of an order under subsection (1), the court is not required to make the order.

(3) Where the court does not make an order under subsection (1), the court shall

- (a) provide the reasons why the order is not being made; and
- (b) enter the reasons in the record of the proceedings or, where the proceedings are not recorded, provide written reasons.

(4) *A victim fine surcharge imposed under subsection (1) shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time.*

(5) *The Governor in Council may, for the purposes of subsection (1), make regulations prescribing the maximum amount or the manner of calculating the maximum amount of a victim fine surcharge to be imposed under that subsection, not exceeding the amount referred to in paragraph (1)(a), and any terms and conditions subject to which the victim fine surcharge is to be imposed.*

(6) *Subsections 734(2) to (4) and sections 734.1, 734.3 and 734.7 apply, and section 736 does not apply, in respect of a victim fine surcharge imposed under subsection (1).*

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## Restitution

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### RESTITUTION TO VICTIMS OF OFFENCES / Regulations.

738. (1) *Where an offender is convicted or discharged under section 730 of an offence, the court imposing sentence on or discharging the offender may, on application of the Attorney General or on its own motion, in addition to any other measure imposed on the offender, order that the offender make restitution to another person as follows:*

- (a) *in the case of damage to, or the loss or destruction of, the property of any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding the replacement value of the property as of the date the order is imposed, less the value of any part of the property that is returned to that person as of the date it is returned, where the amount is readily ascertainable;*
- (b) *in the case of bodily harm to any person as a result of the commission of the offence or the arrest or attempted arrest of the offender, by paying to the person an amount not exceeding all pecuniary damages, including loss of income or support, incurred as a result of the bodily harm, where the amount is readily ascertainable; and*
- (c) *in the case of bodily harm or threat of bodily harm to the offender's spouse or child, or any other person, as a result of the commission of the offence or the arrest or attempted arrest of the offender, where the spouse, child or other person was a member of the offender's household at the relevant time, by paying to the person in question, independently of any amount ordered to be paid under paragraphs (a) and (b), an amount not exceeding actual and reasonable expenses incurred by that person, as a result of moving out of the offender's household, for temporary housing, food, child care and transportation, where the amount is readily ascertainable.*

(2) *The lieutenant governor in council of a province may make regulations precluding the inclusion of provisions on enforcement of restitution orders as an optional condition of a probation order or of a conditional sentence order.*

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### RESTITUTION TO PERSONS ACTING IN GOOD FAITH.

739. *Where an offender is convicted or discharged under section 730 of an offence and*

- (a) *any property obtained as a result of the commission of the offence has been conveyed or transferred for valuable consideration to a person acting in good faith and without notice, or*
- (b) *the offender has borrowed money on the security of that property from a person acting in good faith and without notice.*

*the court may, where that property has been returned to the lawful owner or the person who had lawful possession of that property at the time the offence was committed, order the offender to*



pay as restitution to the person referred to in paragraph (a) or (b) an amount not exceeding the amount of consideration for that property or the total amount outstanding in respect of the loan, as the case may be.

#### PRIORITY TO RESTITUTION.

740. Where the court finds it applicable and appropriate in the circumstances of a case to make, in relation to an offender, an order of restitution under section 738 or 739, and

- (a) an order of forfeiture under this or any other Act of Parliament may be made in respect of property that is the same as property in respect of which the order of restitution may be made, or
- (b) the court is considering ordering the offender to pay a fine and it appears to the court that the offender would not have the means or ability to comply with both the order of restitution and the order to pay the fine,

the court shall first make the order of restitution and shall then consider whether and to what extent an order of forfeiture or an order to pay a fine is appropriate in the circumstances.

#### ENFORCING RESTITUTION ORDER / Moneys found on offender.

741. (1) Where an amount that is ordered to be paid under section 738 or 739 is not paid forthwith, the person to whom the amount was ordered to be paid may, by filing the order, enter as a judgment the amount ordered to be paid in any civil court in Canada that has jurisdiction to enter a judgment for that amount, and that judgment is enforceable against the offender in the same manner as if it were a judgment rendered against the offender in that court in civil proceedings.

(2) All or any part of an amount that is ordered to be paid under section 738 or 739 may be taken out of moneys found in the possession of the offender at the time of the arrest of the offender if the court making the order, on being satisfied that ownership of or right to possession of those moneys is not disputed by claimants other than the offender, so directs.

#### NOTICE OF ORDERS OF RESTITUTION.

741.1. Where a court makes an order of restitution under section 738 or 739, it shall cause notice of the content of the order, or a copy of the order, to be given to the person to whom the restitution is ordered to be paid.

#### CIVIL REMEDY NOT AFFECTED.

741.2. A civil remedy for an act or omission is not affected by reason only that an order for restitution under section 738 or 739 has been made in respect of that act or omission.

## Conditional Sentence of Imprisonment

#### DEFINITIONS / "Change" / "Optional conditions" / "Supervisor".

742. In sections 742.1 to 742.7,

"change", in relation to optional conditions, includes deletions and additions;

"optional conditions" means the conditions referred to in subsection 742.3(2);

"supervisor" means a person designated by the Attorney General, either by name or by title of office, as a supervisor for the purposes of sections 742.1 to 742.7.

**IMPOSING OF CONDITIONAL SENTENCE.**

742.1. *Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court*

- (a) *imposes a sentence of imprisonment of less than two years, and*
- (b) *is satisfied that serving the sentence in the community would not endanger the safety of the community,*

*the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.*

**FIREARM, ETC., PROHIBITIONS / Idem.**

742.2. (1) *Before imposing a conditional sentence under section 742.1, the court shall consider whether section 100 is applicable.*

(2) *For greater certainty, a condition of a conditional sentence referred to in paragraph 742.3(2)(b) does not affect the operation of section 100.*

**COMPULSORY CONDITIONS OF CONDITIONAL SENTENCE ORDER / Optional conditions of conditional sentence order / Proceedings on making order.**

742.3. (1) *The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following:*

- (a) *keep the peace and be of good behaviour;*
- (b) *appear before the court when required to do so by the court;*
- (c) *report to a supervisor*
  - (i) *within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and*
  - (ii) *thereafter, when required by the supervisor and in the manner directed by the supervisor;*
- (d) *remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and*
- (e) *notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.*

(2) *The court may prescribe, as additional conditions of a conditional sentence order, that the offender do one or more of the following:*

- (a) *abstain from*
  - (i) *the consumption of alcohol or other intoxicating substances, or*
  - (ii) *the consumption of drugs except in accordance with a medical prescription;*
- (b) *abstain from owning, possessing or carrying a weapon;*
- (c) *provide for the support or care of dependants;*
- (d) *perform up to 240 hours of community service over a period not exceeding eighteen months;*
- (e) *attend a treatment program approved by the province; and*
- (f) *comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences.*

(3) *A court that makes an order under this section shall*

- (a) *cause to be given to the offender*
  - (i) *a copy of the order,*
  - (ii) *an explanation of the substance of sections 742.4 and 742.6, and*

- (iii) an explanation of the procedure for applying under section 742.4 for a change to the optional conditions; and
- (b) take reasonable measures to ensure that the offender understands the order and the explanations given to the offender under paragraph (a).

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SUPERVISOR MAY PROPOSE CHANGES TO OPTIONAL CONDITIONS / Hearing / Decision at hearing / Where no hearing requested or ordered / Changes proposed by offender or prosecutor / Judge may act in chambers.

742.4. (1) Where an offender's supervisor is of the opinion that a change in circumstances makes a change to the optional conditions desirable, the supervisor may give written notification of the proposed change, and the reasons therefor, to the offender, the prosecutor and the court.

- (2) Within seven days after receiving a notification referred to in subsection (1),
  - (a) the offender or the prosecutor may request the court to hold a hearing to consider the proposed change, or
  - (b) the court may, of its own initiative, order that a hearing be held to consider the proposed change,

and a hearing so requested or ordered shall be held within thirty days after the receipt by the court of the notification referred to in subsection (1).

- (3) At a hearing held pursuant to subsection (2), the court
  - (a) shall approve or refuse to approve the proposed change; and
  - (b) may make any other change to the optional conditions that the court deems appropriate.
- (4) Where no request or order for a hearing is made within the time period stipulated in subsection (2), the proposed change takes effect fourteen days after the receipt by the court of the notification referred to in subsection (1), and the supervisor shall so notify the offender and file proof of that notification with the court.
- (5) Subsections (1) and (3) apply, with such modifications as the circumstances require, in respect of a change proposed by the offender or the prosecutor to the optional conditions, and in all such cases a hearing must be held, and must be held within thirty days after the receipt by the court of the notification referred to in subsection (1).
- (6) All the functions of the court under this section may be exercised in chambers.

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TRANSFER OF ORDER / Where court unable to act.

742.5. (1) Where an offender who is bound by a conditional sentence order becomes a resident of a territorial division other than the territorial division where the order was made, the court that made the order may,

- (a) on the application of a supervisor, and
- (b) if both such territorial divisions are not in the same province, with the consent of the Attorney General of the province in which the order was made,

transfer the order to a court in that other territorial division that would, having regard to the mode of trial of the offender, have had jurisdiction to make the order in that other territorial division if the offender had been tried and convicted there of the offence in respect of which the order was made, and the order may thereafter be dealt with and enforced by the court to which it is so transferred in all respects as if that court had made the order.

- (2) Where a court that has made a conditional sentence order or to which a conditional sentence order has been transferred pursuant to subsection (1) is for any reason unable to act, the powers of that court in relation to the conditional sentence order may be exercised by any other court that has equivalent jurisdiction in the same province.



PROCEDURE ON BREACH OF CONDITION / Interim release / Hearing / Report of supervisor / Notice of intention to produce report / Proof of service / Attendance for examination / Requiring attendance of supervisor or witness / Powers of court.

742.6. (1) *The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice apply, with such modifications as the circumstances require, to proceedings under subsections (3) to (9), and any reference in those Parts to committing an offence shall be read as a reference to breaching a condition of a conditional sentence order.*

(2) *For the purpose of the application of section 515, the release from custody of an offender who is detained on the basis of an alleged breach of a condition of a conditional sentence order shall be governed by subsection 515(6).*

(3) *An allegation of a breach of condition may be heard by any court having jurisdiction to hear that allegation in the place where the breach is alleged to have been committed or in the place where the accused is found, is arrested or is in custody, but where the place where the accused is found, is arrested or is in custody is outside the province in which the breach is alleged to have been committed, no proceedings in respect of that breach shall be instituted in that place without the consent of the Attorney General of that province, and any allegation of a breach shall be heard*

(a) *within thirty days after the offender's arrest, where a warrant was issued; or*

(b) *where a summons was issued, within thirty days after the issue of the summons.*

(4) *An allegation of a breach of condition must be supported by a written report of the supervisor, which report must include, where appropriate, signed statements of witnesses.*

(5) *No report shall be admitted in evidence unless the party intending to produce it has, before the hearing, given the offender reasonable notice and a copy of the report.*

(6) *Service of any report referred to in subsection (4) may be proved by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served it.*

(7) *Notwithstanding subsection (6), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service.*

(8) *The offender may, with leave of the court, require the attendance, for cross-examination, of the supervisor or of any witness whose signed statement is included in the report.*

(9) *Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may*

(a) *take no action;*

(b) *change the optional conditions;*

(c) *suspend the conditional sentence order and direct*

(i) *that the offender serve in custody a portion of the unexpired sentence, and*

(ii) *that the conditional sentence order resume on the offender's release from custody, either with or without changes to the optional conditions; or*

(d) *terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence.*

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#### WHERE PERSON IMPRISONED FOR NEW OFFENCE.

742.7. *Where an offender who is at large under a conditional sentence is imprisoned for another offence, whenever committed, the running of the conditional sentence is suspended during the period of imprisonment for that other offence, unless otherwise ordered by the court*

*under subsection 742.4(3) or 742.6(9), but no such order may be incompatible with subsection 718.3(5).*

## Imprisonment

### IMPRISONMENT WHEN NO OTHER PROVISION.

*743. Every one who is convicted of an indictable offence for which no punishment is specially provided is liable to imprisonment for a term not exceeding five years.*

IMPRISONMENT FOR LIFE OR MORE THAN TWO YEARS / Subsequent term less than two years / Imprisonment for term less than two years / Sentence to penitentiary of person serving sentence elsewhere / Transfer to penitentiary / Newfoundland.

*743.1. (1) Except where otherwise provided, a person who is sentenced to imprisonment for*

*(a) life,*

*(b) a term of two years or more, or*

*(c) two or more terms of less than two years each that are to be served one after the other and that, in the aggregate, amount to two years or more,*

*shall be sentenced to imprisonment in a penitentiary.*

*(2) Where a person who is sentenced to imprisonment in a penitentiary is, before the expiration of that sentence, sentenced to imprisonment for a term of less than two years, the person shall serve that term in a penitentiary, but if the previous sentence of imprisonment in a penitentiary is set aside, that person shall serve that term in accordance with subsection (3).*

*(3) A person who is sentenced to imprisonment and who is not required to be sentenced as provided in subsection (1) or (2) shall, unless a special prison is prescribed by law, be sentenced to imprisonment in a prison or other place of confinement, other than a penitentiary, within the province in which the person is convicted, in which the sentence of imprisonment may be lawfully executed.*

*(4) Where a person is sentenced to imprisonment in a penitentiary while the person is lawfully imprisoned in a place other than a penitentiary, that person shall, except where otherwise provided, be sent immediately to the penitentiary, and shall serve in the penitentiary the unexpired portion of the term of imprisonment that that person was serving when sentenced to the penitentiary as well as the term of imprisonment for which that person was sentenced to the penitentiary.*

*(5) Where, at any time, a person who is imprisoned in a prison or place of confinement other than a penitentiary is subject to two or more terms of imprisonment, each of which is for less than two years, that are to be served one after the other, and the aggregate of the unexpired portions of those terms at that time amounts to two years or more, the person shall be transferred to a penitentiary to serve those terms, but if any one or more of such terms is set aside or reduced and the unexpired portions of the remaining term or terms on the day on which that person was transferred under this section amounted to less than two years, that person shall serve that term or terms in accordance with subsection (3).*

*(6) For the purposes of subsection (3), “penitentiary” does not, until a day to be fixed by order of the Governor in Council, include the facility mentioned in subsection 15(2) of the Corrections and Conditional Release Act.*

### REPORT BY COURT TO CORRECTIONAL SERVICE.

*743.2. A court that sentences or commits a person to penitentiary shall forward to the Correc-*

tional Service of Canada its reasons and recommendation relating to the sentence or committal, any relevant reports that were submitted to the court, and any other information relevant to administering the sentence or committal.

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SENTENCE SERVED ACCORDING TO REGULATIONS.

743.3. A sentence of imprisonment shall be served in accordance with the enactments and rules that govern the institution to which the prisoner is sentenced.

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TRANSFER OF YOUNG PERSON TO PLACE OF CUSTODY / Removal of young person from place of custody / Words and expressions.

743.4. (1) Where a young person is sentenced to imprisonment under this or any other Act of Parliament, the young person may, with the consent of the provincial director, be transferred to a place of custody for any portion of the young person's term of imprisonment, but in no case shall that young person be kept in a place of custody under this section after that young person attains the age of twenty years.

(2) Where the provincial director certifies that a young person transferred to a place of custody under subsection (1) can no longer be held therein without significant danger of escape or of detrimentally affecting the rehabilitation or reformation of other young persons held therein, the young person may be imprisoned during the remainder of his term of imprisonment in any place where that young person might, but for subsection (1), have been imprisoned.

(3) For the purposes of this section, the expressions "provincial director" and "young person" have the meanings assigned by subsection 2(1) of the Young Offenders Act, and the expression "place of custody" means "open custody" or "secure custody" within the meaning assigned by subsection 24.1(1) of that Act.

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TRANSFER OF JURISDICTION / Whether sentence to be served concurrently or consecutively / Remaining portion deemed to constitute one sentence.

743.5. (1) Where a person is sentenced for an offence while subject to a disposition made under paragraph 20(1)(j), (k) or (k.1) of the Young Offenders Act, on the application of the Attorney General or the Attorney General's agent, the court that sentences the person may, unless to so order would bring the administration of justice into disrepute, order that the remaining portion of the disposition made under that Act be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

**NOTE:** Section 743.5(1) replaced by 1995, c. 22, s. 19(b) (to come into force when s. 743.5(1) as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, c. 37(1) is brought into force before that date). The text of subsec. (1), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

743.5. (1) Where a person is or has been sentenced for an offence while subject to a disposition made under paragraph 20(1)(j), (k) or (k.1) of the Young Offenders Act, on the application of the Attorney General or the Attorney General's agent, a court of criminal jurisdiction may, unless to so order would bring the administration of justice into disrepute, order that the remaining portion of the disposition made under that Act be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

(2) Where an order is made under subsection (1), in respect of a disposition made under paragraph 20(1)(k) or (k.1) of the Young Offenders Act, the remaining portion of the disposition to be served pursuant to the order shall be served concurrently with the sentence referred to in subsection (1), where it is a term of imprisonment, unless the court making the order orders that it be served consecutively.

(3) For greater certainty, the remaining portion of the disposition referred to in subsection (2)



*shall, for the purposes of section 139 of the Corrections and Conditional Release Act and section 743.1 of this Act, be deemed to constitute one sentence of imprisonment on the day the order is made.*

**NOTE:** Section 743.5(3) replaced by 1995, c. 22, s. 20(b) (to come into force when s. 743.5(3) as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, s. 37(2) is brought into force before that date). The text of subsec. (3), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*(3) For greater certainty, the remaining portion of the disposition referred to in subsection (2) shall, for the purposes of section 139 of the Corrections and Conditional Release Act and section 743.1 of this Act, be deemed to constitute one sentence of imprisonment.*

## Eligibility for Parole

POWER OF COURT TO DELAY PAROLE / Principles that are to guide the court.

743.6. (1) *Notwithstanding subsection 120(1) of the Corrections and Conditional Release Act, where an offender is sentenced, after the coming into force of this section, to a term of imprisonment of two years or more on conviction for one or more offences set out in Schedules I and II to that Act that were prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offences and the character and circumstances of the offender, that the expression of society's denunciation of the offences or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.*

*(2) For greater certainty, the paramount principles that are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to those paramount principles.*

**NOTE:** That part of 1995, c. 22, s. 6 which enacts s. 743.6 is replaced by 1995, c. 42, s. 86(b). The text of s. 743.6 as enacted by s. 86(b), which is not yet in force and therefor printed in *lightface italics*, reads as follows:

POWER OF COURT TO DELAY PAROLE / Principles that are to guide the court.

743.6. (1) *Notwithstanding subsection 120(1) of the Corrections and Conditional Release Act, where an offender receives, on or after November 1, 1992, a sentence of imprisonment of two years or more, including a sentence of imprisonment for life imposed otherwise than as a minimum punishment, on conviction for an offence set out in Schedule I or II to that Act that was prosecuted by way of indictment, the court may, if satisfied, having regard to the circumstances of the commission of the offence and the character and circumstances of the offender, that the expression of society's denunciation of the offence or the objective of specific or general deterrence so requires, order that the portion of the sentence that must be served before the offender may be released on full parole is one half of the sentence or ten years, whichever is less.*

*(2) For greater certainty, the paramount principles which are to guide the court under this section are denunciation and specific or general deterrence, with rehabilitation of the offender, in all cases, being subordinate to these paramount principles.*

## Delivery of Offender to Keeper of Prison

### EXECUTION OF WARRANT OF COMMITTAL.

744. *A peace officer or other person to whom a warrant of committal authorized by this or any other Act of Parliament is directed shall arrest the person named or described therein, if it is necessary to do so in order to take that person into custody, convey that person to the prison mentioned in the warrant and deliver that person, together with the warrant, to the keeper of the prison who shall thereupon give to the peace officer or other person who delivers the prisoner a receipt in Form 43 setting out the state and condition of the prisoner when delivered into custody.*

## Imprisonment for Life

### SENTENCE OF LIFE IMPRISONMENT.

745. *Subject to section 745.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be*

- (a) *in respect of a person who has been convicted of high treason or first degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;*
- (b) *in respect of a person who has been convicted of second degree murder where that person has previously been convicted of culpable homicide that is murder, however described in this Act, that that person be sentenced to imprisonment for life without eligibility for parole until the person has served twenty-five years of the sentence;*
- (c) *in respect of a person who has been convicted of second degree murder, that the person be sentenced to imprisonment for life without eligibility for parole until the person has served at least ten years of the sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefor pursuant to section 745.4; and*
- (d) *in respect of a person who has been convicted of any other offence, that the person be sentenced to imprisonment for life with normal eligibility for parole.*

### PERSONS UNDER EIGHTEEN.

745.1. *The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served such period between five and ten years of the sentence as is specified by the judge presiding at the trial.*

**NOTE:** Section 745.1 replaced by 1995, c. 22, s. 21(b) (to come into force when s. 745.1 as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, s. 38 is brought into force before that date). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

745.1. *The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served*

- (a) *such period between five and seven years of the sentence as is specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five*

years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;

- (b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
- (c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

#### RECOMMENDATION BY JURY.

745.2. Subject to section 745.3, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

*You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.*

#### PERSONS UNDER EIGHTEEN.

745.3. Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of eighteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

*You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and ten years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.*

**NOTE:** Section 745.3 replaced by 1995, c. 22, s. 22(b) (to come into force when s. 745.3 as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, s. 39 is brought into force before that date). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

#### PERSONS UNDER SIXTEEN.

745.3. Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

*You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.*



**INELIGIBILITY FOR PAROLE.**

*745.4. Subject to section 745.5, at the time of the sentencing under section 745 of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.2, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five) without eligibility for parole, as the judge deems fit in the circumstances.*

**IDEM.**

*745.5. At the time of the sentencing under section 745.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of eighteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.3, by order, decide the period of imprisonment the offender is to serve that is between five years and ten years without eligibility for parole, as the judge deems fit in the circumstances.*

**NOTE:** Section 745.5 replaced by 1995, c. 22, s. 23(b) (to come into force when s. 745.5 as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, s. 40 is brought into force before that date). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

*745.5. At the time of the sentencing under section 745.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.3, by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances.*

APPLICATION FOR JUDICIAL REVIEW / Judicial hearing / Definition of "victim" / Renewal of application / Reduction / Rules / Definition of "appropriate Chief Justice" / Territories.

**745.6. (1) Where a person has served at least fifteen years of a sentence**

- (a) in the case of a person who has been convicted of high treason or first degree murder, or
- (b) in the case of a person convicted of second degree murder who has been sentenced to imprisonment for life without eligibility for parole until more than fifteen years of that person's sentence have been served,

that person may apply to the appropriate Chief Justice in the province in which the conviction took place for a reduction in the number of years of imprisonment without eligibility for parole.

(2) On receipt of an application under subsection (1), the appropriate Chief Justice shall designate a judge of the superior court of criminal jurisdiction to empanel a jury to hear the application and determine whether the applicant's number of years of imprisonment without eligibility for parole ought to be reduced having regard to

- (a) the character of the applicant,
- (b) the applicant's conduct while serving the sentence,
- (c) the nature of the offence for which that applicant was convicted,
- (d) any information provided by a victim, either at the time of the imposition of the sentence or at the time of the hearing under this subsection, and

(e) such other matters as the judge deems relevant in the circumstances, and the determination shall be made by not less than two thirds of the jury.

(3) In subsection (2), “victim” has the same meaning as in subsection 722(4).

(4) Where the jury hearing an application under subsection (1) determines that the applicant’s number of years of imprisonment without eligibility for parole ought not to be reduced, the jury shall set another time at or after which an application may again be made by the applicant to the appropriate Chief Justice for a reduction in the applicant’s number of years of imprisonment without eligibility for parole.

(5) Where the jury hearing an application under subsection (1) determines that the applicant’s number of years of imprisonment without eligibility for parole ought to be reduced, the jury may, by order,

(a) substitute a lesser number of years of imprisonment without eligibility for parole than that then applicable; or

(b) terminate the ineligibility for parole.

(6) The appropriate Chief Justice in each province or territory may make such rules in respect of applications and hearings under this section as are required for the purposes of this section.

(7) For the purposes of this section, the “appropriate Chief Justice” is

(a) in relation to the Province of Ontario, the Chief Justice of the Ontario Court;

(b) in relation to the Province of Quebec, the Chief Justice of the Superior Court;

(c) in relation to the Provinces of Nova Scotia, Prince Edward Island and Newfoundland, the Chief Justice of the Supreme Court, Trial Division;

(d) in relation to the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Chief Justice of the Court of Queen’s Bench;

(e) in relation to the Province of British Columbia, the Chief Justice of the Supreme Court; and

(f) in relation to the Yukon Territory and the Northwest Territories, the Chief Justice of the Court of Appeal thereof.

(8) For the purposes of this section, when the appropriate Chief Justice is designating a judge of the superior court of criminal jurisdiction to empanel a jury to hear an application in respect of a conviction that took place in the Yukon Territory or the Northwest Territories, the appropriate Chief Justice may designate the judge from the Court of Appeal or the Supreme Court of the Yukon Territory or Northwest Territories, as the case may be.

#### TIME SPENT IN CUSTODY.

746. In calculating the period of imprisonment served for the purposes of section 745, 745.4 or 745.6, there shall be included any time spent in custody between

(a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed; or

(b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to death and the day the sentence was commuted or deemed to have been commuted to a sentence of imprisonment for life.

**NOTE:** The portion of s. 746 preceding para. (a) replaced by 1995, c. 22, s. 24(b) (to come into force when that portion as enacted by 1995, c. 22, s. 6 is brought into force but only if 1995, c. 19, s. 41 is brought into force before that date). The text of that portion, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

746. *In calculating the period of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between*

PAROLE PROHIBITED / Temporary absences and day parole / Idem.

746.1. (1) *Unless Parliament otherwise provides by an enactment making express reference to this section, a person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall not be considered for parole or released pursuant to a grant of parole under the Corrections and Conditional Release Act or any other Act of Parliament until the expiration or termination of the specified number of years of imprisonment.*

(2) *Subject to subsection (3), in respect of a person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of the specified number of years of imprisonment.*

- (a) *no day parole may be granted under the Corrections and Conditional Release Act;*
- (b) *no absence without escort may be authorized under that Act or the Prisons and Reformatories Act; and*
- (c) *except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons may be authorized under either of those Acts.*

(3) *Notwithstanding the Corrections and Conditional Release Act, in the case of any person convicted of first degree murder or second degree murder who was under the age of eighteen at the time of the commission of the offence and who is sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but one fifth of the period of imprisonment the person is to serve without eligibility for parole.*

- (a) *no day parole may be granted under the Corrections and Conditional Release Act;*
- (b) *no absence without escort may be authorized under that Act or the Prisons and Reformatories Act; and*
- (c) *except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons may be authorized under either of those Acts.*

**NOTE:** That part of 1995, c. 22, s. 6 which enacts s. 746.1 is replaced by 1995, c. 42, s. 87(b). The text of s. 746.1 as enacted by s. 87(b), which is not yet in force and therefore printed in *lightface italics*, reads as follows:

PAROLE PROHIBITED / Absence with or without escort and day parole / Idem.

746.1. (1) *Unless Parliament otherwise provides by an enactment making express reference to this section, a person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall not be considered for parole or released pursuant to a grant of parole under the Corrections and Conditional Release Act or any other Act of Parliament until the expiration or termination of the specified number of years of imprisonment.*

(2) *Subject to subsection (3), in respect of a person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of the specified number of years of imprisonment,*

- (a) *no day parole may be granted under the Corrections and Conditional Release Act;*
- (b) *no absence without escort may be authorized under that Act or the Prisons and Reformatories Act; and*
- (c) *except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts.*

(3) *Notwithstanding the Corrections and Conditional Release Act, in the case of any person*



convicted of first degree murder or second degree murder who was under the age of eighteen at the time of the commission of the offence and who is sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but one fifth of the period of imprisonment the person is to serve without eligibility for parole,

- (a) no day parole may be granted under the Corrections and Conditional Release Act;
- (b) no absence without escort may be authorized under that Act or the Prisons and Reformatories Act; and
- (c) except with the approval of the National Parole Board, no absence with escort otherwise than for medical reasons or in order to attend judicial proceedings or a coroner's inquest may be authorized under either of those Acts.

## Hospital Orders

DEFINITIONS / "assessment report" / "hospital order" / "medical practitioner" / "treatment facility".

747. In this section and sections 747.1 to 747.8,

"assessment report" means a written report made pursuant to an assessment order made under section 672.11 by a psychiatrist who is entitled under the laws of a province to practise psychiatry or, where a psychiatrist is not practicably available, by a medical practitioner;

"hospital order" means an order by a court under section 747.1 that an offender be detained in a treatment facility;

"medical practitioner" means a person who is entitled to practise medicine by the laws of a province;

"treatment facility" means any hospital or place for treatment of the mental disorder of an offender, or a place within a class of such places, designated by the Governor in Council, the lieutenant governor in council of the province in which the offender is sentenced or a person to whom authority has been delegated in writing for that purpose by the Governor in Council or that lieutenant governor in council.

COURT MAY MAKE A HOSPITAL ORDER / Limitation on hospital order / Form / Warrant of committal.

747.1. (1) A court may order that an offender be detained in a treatment facility as the initial part of a sentence of imprisonment where it finds, at the time of sentencing, that the offender is suffering from a mental disorder in an acute phase and the court is satisfied, on the basis of an assessment report and any other evidence, that immediate treatment of the mental disorder is urgently required to prevent further significant deterioration of the mental or physical health of the offender, or to prevent the offender from causing serious bodily harm to any person.

(2) A hospital order shall be for a single period of treatment not exceeding sixty days, subject to any terms and conditions that the court considers appropriate.

(3) A hospital order may be in Form 51.

(4) A court that makes a hospital order shall issue a warrant for committal of the offender, which may be in Form 8.

RECOMMENDED TREATMENT FACILITY / Court chooses treatment facility.

747.2. (1) In a hospital order, the court shall specify that the offender be detained in a particular treatment facility recommended by the central administration of any penitentiary, prison or

*other institution to which the offender has been sentenced to imprisonment, unless the court is satisfied, on the evidence of a medical practitioner, that serious harm to the mental or physical health of the offender would result from travelling to that treatment facility or from the delay occasioned in travelling there.*

*(2) Where the court does not follow a recommendation referred to in subsection (1), it shall order that the offender be detained in a treatment facility that is reasonably accessible to the place where the accused is detained when the hospital order is made or to the place where the court is located.*

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CONDITION.

*747.3. No hospital order may be made unless the offender and the person in charge of the treatment facility where the offender is to be detained consent to the order and its terms and conditions, but nothing in this section shall be construed as making unnecessary the obtaining of any authorization or consent to treatment from any other person that is or may be required otherwise than under this Act.*

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EXCEPTION.

*747.4. No hospital order may be made in respect of an offender*

- (a) who is convicted of or is serving a sentence imposed in respect of a conviction for an offence for which a minimum punishment of imprisonment for life is prescribed by law;*
- (b) who has been found to be a dangerous offender pursuant to section 753;*
- (c) where the term of imprisonment to be served by the offender does not exceed sixty days;*
- (d) where the term of imprisonment is imposed on the offender in default of payment of a fine or of a victim fine surcharge imposed under subsection 737(1); or*
- (e) where the sentence of imprisonment imposed on the offender is ordered under paragraph 732(1)(a) to be served intermittently.*

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OFFENDER TO SERVE REMAINDER OF SENTENCE / *Transfer from one treatment facility to another.*

*747.5. (1) An offender shall be sent or returned to a prison to serve the portion of the offender's sentence that remains unexpired where*

- (a) the hospital order expires before the expiration of the sentence; or*
- (b) the consent to the detention of the offender in the treatment facility pursuant to the hospital order is withdrawn either by the offender or by the person in charge of the treatment facility.*

*(2) Before the expiration of a hospital order in respect of an offender, the offender may be transferred from the treatment facility specified in the hospital order to another treatment facility where treatment of the offender's mental disorder is available, if the court authorizes the transfer in writing and the person in charge of the treatment facility consents.*

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DETENTION TO COUNT AS SERVICE OF TERM.

*747.6. Each day that an offender is detained under a hospital order shall be treated as a day of service of the term of imprisonment of the offender, and the offender shall be deemed, for all purposes, to be lawfully confined in a prison during that detention.*

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APPLICATION OF SECTION 12 OF CORRECTIONS AND CONDITIONAL RELEASE ACT.

*747.7. Notwithstanding section 12 of the Corrections and Conditional Release Act, an offender in respect of whom a hospital order is made and who is sentenced or committed to a*

penitentiary may, during the period for which that order is in force, be received in a penitentiary before the expiration of the time limited by law for an appeal and shall be detained in the treatment facility specified in the order during that period.

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#### COPY OF WARRANT AND ORDER GIVEN TO PRISON AND HOSPITAL.

747.8. Where a court makes a hospital order in respect of an offender, the court shall cause a copy of the order and of the warrant of committal issued pursuant to subsection 747.1 to be sent to the central administration of the penitentiary, prison or other institution where the term of imprisonment imposed on the offender is to be served and to the treatment facility where the offender is to be detained for treatment.

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## Pardons and Remissions

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TO WHOM PARDON MAY BE GRANTED / Free or conditional pardon / Effect of free pardon / Punishment for subsequent offence not affected.

748. (1) Her Majesty may extend the royal mercy to a person who is sentenced to imprisonment under the authority of an Act of Parliament, even if the person is imprisoned for failure to pay money to another person.

(2) The Governor in Council may grant a free pardon or a conditional pardon to any person who has been convicted of an offence.

(3) Where the Governor in Council grants a free pardon to a person, that person shall be deemed thereafter never to have committed the offence in respect of which the pardon is granted.

(4) No free pardon or conditional pardon prevents or mitigates the punishment to which the person might otherwise be lawfully sentenced on a subsequent conviction for an offence other than that for which the pardon was granted.

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#### REMISSION BY GOVERNOR IN COUNCIL / Terms of remission.

748.1. (1) The Governor in Council may order the remission, in whole or in part, of a fine or forfeiture imposed under an Act of Parliament, whoever the person may be to whom it is payable or however it may be recoverable.

(2) An order for remission under subsection (1) may include the remission of costs incurred in the proceedings, but no costs to which a private prosecutor is entitled shall be remitted.

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#### ROYAL PREROGATIVE.

749. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

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## Disabilities

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PUBLIC OFFICE VACATED FOR CONVICTION / When disability ceases / Disability to contract / Application for restoration of privileges / Order of restoration / Removal of disability.

750. (1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.



(2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefor for competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage.

(3) No person who is convicted of an offence under section 121, 124 or 418 has, after that conviction, capacity to contract with Her Majesty or to receive any benefit under a contract between Her Majesty and any other person or to hold office under Her Majesty.

(4) A person to whom subsection (3) applies may, at any time before a pardon is granted to the person under section 4.1 of the Criminal Records Act, apply to the Governor in Council for the restoration of one or more of the capacities lost by the person by virtue of that subsection.

(5) Where an application is made under subsection (4), the Governor in Council may order that the capacities lost by the applicant by virtue of subsection (3) be restored to that applicant in whole or in part and subject to such conditions as the Governor in Council considers desirable in the public interest.

(6) Where a conviction is set aside by competent authority, any disability imposed by this section is removed.

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## Miscellaneous Provisions

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### COSTS TO SUCCESSFUL PARTY IN CASE OF LIBEL.

751. The person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount to be fixed by order of the court.

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### HOW RECOVERED.

751.1. Where costs that are fixed under section 751 are not paid forthwith, the party in whose favour judgment is given may enter judgment for the amount of the costs by filing the order in any civil court of the province in which the trial was held that has jurisdiction to enter a judgment for that amount, and that judgment is enforceable against the opposite party in the same manner as if it were a judgment rendered against that opposite party in that court in civil proceedings.

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## Part XXIV / DANGEROUS OFFENDERS

### Interpretation

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#### DEFINITIONS / "court" / "serious personal injury offence".

752. In this Part,

"court" means the court by which an offender in relation to whom an application under this Part is made was convicted, or a superior court of criminal jurisdiction;  
"serious personal injury offence" means

- (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
  - (i) the use or attempted use of violence against another person, or
  - (ii) conduct endangering or likely to endanger the life or safety of another per-

son or inflicting or likely to inflict severe psychological damage upon another person,  
and for which the offender may be sentenced to imprisonment for ten years or more, or

- (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault). R.S., c. C-34, s. 687; 1976-77, c. 53, s. 14; 1980-81-82-83, c. 125, s. 26.

**Note:** By virtue of s. 179(1)(b) of the *Criminal Code*, as re-enacted by R.S.C. 1985, c. 27 (1st Supp.), s. 22, proclaimed in force December 4, 1985, para. (b) of the above definition, as it read immediately before January 4, 1983 (the date upon which 1980-81-82, c. 125, s. 26 came into force, amending para. (b)) is now relevant to determining whether the offence of vagrancy has been committed. The text of para. (b), as it read immediately before January 4, 1983, is as follows:

“(b) an offence mentioned in section 144 (rape) or 145 (attempted rape) or an offence or attempt to commit an offence mentioned in section 146 (sexual intercourse with a female under fourteen or between fourteen and sixteen), 149 (indecent assault on a female), 156 (indecent assault on a male) or 157 (gross indecency).”

#### CROSS-REFERENCES

See s. 2 for definition of “superior court of criminal jurisdiction.”

The Interpretation Act, R.S.C. 1985, c. I-21, s. 34(1)(a), defines indictable offence as any offence which may be prosecuted on indictment. The reference to “indictable offence” in para. (a) of the definition may include offences triable either way, if the other required elements of the definition are present.

Section 754 governs applications for commencement of dangerous offender proceedings.

Section 758 deals with the hearing at which the offender is present. Sections 755 and 757 govern indictable matters. Pursuant to s. 756, the offender may be directed to attend or remanded in custody for observation and the evidence obtained thereby adduced on the hearing.

Section 753 describes the grounds upon which a person may be found a dangerous offender and sentenced to prison for an indeterminate period instead of being sentenced for the predicate offence. Right of appeal is conferred by s. 759, including appeal from a dismissal of an application for an order under Part XXIV.

See s. 761 for obligations of Parole Board.

#### ANNOTATIONS

The removal in December, 1985 of gross indecency contrary to former s. 157 as an offence which could lead to a dangerous-offender finding, did not affect the validity of the accused's continued detention on an order made under this Part prior to the 1985 amendment. Further his continued detention did not violate ss. 9 and 12 of the Charter of Rights: *R. v. Milne* (1987), 38 C.C.C. (3d) 502, [1987] 2 S.C.R. 512, 81 N.R. 36 (5:2).

## Dangerous Offenders

#### APPLICATION FOR FINDING.

**753.** Where, on an application made under this Part following the conviction of a person for an offence but before the offender is sentenced therefor, it is established to the satisfaction of the court

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in

section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing

- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour,
  - (ii) a pattern of persistent aggressive behaviour by the offender, of which the offence for which he has been convicted forms a part, showing a substantial degree of indifference on the part of the offender respecting the reasonably foreseeable consequences to other persons of his behaviour, or
  - (iii) any behaviour by the offender, associated with the offence for which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint, or
- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his conduct in any sexual matter including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses and a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control his sexual impulses,

the court may find the offender to be a dangerous offender and may thereupon impose a sentence of detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence for which the offender has been convicted. *R.S., c. C-34*, s. 688; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

Section 754 describes the procedural steps in an application to have a person declared a dangerous offender. The subject may be compelled to attend the hearing pursuant to s. 758.

See ss. 755 and 757 for rules governing evidence at the hearing. Right of appeal is conferred by s. 759 including appeal from a dismissal of an application for an order under Part XXIV. Procedure on appeal generally parallels the procedure in indictable appeals under Part XXI.

#### SYNOPSIS

This section sets out what findings are required to be made before an accused can be declared a "dangerous offender". If such a declaration is made, the court has the discretion to impose a penitentiary term for an indeterminate period in lieu of any other punishment for the "serious personal injury" offence (see s. 752) that the accused has been convicted of committing.

Depending on the nature of the underlying offence, the court will consider whether the evidence establishes: (a) a pattern of repetitive or aggressive behaviour such that the accused constitutes a threat to the safety of the public; or (b) that the inability of the accused to control his or her sexual impulses will likely cause injury or pain to other persons.

#### ANNOTATIONS

**Constitutional considerations** – The imposition of a sentence of indeterminate detention as authorized by this Part does not offend ss. 7, 9, and 12 of the Charter of Rights and Freedoms: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193 (5:2).

**Violent offence [para. (a)]** – The pattern of repetitive behaviour referred to in subpara.

(i) may be made out where there is only one other incident but both incidents display elements of similarity in the accused's behaviour. With respect to the element of future



conduct, the Crown need only establish beyond a reasonable doubt an existing likelihood of causing death, injury or severe psychological damage through the accused's failure in the future to restrain his behaviour: *R. v. Langevin* (1984), 11 C.C.C. (3d) 336, 39 C.R. (3d) 333, 45 O.R. (2d) 705 (C.A.).

Conduct which involved the rape of a 12-year-old girl and performances of other sexual acts and which can be described as coarse, savage and cruel properly comes within the term "brutal" in subpara. (iii): *R. v. Langevin, supra*.

Subparagraphs (i), (ii) and (iii) are disjunctive and the finding of dangerous offender may be supported by any of the definitions alone: *R. v. Lewis* (1984), 12 C.C.C. (3d) 353, 46 O.R. (2d) 289, 9 D.L.R. (4th) 715 (C.A.), appeal to S.C.C. abandoned 25 C.C.C. (3d) 288n.

**Sexual offences [para. (b)] / Pedophile** – It was held in *R. v. Roestad* (1971), 5 C.C.C. (2d) 564, 19 C.R.N.S. 190 (Ont. Co. Ct.) considering the former s. 687 which was in substantially the same language that the words "other evil" are not necessarily related to injury and pain and accordingly damage caused by an accused to the morals of children which could lead them to male prostitution or some other form of exploitive behaviour is a form of that evil.

In another case under the former provisions, which also involved a homosexual pedophile, it was held that "evil" in the context of the young male victims must be taken to mean evil consequent on the commission of any offence within the category of offences such as gross indecency, which do not necessarily involve violence as a constituent element. In this case although the accused had not permanently harmed any of the boys in the past there was evidence from which the trial Judge could find that evil would likely be caused to a young boy by subjection to such experiences: *R. v. Dwyer* (1977), 34 C.C.C. (2d) 293, [1977] 2 W.W.R. 704 (Alta. S.C. App. Div.).

**Evidence and procedure** – In *R. v. Knight* (1975), 27 C.C.C. (2d) (Ont. H.C.J.) the psychiatrists were shown certain police reports as to other offences allegedly committed by the offender. However, no evidence was led as to those other offences. The Court held that it could not rely on the psychiatrists' evaluation of what factual inference should be drawn from the reports, for it is not within their area of competence to make such findings, and even if it were, those facts would have to be independently proved before the Court could rely on any consequent opinion based on inferences drawn therefrom. In this case the application was dismissed as one psychiatrist was unable to give an opinion on the future likelihood without taking into account data of which the Court could not take cognizance and the other psychiatrist may have been influenced by that information in forming his opinion. In the result, the Crown had not met the burden of proof. Specifically, with respect to the burden of proof of likelihood, His Lordship held that proof beyond a reasonable doubt is not required since in the nature of things that would be impossible in almost every case but His Lordship stated "I do refer to the quality and strength of the evidence of past and present facts together with the expert opinion thereon, as an existing basis for finding present likelihood of future conduct".

At a hearing the Court may consider evidence of another sexual offence for which the accused was not convicted, and also may accept expert evidence of psychiatrists who, in lieu of personally examining the accused, formed their opinions on the basis of medical reports and observance at the accused's recent trial: *R. v. Kanester*, [1968] 1 C.C.C. 351 (B.C.C.A.).

While previous convictions for sexual offences is relevant evidence the accused must be permitted to adduce evidence of the circumstances of those convictions to show that they were not the result of his failure to control his sexual impulses: *R. v. Dawson*, [1970] 3 C.C.C. 212, 8 C.R.N.S. 395 (B.C.C.A.).

Furthermore, while prior convictions are relevant, in *R. v. Currie* (1995), 103 C.C.C. (3d) 281, 26 O.R. (3d) 444, 86 O.A.C. 143 (C.A.) it was held that it is inappropriate to base the assessment of the accused's present propensity to commit future violent acts

almost exclusively on past criminal conduct rather than on the predicate offences of which the accused had been convicted.

The burden on the Crown is to establish beyond a reasonable doubt all the necessary elements contained in this section before the accused may be found to be a dangerous offender: *R. v. Jackson* (1981), 61 C.C.C. (2d) 540, 23 C.R. (3d) 4 (N.S.S.C. App. Div.).

The requirements for a finding that the accused is a dangerous offender within the meaning of this paragraph are: (1) whether the accused by his conduct in sexual matters has shown a failure to control his sexual impulses; (2) is the accused likely in the future to show a similar failure; and (3) if so, is he likely to cause injury, pain or other evil to any persons? While psychiatric evidence is relevant to all three issues the trial judge may also properly base her findings on the first and third issues by an analysis of the facts surrounding the predicate offence and other previous offences committed by the accused: *R. v. Sullivan* (1987), 37 C.C.C. (3d) 143 (Ont. C.A.).

**Nature of judge's discretion** – Even where the Judge finds that the accused is a dangerous offender he has a discretion whether or not to impose the sentence of indeterminate imprisonment: *R. v. Hall* (1981), 63 C.C.C. (2d) 535, 16 Alta. L.R. 289 (C.A.), leave to appeal to S.C.C. refused March 5, 1982; *R. v. Milne* (1982), 66 C.C.C. (2d) 544 (B.C.C.A.); *R. v. Crosby* (1982), 1 C.C.C. (3d) 233 (Ont. C.A.).

However, where the statutory criteria are satisfied the judge has no discretion not to make the finding that the accused is a dangerous offender: *R. v. Moore* (1985), 16 C.C.C. (3d) 328, 44 C.R. (3d) 137, 49 O.R. (2d) 1 (C.A.); *R. v. B.(J.H.)* (1995), 101 C.C.C. (3d) 1, 144 N.S.R. (2d) 293 (C.A.).

**Possibility of treatment and cure** – The Crown must prove beyond a reasonable doubt that the past conduct of the accused is such that it gives rise to a likelihood of future injury to others. Thus the prospects of treatment or a cure are irrelevant to the initial determination of whether the accused is a dangerous offender but are relevant to the exercise of the Judge's discretion whether or not to impose the sentence of indeterminate imprisonment: *R. v. Carleton* (1981), 69 C.C.C. (2d) 1, 23 C.R. (3d) 129, [1981] 6 W.W.R. 148 (Alta. C.A.), affd 6 C.C.C. (3d) 480, 36 C.R. (3d) 393n, [1983] 2 S.C.R. 58 (7:0).

Assuming that the probability that the accused would be cured within a determinate time is a basis for the trial judge exercising his discretion against imposing the sentence of indeterminate detention, where there is no evidence to support that finding the trial judge errs in law in failing to impose the sentence of indeterminate detention. In this case the trial judge relied on the cumulative effect of four factors which he erroneously concluded demonstrated that the accused could be cured within a determinate time. In particular he erred in taking into account the so-called "burn-out" theory that statistically the kind of violence exhibited by this accused tends to lessen as a person gets older. There was no evidence to show this accused would fit that particular pattern and, in any event, if this theory standing alone were a valid basis for avoiding an indeterminate term, such a sentence would have very little scope for operation: *R. v. Poutsoungas* (1989), 49 C.C.C. (3d) 388 (Ont. C.A.).

**Other notes** – A definite sentence of imprisonment may not be made consecutive to a sentence of indeterminate detention imposed under this Part: *R. v. Martin* (1982), 65 C.C.C. (2d) 376 (Que. C.A.).

#### HEARING OF APPLICATION / By court alone / When proof unnecessary / Proof of consent.

**754. (1) Where an application under this Part has been made, the court shall hear and determine the application except that no such application shall be heard unless**

- (a) the Attorney General of the province in which the offender was tried has, either before or after the making of the application, consented to the application;
  - (b) at least seven days notice has been given to the offender by the prosecutor, following the making of the application, outlining the basis on which it is intended to found the application; and
  - (c) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be.
- (2) An application under this Part shall be heard and determined by the court without a jury.
- (3) For the purposes of an application under this Part, where an offender admits any allegations contained in the notice referred to in paragraph (1)(b), no proof of those allegations is required.
- (4) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and purporting to be signed by the Attorney General is, in the absence of any evidence to the contrary, proof of that nomination or consent without proof of the signature or the official character of the person appearing to have signed the document. R.S., c. C-34, s. 689; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

The subject of a dangerous offender application hearing must be present with certain narrow exceptions. Sections 755 and 757 describe what evidence may be adduced and admissions allowed. See also s. 754(3) regarding admissions. Section 754(3) does not restrict the reception of other evidence relevant to the issues on the application which are otherwise receivable. The subject of the application may be compelled to attend the hearing or remanded in custody for observation under s. 756.

Section 753 describes the ground upon which a person may be found to be a dangerous offender and sentenced to an indeterminate period instead of being sentenced for the original serious personal injury offence. Right of appeal is conferred by s. 759 including appeal from a dismissal of an application for an order under this part.

#### SYNOPSIS

An application for a declaration that an accused is a “dangerous offender” requires the consent of the Attorney General of the province in which the order is sought. Proper notice (at least seven days) must be given (subsec. (1)).

The issue is determined by a judge sitting alone (subsec. (2)).

It is open to the offender to admit any of the allegations set out in the Crown’s notice, eliminating the need to prove the allegations (subsec. (3)).

#### ANNOTATIONS

**subsec. (1)(b)** – Under the predecessor to this section it was held that personal service upon the accused patient in a provincial mental hospital was inadequate service in *R. v. Tume ex p. Morris*, [1965] 3 C.C.C. 118, 49 W.W.R. 756 *sub nom. Re Morris’ Prohibition Application* (B.C.S.C.), *revd* on other grounds [1965] 3 C.C.C. 349, 46 C.R. 203 *sub nom. R. v. Morris*, 50 W.W.R. 576 (B.C.C.A.).

There is no minimum period of time for giving notice of the intention to seek an order under this Part. It is sufficient if the application is made in Court in the presence of the accused. Thereafter the Court should adjourn the proceedings to permit the Crown to give the accused the notice in writing as required by this paragraph outlining the basis upon which it is intended to found the application: *R. v. Currie* (1984), 12 C.C.C. (3d) 9 (Ont. C.A.).

**subsec. (2)** – This subsection is not inconsistent with the guarantee in s. 11(f) of the



Charter of Rights and Freedoms to a jury trial: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193 (5:2).

**EVIDENCE OF DANGEROUS OFFENDER STATUS / Nomination of psychiatrists / Nomination by court / Saving.**

755. (1) On the hearing of an application under this Part, the court shall hear the evidence of at least two psychiatrists and all other evidence that, in its opinion, is relevant, including the evidence of any psychologist or criminologist called as a witness by the prosecution or the offender.

(2) One of the psychiatrists referred to in subsection (1) shall be nominated by the prosecution and one shall be nominated by the offender.

(3) If the offender fails or refuses to nominate a psychiatrist pursuant to this section, the court shall nominate a psychiatrist on behalf of the offender.

(4) Nothing in this section shall be construed to enlarge the number of expert witnesses that may be called without the leave of the court or judge under section 7 of the *Canada Evidence Act*. R.S., c. C-34, s. 690; 1976-77, c. 53, s. 14.

**CROSS-REFERENCES**

The nomination of a psychiatrist by the prosecution may be proven by the production of the appropriate document pursuant to s. 754(4). Admissions in dangerous offender proceedings are authorized by s. 754(3). The introduction of evidence of the subject's character and repute in a dangerous offender application is permitted by s. 757.

See also ss. 756, 758 and 759.

**SYNOPSIS**

On the hearing of a "dangerous offender" application, the court is required to hear evidence given by at least two psychiatrists: one nominated by each party. All other evidence which the court considers relevant is admissible, including that of any psychologist or criminologist (subsecs. (1) and (2)).

If the accused fails to nominate a psychiatrist, the court will appoint one (subsec. (3)).

**ANNOTATIONS**

**Admissibility of confessions** – It was held in *Wilband v. The Queen*, [1967] 2 C.C.C. 6, [1967] S.C.R. 14, 2 C.R.N.S. 29 (5:0) that a psychiatrist appointed under the former s. 689 is not a person in authority and therefore the rule with respect to confessions does not apply to statements given by the offender to such a psychiatrist. Further, the Court held that the confession rule would also not apply to such evidence as these proceedings do not involve the conviction of an offence but the determination of the sentence. "The confession rule . . . is a rule which has been designed for proceedings where, broadly speaking, the guilt or innocence of a person charged with an offence is the matter in issue. The rule has not been established for proceedings related to the determination of a sentence." Finally, the psychiatrist's opinion is not inadmissible because it is based partly on hearsay according to recognized psychiatric procedures. The value of the opinion may be affected to the extent that it rests on secondhand source material but that goes only to weight, not admissibility.

The ruling in *Wilband v. The Queen*, *supra*, was applied to proceedings under the current provisions and it was held that the Crown was not required to prove the voluntariness of the accused's statements to the police concerning previous sexual offences committed by him: *R. v. Boyd* (1983), 8 C.C.C. (3d) 143 (B.C.C.A.).

At least at the stage where the Crown is merely considering whether or not to bring an application under this Part an accused may refuse to speak to a psychiatrist retained by the Crown and refuse to converse with anyone should he be remanded to a psychiatric

facility after conviction, pursuant to s. 615: *Re Chapelle and The Queen* (1980), 52 C.C.C. (2d) 32 (Ont. H.C.J.).

**Application of other rules of evidence** – Evidence to be admissible on the hearing must be adduced in accordance with the regular rules of evidence: *R. v. Jackson* (1981), 61 C.C.C. (2d) 540, 23 C.R. (3d) 4 (N.S.S.C. App. Div.).

“Other evidence” may include evidence of other incidents which did not result in convictions: *R. v. MacInnis* (1981), 64 C.C.C. (2d) 553, 49 N.S.R. (2d) 393 *sub nom. R. v. MacInnis* (No. 2) (N.S.S.C. App. Div.); *R. v. Lewis* (1984), 12 C.C.C. (3d) 353, 46 O.R. (2d) 289, 9 D.L.R. (4th) 715 (C.A.), appeal to S.C.C. abandoned 25 C.C.C. (3d) 288n.

It would seem that where the hearing is before the Court by which the accused was convicted, the Judge may take into consideration the evidence adduced at the trial of the substantive offence: *R. v. McGrath* (1962), 133 C.C.C. 57, 38 C.R. 115, [1962] S.C.R. 739 (5:0). However, where a Judge other than the trial Judge hears the application (which is possible by reason of the definition of “court” in s. 752), it is not sufficient to simply file a transcript of the previous proceedings; rather, the evidence must be adduced in the form of sworn testimony: *R. v. Canning*, [1966] 4 C.C.C. 379, 49 C.R. 13 (B.C.C.A.).

**Constitutional considerations** – The use of psychiatric evidence does not violate the guarantee in s. 7 of the Charter of Rights to fundamental justice: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 44 D.L.R. (4th) 193 (5:2), nor infringe the guarantee against self-incrimination in s. 11(c). In particular at this stage of the proceedings the offender is no longer a “person charged with an offence” under s. 11. In any event, the offender is not compelled to testify at the hearing nor required to co-operate with the psychiatrists. The psychiatrist is under no duty to caution the accused as to the possible uses of his examination even where the examination is prior to trial: *R. v. Langevin* (1984), 11 C.C.C. (3d) 336, 39 C.R. (3d) 333, 45 O.R. (2d) 705 (C.A.).

Evidence legally obtained on a remand under former s. 537(1)(b) [now see ss. 672.11 and 672.21] is admissible in proceedings under this Part. The evidence is not being used to incriminate the accused at this stage and the constitutional protection against self-incrimination as guaranteed by s. 7 of the Charter is not engaged: *R. v. Jones*, [1994] 2 S.C.R. 229, 89 C.C.C. (3d) 353, 30 C.R. (4th) 1 (5:4).

## DIRECTION OR REMAND FOR OBSERVATION / *Idem.*

**756. (1)** A court to which an application is made under this Part may, by order in writing,

- (a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or
- (b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation,

where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of the observation that would be relevant to the application.

**(2)** Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection

- (a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report; and

- (b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for that period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner. R.S., c. C-34, s. 691; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

For similar provisions, see s. 537(1)(b) and (2) to (4) regarding the preliminary inquiries stage; s. 672.11 for trial; and s. 681 on appeal, in indictable matters.

For equivalent authority in summary conviction trials, see s. 803(5) and (6) and for appeals see s. 823. This section does not expressly authorize the recognition of evidence obtained through such observations. Receipt of relevant evidence so obtained is permitted by s. 755(1).

#### SYNOPSIS

This section empowers a judge, hearing a “dangerous offender” application, to direct the accused to attend for observation or remand the accused in custody for a period not exceeding 30 days for that purpose, where there is reason to believe that evidence relevant to the proceedings might thereby be obtained. Such an order must be based on the evidence of one doctor. If both parties agree, a report by the doctor can be filed in lieu of calling *viva voce* evidence (subsec. (1)).

A remand for up to 30 days may be made without the evidence or report of a doctor, if the circumstances warrant and a doctor is not readily available to assist the court in this regard (subsec. (2)(a)).

In special circumstances, the remand (when based on the evidence or report of a doctor) may be for up to 60 days (subsec. (2)(b)).

#### ANNOTATIONS

This section is not so vague as to constitute a violation of s. 7 of the Charter: *R. v. Rollins* (1993), 80 C.C.C. (3d) 385, 15 C.R.R. (2d) 120 (B.C.S.C.).

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#### EVIDENCE OF CHARACTER.

**757.** Without prejudice to the right of the offender to tender evidence as to his character and repute, evidence of character and repute may, if the court thinks fit, be admitted on the question whether the offender is or is not a dangerous offender. R.S., c. C-34, s. 692; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

Relevance is the principle requirement for evidence in dangerous offender proceedings as in criminal proceedings generally. Expert evidence is receivable pursuant to s. 755(1). Admission of allegations contained in a s. 754(1) notice are permitted by s. 754(3). Evidence obtained through observations made under s. 756 is admissible.

See also ss. 757 and 759.

#### SYNOPSIS

With the permission of the court, the Crown may introduce evidence of character and repute, with respect to whether or not the accused is not a dangerous offender. This provision operates without prejudice to the accused's right to tender evidence respecting his character and repute.

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#### PRESENCE OF ACCUSED AT HEARING OF APPLICATION / Exception.

**758.** (1) The offender shall be present at the hearing of the application under this Part and if at the time the application is to be heard



- (a) he is confined in a prison, the court may order, in writing, the person having the custody of the accused to bring him before the court; or
  - (b) he is not confined in a prison, the court shall issue a summons or a warrant to compel the accused to attend before the court and the provisions of Part XVI relating to summons and warrant are applicable with such modifications as the circumstances require.
- (2) Notwithstanding subsection (1), the court may
- (a) cause the offender to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible; or
  - (b) permit the offender to be out of court during the whole or any part of the hearing on such conditions as the court considers proper. R.S., c. C-34, s. 693; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

Section 650 prescribes the general rule regarding the presence of an accused in criminal proceedings. Exceptions to the general rule may be found in s. 650(2) and in ss. 475 and 598 (accused absconding during trial) and s. 544 (accused absconding during preliminary inquiry).

#### SYNOPSIS

Unless the accused is granted leave not to be present or is removed by order of the court, he or she shall be present for the hearing of the application. The court can issue any order or process required to secure the attendance of the accused.

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**APPEAL / Appeal by Attorney General / Disposition of appeal / Idem / Effect of judgment / Commencement of sentence / Part XXI applies re appeals.**

**759. (1) A person who is sentenced to detention in a penitentiary for an indeterminate period under this Part may appeal to the court of appeal against that sentence on any ground of law or fact or mixed law and fact.**

**(2) The Attorney General may appeal to the court of appeal against the dismissal of an application for an order under this Part on any ground of law.**

**(3) On an appeal against a sentence of detention in a penitentiary for an indeterminate period, the court of appeal may**

- (a) quash the sentence and impose any sentence that might have been imposed in respect of the offence for which the appellant was convicted, or order a new hearing; or
- (b) dismiss the appeal.

**(4) On an appeal against the dismissal of an application for an order under this Part, the court of appeal may**

- (a) allow the appeal, set aside any sentence imposed in respect of the offence for which the respondent was convicted and impose a sentence of detention in a penitentiary for an indeterminate period, or order a new hearing; or
- (b) dismiss the appeal.

**(5) A judgment of the court of appeal imposing a sentence pursuant to this section has the same force and effect as if it were a sentence passed by the trial court.**

**(6) Notwithstanding subsection 721(1), a sentence imposed on an offender by the court of appeal pursuant to this section shall be deemed to have commenced when the offender was sentenced by the court by which he was convicted.**

**NOTE:** Subsection (6) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 721(1) with s. 719(1).

(7) The provisions of Part XXI with respect to procedure on appeals apply, with such modifications as the circumstances require, to appeals under this section. R.S., c. C-34, s. 694; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

Right of appeal to the Supreme Court of Canada is given in ss. 691 to 696, Part XXI, in indictable matters. Section 759 provides no more express right. See s. 41 of the Supreme Court Act, R.S.C. 1985, c. S-26, for governing provisions in appeal to the Supreme Court of Canada. Although the general rule is that a sentence commences when imposed (s. 721(1)), s. 759(6) provides an exception.

See s. 2 for definition of "court of appeal". No leave of the court or of a judge is required for the rights of appeal under subsecs. (1) and (2).

#### SYNOPSIS

This section governs appeals in connection with "dangerous offender" proceedings.

An accused, sentenced to serve an indeterminate period in a penitentiary, may appeal against the sentence on any ground of law, fact or mixed law and fact (subsec. (1)). Crown appeals from dismissal are limited to questions of law (subsec. (2)). The normal procedures apply (subsec. (7)).

If the accused's appeal is allowed, the Court of Appeal may either: (a) quash the sentence of indeterminate duration and impose sentence in respect of the underlying offence; or (b) order a new hearing (subsec. (3)).

If a Crown appeal is allowed, the court may: (a) impose an indeterminate sentence; or (b) order a new hearing (subsec. (4)).

Sentences imposed by the Court of Appeal are deemed to have commenced when the offender was sentenced by the trial court (subsec. (6)).

#### ANNOTATIONS

**Subsec. (1)** – While the appeal under this section is as of right and does not require the obtaining of leave, it is limited to the sentence. The court has no power to quash the finding that the accused is a dangerous offender: *R. v. Langevin* (1984), 11 C.C.C. (3d) 336, 39 C.R. (3d) 333, 45 O.R. (2d) 705 (C.A.).

**Subsec. (2)** – It was held under the predecessor to this section that where the application is dismissed upon insufficiency of the form of notice the Crown may appeal: *R. v. Galbraith* (1971), 5 C.C.C. (2d) 37, [1972] 1 W.W.R. 586 (B.C.C.A.), affd 6 C.C.C. (2d) 188 n, [1972] 2 W.W.R. 80 (S.C.C.).

Where the contemplated application was never proceeded with nor dealt with on its merits because of the trial Judge's indicated refusal to grant the Crown a further adjournment in order to make the application there has not been a "dismissal of an application" within the meaning of this subsection against which the Crown may appeal: *R. v. Currie* (1984), 12 C.C.C. (3d) 28 (Ont. C.A.).

Where there was no evidence upon which the trial judge could find that the accused could be cured within a determinate time, the basis upon which the trial judge had exercised his discretion against imposing the sentence of indeterminate detention, then he erred in law and an appeal lies under this subsection: *R. v. Poutsoungas* (1989), 49 C.C.C. (3d) 388 (Ont. C.A.).

#### DISCLOSURE TO SOLICITOR GENERAL.

760. Where a court, pursuant to section 753, finds an offender to be a dangerous offender and imposes a sentence of detention in a penitentiary for an indeterminate period, the court shall order that a copy of all reports or testimony given by psychiatrists, psychologists or criminologists and any observations of the court with respect to the reasons for the sentence, together with a transcript of the trial of the danger-

ous offender, be forwarded to the Solicitor General of Canada for his information. R.S., c. C-34, s. 695; 1976-77, c. 53, s. 14.

#### CROSS-REFERENCES

No specific use to which the Solicitor General may put this information is indicated by s. 760.

See s. 761(1) for parole review eligibility.

#### REVIEW FOR PAROLE / *Idem*.

761. (1) Subject to subsection (2), where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period, the National Parole Board shall, forthwith after the expiration of three years from the day on which that person was taken into custody and not later than every two years thereafter, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions.

(2) Where a person is in custody under a sentence of detention in a penitentiary for an indeterminate period that was imposed before October 15, 1977, the National Parole Board shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be granted parole under Part II of the *Corrections and Conditional Release Act* and, if so, on what conditions. 1976-77, c. 53, s. 14; 1992, c. 20, s. 215.

#### CROSS-REFERENCES

Parole eligibility is largely governed by the Parole Act, R.S.C. 1985, c. P-2, and regulations thereto.

See ss. 742 to 744, 746 and 747, for parole ineligibility periods in cases of high treason, treason and murder.

#### SYNOPSIS

This section provides that, where a person is in custody as a dangerous offender, his or her case shall be reviewed for parole three years after custody commenced and at least every two years thereafter. Where a person has been incarcerated for an indefinite term prior to October 15, 1977, that person's case is to be reviewed for parole at least once a year.

#### ANNOTATIONS

While the initial sentencing of an offender to an indeterminate term as a criminal sexual psychopath under the predecessor legislation is valid and does not contravene s. 12 of the Charter, his continued incarceration may become unlawful as a result of errors committed by the Parole Board in conducting the review mandated by this section according to the criteria set out in s. 16(1)(a) of the Parole Act. It is only by a careful consideration and application of these criteria that the indeterminate sentence can be made to fit the circumstances of the individual offender and not violate his rights under s. 12. If it is clear on the face of the record that the Parole Board has misapplied or disregarded those criteria over a period of years with the result that an offender remains incarcerated far beyond the time that he should have been properly paroled resulting in a length of incarceration which is grossly disproportionate to the circumstances of the offence then the Board's decision may violate s. 12: *Steele v. Mountain Institution* (1990), 60 C.C.C. (3d) 1, 80 C.R. (3d) 257, [1990] 6 W.W.R. 673 (S.C.C.) (7:0).

Where an inmate sentenced to an indeterminate term seeks to challenge the validity of his continued incarceration on the basis that his rights under s. 12 of the Charter have been infringed, it is preferable that the challenge be by way of judicial review of the decision of the Parole Board refusing to release him, rather than by way of *habeas corpus*: *Steel v. Mountain Institution*, *supra*.



## **PART XXV / EFFECT AND ENFORCEMENT OF RECOGNIZANCES**

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**APPLICATIONS FOR FORFEITURE OF RECOGNIZANCES / Definitions / "clerk of the court" / "schedule".**

**762. (1)** Applications for the forfeiture of recognizances shall be made to the courts, designated in column II of the schedule, of the respective provinces designated in column I of the schedule.

**(2)** In this Part,

"clerk of the court" means the officer designated in column III of the schedule in respect of the court designated in column II of the schedule;

"schedule" means the schedule to this Part. R.S., c. C-34, s. 696.

### **CROSS-REFERENCES**

This section deals with applications for forfeiture of a recognizance for non-compliance with the conditions thereof. Reference should be made to s. 145(1) and (3) which establish the elements of the default.

Sections 766 to 769 outline the rights of a surety for a person bound by a recognizance to render that person into custody. The judicial interim release provisions of Parts XVI, XXI and XXVII are made applicable by s. 769. No procedure for enforcing a recognizance in default cases is outlined in ss. 770 to 773.

See s. 2 for further definition of "clerk of the court".

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### **RECOGNIZANCE BINDING.**

**763.** Where a person is bound by recognizance to appear before a court, justice or provincial court judge for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and his sureties continue to be bound by the recognizance in like manner as if it had been entered into with relation to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held. R.S., c. C-34, s. 697; R.S.C. 1985, c. 27 (1st Supp.), s. 203.

### **CROSS-REFERENCES**

See s. 523 for the period for which a recognizance continues in effect.

### **SYNOPSIS**

A recognizance continues to bind the accused and any sureties, notwithstanding that the proceedings have been adjourned or an order changing the venue has been made.

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### **RESPONSIBILITY OF SURETIES / Committal or new sureties / Effect of committal / Endorsement on recognizance.**

**764. (1)** Where an accused is bound by recognizance to appear for trial, his arraignment or conviction does not discharge the recognizance, but it continues to bind him and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be.

**(2)** Notwithstanding subsection (1), the court, justice or provincial court judge may commit an accused to prison or may require him to furnish new or additional sureties for his appearance until he is discharged or sentenced, as the case may be.

**(3) The sureties of an accused who is bound by recognizance to appear for trial are discharged if he is committed to prison pursuant to subsection (2).**

**(4) The provisions of section 763 and subsections (1), (2) and (3) of this section shall be endorsed on any recognizance entered into pursuant to this Act. R.S., c. C-34, s. 698.**

#### CROSS-REFERENCES

See s. 523 for the period during which recognizances are in force. Where a defendant is arrested for another offence during a recognizance, s. 765 becomes applicable.

Authorization for a surety to render into custody a person bound by a recognizance is found in ss. 766 to 768. The judicial interim release provisions of Parts XVI, XXI and XXVII are made applicable by s. 769.

Sections 770 to 773 deal with the enforcement of a recognizance in the event of a default by the defendant.

#### SYNOPSIS

A recognizance continues in effect until the accused is either acquitted or sentenced (subsec. (1)). The court, however, does have the power to commit the accused to prison or require new or additional sureties (subsec. (2)). If the accused is so committed, the existing sureties are discharged (subsec. (3)).

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#### EFFECT OF SUBSEQUENT ARREST.

**765. Where an accused is bound by recognizance to appear for trial, his arrest upon another charge does not vacate the recognizance, but it continues to bind him and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be, in respect of the offence to which the recognizance relates. R.S., c. C-34, s. 699.**

#### CROSS-REFERENCES

A defendant arrested for another offence while under recognizance will be held in custody pending trial on the later charge under ss. 515(6)(a) or (c) and 522(2) unless reasons to the contrary are established by the defendant. Section 524 deals with the circumstances and procedures in the event of misconduct on the part of a defendant or judicial interim release.

Section 524(4) or (8) provide for the cancellation of a recognizance unless the defendant establishes reasons to the contrary under s. 515(10).

See also s. 145(2) and (3), ss. 766 to 769 and ss. 770 to 773.

#### SYNOPSIS

This section clarifies that an arrest on another charge during the duration of a recognizance relating to a previous charge does not affect that recognizance, which continues in force until the previous charge is dealt with.

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#### RENDER OF ACCUSED BY SURETIES / Arrest / Certificate and entry of render / Discharge of sureties.

**766. (1) A surety for a person who is bound by recognizance to appear may, by an application in writing to a court, justice or provincial court judge, apply to be relieved of his obligation under the recognizance, and the court, justice or provincial court judge shall thereupon issue an order in writing for committal of that person to the prison nearest to the place where he was, under the recognizance, bound to appear.**

**(2) An order under subsection (1) shall be given to the surety and on receipt thereof he or any peace officer may arrest the person named in the order and deliver that per-**

son with the order to the keeper of the prison named therein, and the keeper shall receive and imprison that person until he is discharged according to law.

(3) Where a judge, justice or provincial court judge who issues an order under subsection (1) receives from the sheriff a certificate that the person named in the order has been committed to prison pursuant to subsection (2), the court, justice or provincial court judge shall order an entry of the committal to be endorsed on the recognizance.

(4) An endorsement under subsection (3) vacates the recognizance and discharges the sureties. **R.S., c. C-34, s. 700.**

#### CROSS-REFERENCES

The judicial interim release provisions of Parts XVI, XXI and XXVII are made applicable by s. 769 to a defendant rendered into custody by a surety. A defendant bound by a recognizance may be rendered into custody under s. 767.

Section 767.1 provides for the substitution of another surety for the one who had made a s. 766(1) application.

See ss. 770 to 773 for default proceedings.

#### SYNOPSIS

This section provides the means by which a surety can apply to the court to be relieved of his or her obligations under a recognizance.

Upon receipt of the written application of the surety the court shall issue an order for the committal of the accused. Such order is authority for the arrest and detention of the accused (subsecs. (1) and (2)). Once the accused has been committed the recognizance shall be duly endorsed and the surety's obligations will be at an end (subsecs. (3) and (4)).

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#### RENDER OF ACCUSED IN COURT BY SURETIES.

**767. A surety for a person who is bound by recognizance to appear may bring that person into the court at which he is required to appear at any time during the sittings thereof and before his trial and the surety may discharge his obligation under the recognizance by giving that person into the custody of the court, and the court shall thereupon commit that person to prison until he is discharged according to law. R.S., c. C-34, s. 701.**

#### CROSS-REFERENCES

The surety substitute procedure in s. 767.1 is applicable to s. 767 circumstances. See also s. 766 regarding a surety rendering a defendant bound by a recognizance into custody.

Section 769 makes the judicial interim release provision of Parts XVI, XXI and XXVII applicable to s. 767 proceedings. See ss. 770 to 773 for default proceedings.

#### SYNOPSIS

This section allows sureties to discharge their obligation under a recognizance by delivering the accused into the custody of the relevant court during a sitting thereof prior to the accused's trial.

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#### SUBSTITUTION OF SURETY / Signing of recognizance by new sureties.

**767.1 (1) Notwithstanding subsection 766(1) and section 767, where a surety for a person who is bound by a recognizance has rendered the person into the custody of a court pursuant to section 767 or applies to be relieved of his obligation under the recognizance pursuant to subsection 766(1), the court, justice or provincial court judge, as the case may be, may, instead of committing or issuing an order for the**



**committal of the person to prison, substitute any other suitable person for the surety under the recognizance.**

**(2) Where a person substituted for a surety under a recognizance pursuant to subsection (1) signs the recognizance, the original surety is discharged, but the recognizance and the order for judicial interim release pursuant to which the recognizance was entered into are not otherwise affected. R.S.C. 1985, c. 27 (1st Supp.), s. 167.**

#### CROSS-REFERENCES

Particular persons may be named as sureties by the court under s. 515(2.1).

For review of bail generally, see note under ss. 515 and 522 and provisions of ss. 520, 521, 523 and 524. These provisions may be used instead of ss. 766(1) and 767.

#### SYNOPSIS

This section provides that where an existing surety wishes to be relieved of his or her obligations the court may, instead of issuing an order for the accused's committal (see s. 766(1)), permit the accused to obtain a new surety (subsec. (1)). Once the new surety has signed the recognizance the previous one is discharged (subsec. (2)).

#### RIGHTS OF SURETY PRESERVED.

**768. Nothing in this Part limits or restricts any right that a surety has of taking and giving into custody any person for whom, under a recognizance, he is a surety. R.S., c. C-34, s. 702.**

#### CROSS-REFERENCES

Section 766(1) provides for application for relief from obligations under a recognizance by the surety. Section 767 provides for such release upon the release of the defendant into the custody of the court.

See s. 767.1 for substitution of sureties.

#### SYNOPSIS

This section preserves common law rights of a surety to deliver the person for whom they are a surety into custody. See Note: E. Armour, "Bail in Criminal Cases", 47 C.C.C. 1 at pages 8 and 9.

#### APPLICATION OF JUDICIAL INTERIM RELEASE PROVISIONS.

**769. Where a surety for a person has rendered him into custody and that person has been committed to prison, the provisions of Parts XVI, XXI and XXVII relating to judicial interim release apply, with such modifications as the circumstances require in respect of him and he shall forthwith be taken before a justice or judge as an accused charged with an offence or as an appellant, as the case may be, for the purposes of those provisions. R.S., c. C-34, s. 703; R.S., c. 2 (2nd Supp.), s. 14.**

#### CROSS-REFERENCES

Section 515 governs the release of accused charged with an indictable offence not listed in s. 469. Section 522 applies where the offence is listed in s. 469.

Section 795 incorporates the provisions of Parts XVI and XVIII in compelling the defendant to appear before a judge. See ss. 816 to 818 and 831 and 832 for applicable appeal provisions.

#### SYNOPSIS

A new bail hearing is required when an accused has been rendered by a surety and committed to prison.

**ANNOTATIONS**

Where an accused has been committed to jail pursuant to s. 766 he is to be brought before a Justice for a new judicial interim release hearing notwithstanding he has already been committed for trial or that the original release order was made by a Judge under s. 520 on a bail review: *R. v. Whalen* (1980), 57 C.C.C. (2d) 10 (Ont. Dist. Ct.).

**DEFAULT TO BE ENDORSED / Transmission to clerk of court / Certificate is evidence / Transmission of deposit.**

770. (1) Where, in proceedings to which this Act applies, a person who is bound by recognizance does not comply with a condition of the recognizance, a court, justice or provincial court judge having knowledge of the facts shall endorse or cause to be endorsed on the back of the recognizance a certificate in Form 33 setting out

- (a) the nature of the default,
- (b) the reason for the default, if it is known;
- (c) whether the ends of justice have been defeated or delayed by reason of the default; and
- (d) the names and addresses of the principal and sureties.

(2) A recognizance that has been endorsed pursuant to subsection (1) shall be sent to the clerk of the court and shall be kept by him with the records of the court.

(3) A certificate that has been endorsed on a recognizance pursuant to subsection (1) is evidence of the default to which it relates.

(4) Where, in proceedings to which this section applies, the principal or surety has deposited money as security for the performance of a condition of a recognizance, that money shall be sent to the clerk of the court with the defaulted recognizance, to be dealt with in accordance with this Part. R.S., c. C-34, s. 704.

**CROSS-REFERENCES**

Sections 771 to 773 govern the proceedings taken against the principal and sureties upon a default in a recognizance. Under s. 145(2) and (3), the principal may incur criminal liability for failing to appear or comply.

**SYNOPSIS**

This section sets out the first step in the bail estreatment process.

Where an accused has breached the terms of a recognizance, a court with knowledge of the facts (usually the court which is otherwise dealing with the matter) will endorse the recognizance setting out: (a) the nature of the breach; (b) the reason for the breach, if known; (c) whether justice has been delayed or defeated; and (d) the name and address of the accused and those of any sureties (subsec. (1)).

The recognizance shall then be forwarded to the clerk of the court (see s. 762(2)) to be dealt with under s. 771 (subsec. (2)). Any moneys deposited as security will also be sent to the clerk (subsec. (4)).

**ANNOTATIONS**

In *R. v. Mackie* (1977), 38 C.C.C. (2d) 385 (Man. Q.B.) the accused acknowledged in the recognizance that he owed "nil" amount to the Queen if he failed to comply with the conditions while the sureties each acknowledged that they owed \$1,000 if the accused failed in any of the conditions. It was held that to be bound by a recognizance the person must acknowledge that he owes a sum of money to the Queen and accordingly the accused was not bound by the recognizance. However, as the sureties did acknowledge their indebtedness and were thus bound by the recognizance and having failed to ensure that the accused attend for his trial they failed to comply with a condition of recognizance and it was ordered forfeited.

Merely endorsing on the certificate the words “fail to comply” does not meet the requirement in para. (1)(a): *R. v. Gabrielson* (1991), 62 C.C.C. (3d) 571 (Ont. Ct. (Gen. Div.)).

A separate certificate of default of appearance, although not actually endorsed on the back of the recognizance, was held to be adequate in *Re Ingebrigtsen* (1961), 37 C.R.21 (Man.Q.B.).

The recognizance need not be physically in Court at the precise time the accused is required to appear and the endorsement under this section may be made at a later time when the recognizance is obtained: *R. v. Wolf* (1982), 65 C.C.C. (2d) 331, 27 C.R. (3d) 393 (Alta. Q.B.).

Provided that the accused was bound by the recognizance at the time of the non-compliance therewith, the court has jurisdiction under this section to make the endorsement in Form 33, even if the information was stayed by the Crown after the act of non-compliance: *Purves v. Canada (Attorney General)* (1990), 54 C.C.C. (3d) 355 (B.C.C.A.).

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**PROCEEDINGS IN CASE OF DEFAULT / Order of judge / Judgment debtors of the Crown / Order may be filed / Transfer of deposit.**

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771. (1) Where a recognizance has been endorsed with a certificate pursuant to section 770 and has been received by the clerk of the court pursuant to that section,

- (a) a judge of the court shall, on the request of the clerk of the court or the Attorney General or counsel acting on his behalf, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and
- (b) the clerk of the court shall, not less than ten days before the time fixed under paragraph (a) for the hearing, send by registered mail, or have served in the manner directed by the court or prescribed by the rules of court, to each principal and surety named in the recognizance, directed to the principal or surety at the address set out in the certificate, a notice requiring the person to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) Where subsection (1) has been complied with, the judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) Where, pursuant to subsection (2), a judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

(3.1) An order made under subsection (2) may be filed with the clerk of the superior court or, in the Province of Quebec, the prothonotary and, where an order is filed, the clerk or the prothonotary shall issue a writ of *fiери facias* in Form 34 and deliver it to the sheriff of each of the territorial divisions in which the principal or any of his sureties resides, carries on business or has property.

(4) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fiери facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it. R.S., c. C-34, s. 705; 1972, c. 13, s. 60; R.S.C. 1985, c. 27 (1st Supp.), s. 168; 1994, c. 44, s. 78.

#### CROSS-REFERENCES

Section 772 deals with execution of a writ of *fiери facias*. Section 773 provides for committal in the event of an insufficiency of property found to satisfy the court.



## SYNOPSIS

This section sets out the procedures to be followed after a recognizance has been "marked for estreatment" pursuant to s. 770.

At the request of the clerk of the court (see s. 762(2)) or the Crown a judge shall fix a date for the hearing of a forfeiture application. Notice will then be sent, by registered mail, to the accused and any sureties at least 10 days before the hearing (subsec. (1)).

After giving the parties an opportunity to be heard the judge may grant or refuse the application. If forfeiture is ordered the amount is within the judge's discretion (subsec. (2)).

If all or any part of the recognizance is ordered forfeited the accused/sureties become judgment debtors of the Crown and civil action may be taken to collect the amount owing (subssecs. (3), (3.1), s. 772). Any moneys ordered forfeited are delivered to the Crown (subsec. (4)).

(Note: The Criminal Code does not provide an appeal from the decision on a forfeiture application.)

## ANNOTATIONS

Where the judge "re-opened" the application for forfeiture proceedings after having dismissed the application, and without notice to the surety and without giving the accused an opportunity to be heard reversed himself, the resulting order was quashed: *R. v. Policha, Ex p. Pawliwsky*, [1970] 5 C.C.C.172, 11 C.R.N.S.199 *sub nom. Pawliwsky v. The Queen* (Sask.Q.B.).

Connivance with the accused's disappearance requires complete forfeiture, and lack of diligence to ensure his attendance, depending upon the degree of fault, will result in at least a substantial forfeiture: *R. v. Andrews* (1975), 34 C.R.N.S. 344, 9 Nfld. & P.E.I.R. 168 (Nfld. S.C.).

In determining that all or part of the recognizance should not be forfeited the court may take into account that the surety had not properly understood the nature of the obligations he assumed and that the terms of the recognizance had been varied without the knowledge of the surety: *R. v. Sandhu* (1984), 38 C.R. (3d) 56 (Que. S.C.).

It would appear that where a potential surety's property is wholly outside the province in which the release order is made such a surety is not put at risk of having his property taken in execution in the event of default. Accordingly such a person could not be taken as a sufficient surety: *R. v. Martin* (No. 2) (1980), 57 C.C.C. (2d) 31 (Ont. C.A. in Chambers).

A person who lent the accused the money which he deposited in order to comply with the terms of his recognizance has no standing when the Crown seeks to forfeit the recognizance: *R. v. Cochrane* (1981), 60 C.C.C. (2d) 329 (Sask. Dist. Ct.); *R. v. Frenette* (1982), 30 C.R. (3d) 123 (B.C. Co. Ct.).

There is no right of appeal from an order of forfeiture made under this section: *R. v. Coles* (1982), 2 C.C.C. (3d) 65, 41 B.C.L.R. 323 (C.A.).

Where the accused has not deliberately absented himself and in fact is, to the knowledge of the judge, in custody at the time of the estreatment proceedings then the judge cannot proceed without giving the accused an opportunity to make submissions: *R. v. Gabrielson* (1991), 62 C.C.C. (3d) 571 (Ont. Ct. (Gen. Div.)).

Lawyers, to whom bail moneys have been assigned by their client, are entitled to step into the shoes of the accused. They are not, however, entitled to a more favourable position than that of the accused and, in particular, are not entitled to the treatment of a surety. An accused who has not surrendered to justice has no standing to ask for the return of the recognizance: *R. v. Webster* (1994), 94 C.C.C. (3d) 562, 159 A.R. 278 (Q.B.).

## LEVY UNDER WRIT / Costs.

772. (1) Where a writ of *fieri facias* is issued pursuant to section 771, the sheriff to

whom it is delivered shall execute the writ and deal with the proceeds thereof in the same manner in which he is authorized to execute and deal with the proceeds of writs of *fiery facias* issued out of superior courts in the province in civil proceedings.

(2) Where this section applies the Crown is entitled to the costs of execution and of proceedings incidental thereto that are fixed, in the Province of Quebec, by any tariff applicable in the Superior Court in civil proceedings, and in any other province, by any tariff applicable in the superior court of the province in civil proceedings, as the judge may direct. R.S., c. C-34, s. 706.

# CROSS-REFERENCES

Section 773 provides for committal when writ of *fiery facias* is not satisfied.

# SYNOPSIS

This section provides that a writ issued under s. 771 to enforce a forfeiture of a recognizance may be enforced in the same manner as a writ issued civilly through the superior court of the province (subsec. (1)). The costs of executing the writ are also recoverable according to the provincial superior court tariff (subsec. (2)).

## COMMITTAL WHEN WRIT NOT SATISFIED / Notice / Hearing / Warrant to committal / Definition of "Attorney General".

773. (1) Where a writ of *fiery facias* has been issued under this Part and it appears from a certificate in a return made by the sheriff that sufficient goods and chattels, lands and tenements cannot be found to satisfy the writ, or that the proceeds of the execution of the writ are not sufficient to satisfy it, a judge of the court may, upon the application of the Attorney General or counsel acting on his behalf, fix a time and place for the sureties to show cause why a warrant of committal should not be issued in respect of them.

(2) Seven clear days notice of the time and place fixed for the hearing pursuant to subsection (1) shall be given to the sureties.

(3) The judge shall, at the hearing held pursuant to subsection (1), inquire into the circumstances of the case and may in his discretion

(a) order the discharge of the amount for which the surety is liable; or

(b) make any order with respect to the surety and to his imprisonment that he considers proper in the circumstances and issue a warrant of committal in Form 27.

(4) A warrant of committal issued pursuant to this section authorizes the sheriff to take into custody the person in respect of whom the warrant was issued and to confine him in a prison in the territorial division in which the writ was issued or in the prison nearest to the court, until satisfaction is made or until the period of imprisonment fixed by the judge has expired.

(5) In this section and in section 771, "Attorney General" means, where subsection 723(2) applies, the Attorney General of Canada. R.S., c. C-34, s. 707.

**NOTE:** Subsection (5) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 723(2) with s. 734.4(2).

## SCHEDULE (Section 762)

Column I	Column II	Column III
Ontario .....	A judge of the Court of Appeal in respect of a recognizance for the appearance of a person before the Court	The Registrar of the Court of Appeal

	The Ontario Court (General Division) in respect of all other recognizances	A Registrar of the Ontario Court (General Division)
Quebec .....	The Superior Court, exercising civil jurisdiction.	The Clerk of the Peace
Nova Scotia.....	The Supreme Court	A Prothonotary of the Supreme Court
New Brunswick .....	The Court of Queen's Bench .....	The Registrar of the Court of Queen's Bench
British Columbia ...	The Supreme Court in respect of a recognizance for the appearance of a person before that Court or the Court of Appeal. [Repealed. 1992, c. 51, s. 42.]	The District Reg- istrar of the Supreme Court  [Repealed. 1992, c. 51, s. 42.]
	A Provincial Court in respect of a recognizance for the appearance of a person before a judge of that Court or a justice.	The Clerk of the Provincial Court
Prince Edward Island .....	The Supreme Court Trial Division.....	The Prothonotary
Manitoba .....	The Court of Queen's Bench .....	The registrar or a deputy registrar of the Court of Queen's Bench
Saskatchewan .....	The Court of Queen's Bench .....	The Local Regis- trar of the Court of Queen's Bench
Alberta .....	The Court of Queen's Bench .....	The Clerk of the Court of Queen's Bench
Newfoundland.....	The Supreme Court .....	The Registrar of the Supreme Court
Yukon Territory ....	The Supreme Court .....	The Clerk of the Court



**Northwest****Territories.....****The Supreme Court .....**

**The Clerk of the Supreme Court R.S., c. C-34, Sch. to Part XXII; 1972, c. 17, s. 3; 1974-75-76, c. 93, s. 84; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 11 (1st Supp.), s. 2; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; 1992, c. 1, s. 58; 1992, c. 51, ss. 40, 41, 42.**

**CROSS-REFERENCES**

The court in which a show cause hearing shall be heard is prescribed in the Schedule, col. II.

**SYNOPSIS**

This section provides for the committal of a surety where the amount owing cannot be satisfied through the collection processes of the court (*e.g.*, a writ of execution). The sheriff must certify such inability to satisfy the amount owing. The surety must be given seven clear days notice of the Crown's application in this regard (subsecs. (1) and (2)).

The judge hearing the matter may discharge the obligation or make an order for the imprisonment of the surety (subsec. (3)). Imprisonment shall be for the term imposed by the judge or until the surety is satisfied (subsec. (4)).

**ANNOTATIONS**

Except where the accused is released by the Supreme Court or the Court of Appeal, in Ontario application for forfeiture of recognizance is to the Court of the General Sessions of the Peace and not, for example, to the provincial Court although the failure to appear was in that Court: *R. v. Moffatt* (1981), 21 C.R. (3d) 372 (Ont. H.C.J.).

**PART XXVI / EXTRAORDINARY REMEDIES****APPLICATION OF PART.**

**774. This Part applies to proceedings in criminal matters by way of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition. R.S., c. C-34, s. 708; R.S.C. 1985, c. 27 (1st Supp.), s. 169.**

**CROSS-REFERENCES**

This part is chiefly concerned with the extraordinary remedies of *certiorari* and *habeas corpus*, and the extent of their applications. The sole reference to *mandamus* or prohibition occurs in s. 784(1). The single reference to *procedendo* occurs in this section. Section 780 provides a parallel procedure.

Extraordinary remedies are generally only available in respect of jurisdictional errors. In a case of excess of jurisdiction, *certiorari* is available to quash an order, and prohibition lies to prevent proceedings or their continuance. *Mandamus* and *procedendo* require a tribunal of limited jurisdiction to exercise that jurisdiction. Detention may be challenged on grounds of authority and jurisdiction through *habeas corpus*. Also see s. 10(c) of the Charter and pre-Confederation legislation which may still be in force in the province and the rules of court enacted pursuant to s. 482.

## ANNOTATIONS

**Applications under the Charter of Rights** – In *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, 52 C.R. (3d) 1, [1986] 1 S.C.R. 863 (4:3), the court considered some of the problems raised by the Charter in relation to claims for prerogative relief. The plurality (McIntyre, Beetz and Chouinard JJ.) held that while the provincial superior court is a court of competent jurisdiction within the meaning of s. 24(1) of the Canadian Charter of Rights and Freedoms where a Charter violation arises in the context of the court exercising its supervisory jurisdiction over the inferior courts, not all Charter violations are jurisdictional and thus reviewable by way of the prerogative remedies. LaForest J. appeared to envisage a somewhat wider role for the superior court to fill the gap which could arise when a remedy is required and no other court, such as the trial court, is in a position to exercise an effective remedy. The dissenting members of the court (Dickson C.J.C., Lamer and Wilson JJ.) were of the view that original application may be made to the superior court under s. 24(1) and that while the court had a discretion to refuse the application where a more appropriate forum exists, the court could grant a remedy for Charter violations which are jurisdictional in nature.

**Certiorari** – The court ought not to refuse *certiorari* because of alternative remedies other than appeal unless it is clearly satisfied that those other remedies are more appropriate: *Dubois v. The Queen*, *infra*.

**Receiving information** – The act of a justice in receiving an information under s. 498 is ministerial and accordingly the information is not subject to *certiorari*: *McDonald et al. v. A.-G. Alta.* (1968), 4 C.R.N.S.362, 66 W.W.R.111 (Alta. C.A.).

**Preliminary inquiry [Also see notes under s. 548]** – *Certiorari* lies against a justice holding a preliminary hearing only for lack of jurisdiction and a decision concerning the admissibility of evidence, even if erroneous does not affect jurisdiction: *A.-G. Que. v. Cohen* (1979), 46 C.C.C. (2d) 473, [1979] 2 S.C.R. 305, 13 C.R. (3d) 36 (S.C.C.) (7:0), revg 32 C.C.C. (2d) 446, 34 C.R.N.S. 362 *sub nom. Re Cohen and The Queen* (Que. C.A.).

Lack of jurisdiction in this context means not merely lack of initial jurisdiction but loss of jurisdiction which can occur where the justice presiding at the preliminary hearing fails to observe a mandatory provision of this Act or where there has been a denial of natural justice. However, mere disallowance of some questions on cross-examination does not result in a loss of jurisdiction: *Forsythe v. The Queen* (1980), 53 C.C.C. (2d) 225, 15 C.R. (3d) 280, [1980] 2 S.C.R. 268 (7:0).

In *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 10 C.R.N.S.55 (S.C.C.), it was held (5:2) that even if a justice on a preliminary inquiry erred in failing to order production of a witness' previous statement it would amount to no more than an error in the exercise of jurisdiction. For success in attacking a committal for trial by *certiorari* the only ground is lack of jurisdiction.

*Certiorari* alone lies to review orders made by a justice on a preliminary hearing only where the grounds relate to the justice's jurisdiction. With respect to quashing a committal for trial on the basis that there was no evidence to support the committal for trial it was held that it cannot be said that the justice acted without jurisdiction unless he commits the accused "without any evidence at all, in the sense of an entire absence of proper material as a basis for the formation of a judicial opinion that the evidence was sufficient to put the accused on trial. That is quite a different question from the question 'whether in the opinion of the reviewing tribunal there was evidence upon which a properly instructed jury acting judicially could convict'": *Re Martin, Simard and Desjardins and The Queen; Re Nichols and The Queen* (1977), 41 C.C.C. (2d) 308, 87 D.L.R. (3d) 634 (Ont. C.A.).

*Certiorari* also lies to quash an order discharging the accused following a preliminary inquiry where there has been jurisdictional error, as where the judge assumed the jurisdiction of the trial court and applying the standard of proof beyond reasonable doubt

purported to dismiss the charge: *Dubois v. The Queen* (1986), 25 C.C.C. (3d) 221, 51 C.R. (3d) 193, [1986] 1 S.C.R. 366.

**Trial rulings** – Where a trial Judge has embarked upon a trial in the proper exercise of his jurisdiction the superior Court will accord him the widest latitude in the conduct of the trial without prerogative intervention, the proper remedy if he errs being by way of appeal at the conclusion of the trial. Once having properly embarked on a trial in which he has jurisdiction, the trial Judge has a further jurisdiction to decide all matters of law, including questions as to the admissibility of evidence, necessary for the conduct of the trial and the final disposition of the charge, and the superior Court will not exercise its discretion to grant a prerogative remedy: *Re Madden et al. and The Queen* (1977), 35 C.C.C. (2d) 381 (Ont. H.C.J.).

A superior Court will intervene by way of prerogative remedies in the course of a trial only in an extraordinary case. Short of conducting himself in a manner that shocks the judicial conscience, a trial Judge who has embarked upon a trial, over which he has jurisdiction, is to be left free to complete it and challenges to decisions made by him in the course of the trial must be initiated by way of appeal: *Re Madden et al. and The Queen* (No. 2) (1977), 35 C.C.C. (2d) 385 (Ont. H.C.J.).

**Habeas Corpus / Procedure** – The application for a writ of *habeas corpus* is actually a two-stage process. In the first stage the judge to whom the application is made must determine whether probable and reasonable grounds for the complaint exist as provided, for example, in Ontario, in s. 1 of the pre-Confederation Habeas Corpus Act, S.C. 1866, c. 45. If such grounds are present, the writ issues and merits are determined on the return of the writ. The usual practice, however, in most provinces where the prisoner is represented by counsel, is to collapse both stages into one. However, where a written application is made by a prisoner then the judge must determine whether or not to issue the writ, although usually the formality of issuing the writ is dispensed with, the judge simply ordering the prisoner to be brought before the court to make submissions. In this case the Court of Appeal concluded that the motions court judge erred in refusing to consider the merits of the application made by a prisoner. However, rather than remitting the matter to that judge, it was open to the Court of Appeal to examine the merits itself, the prisoner being present in the Court of Appeal and participating in the argument: *R. v. Olson* (1989), 47 C.C.C. (3d) 491, 68 O.R. (2d) 256n, [1989] 1 S.C.R. 296.

On an application for *habeas corpus* without *certiorari* in aid affidavit evidence is admissible to establish jurisdictional error. The only limitation on the admissibility of extrinsic evidence on an application for *habeas corpus* arises from the conclusive character of the record of courts of superior or general common law jurisdiction: *Miller v. The Queen* (1985), 23 C.C.C. (3d) 97, 49 C.R. (3d) 1, 24 D.L.R. (4th) 9 (S.C.C.) (7:0).

**Prerequisites for invoking *habeas corpus*** – An accused who is at liberty on interim release on his own recognizance and who has complied with the terms thereof and has not surrendered into custody for the purposes of the application cannot invoke the pre-confederation Habeas Corpus Act of 1866 (still in force in Ontario) to review his commitment for trial: *Re Martin, Simard and Desjardins and The Queen; Re Nichols and The Queen* (1977), 41 C.C.C. (2d) 308, 87 D.L.R. (3d) 634 (Ont. C.A.), *affd* on other grounds 41 C.C.C. (2d) 342, 87 D.L.R. (3d) 704, [1978] 2 S.C.R. 511. [Also, see note under s. 548, *supra*.]

Before a writ of *habeas corpus* may issue, the applicant must establish that he is in detention; assert the cause or basis for his detention; complain that his detention is unlawful and establish that there are probable and reasonable grounds for his complaint: *Idziak v. Canada (Minister of Justice)* (1989), 53 C.C.C. (3d) 464, 63 D.L.R. (4th) 267, 70 O.R. (2d) 498 (H.C.J.).

**Availability of other remedies** – *Habeas corpus* was refused where the inmate sought to quash his conviction and sentence made in adult Court on the basis that that Court



lacked jurisdiction since he was a juvenile at the time of the offence. It was held that the accused could appeal the conviction and appeal was thus the appropriate remedy: *Re Johnson and The Queen* (1982), 68 C.C.C. (2d) 65, 31 C.R. (3d) 329 *sub nom.* A.-G. B.C. *et al. v. Johnson (McLean)* (B.C.C.A.).

**Prohibition / General considerations** – On an application for prohibition only judicial dignity would require the trial Judge to adjourn the case pending disposition of the prohibition application. In the particular circumstances it was not inconsistent with judicial dignity for the trial Judge to proceed with the accused's jury trial where the trial was almost at an end when the Judge was served with the notice of motion, the matters referred to could be raised on appeal in the event of conviction and a long interruption in the trial would be undesirable: *R. v. Turkiewicz, Barrow and MacNamara* (1979), 50 C.C.C. (2d) 406, 10 C.R. (3d) 352 (Ont. C.A.).

**Bias** – Where there is no proof of actual bias in the sense, for example, of financial gain, the test is whether the circumstances give rise to a reasonable apprehension, which reasonably well-informed persons could properly have, of a biased appraisal and judgment of the issues to be determined by the tribunal: *Committee for Justice and Liberty et al. v. National Energy Board* (1976), 68 D.L.R. (3d) 716, 9 N.R. 115 (S.C.C.) (5:3).

**Validity of information** – Where prohibition is sought on the ground that the information does not disclose a criminal offence, it will be refused unless the statute under which the charge was laid is *ultra vires*: *R. v. Layton, Ex p. Thodas et al.*, [1970] 5 C.C.C. 260, 10 C.R.N.S. 290, *sub nom. Re Thodas* (B.C.C.A.) (2:1).

Where an information falls within a trial Court's jurisdiction the Judge has exclusive jurisdiction to determine its validity and his decision upholding it is not subject to either a motion to quash or to extraordinary remedy proceedings but only to an appeal against his disposition of the case: *R. v. Jarman* (1972), 10 C.C.C. (2d) 426 (Ont. C.A.).

A trial Judge's refusal to quash an information charging an offence within his jurisdiction, is not reviewable by prohibition proceedings: *R. v. Acme Bedding & Felt Co. Ltd.* (1974), 16 C.C.C. (2d) 292, [1974] 3 W.W.R. 66 (Man. Q.B.).

The correctness of a trial Judge's ruling on his interpretation of certain Code sections such as the scope of jury challenge for cause is not reviewable by an extraordinary remedy application: *Re Regina and Jones (Nos. 1 and 2)*; *Re Regina and Daley (Nos. 1 and 2)* (1974), 16 C.C.C. (2d) 338, 2 O.R. (2d) 741 (Ont. C.A.) (3:2).

**Rulings of trial judge** – Where an information shows on its face that an applicable limitation period has expired then the Court has no jurisdiction to receive it. The proper remedy is to move by way of motion to quash before the trial Judge and prohibition, being a discretionary remedy, should be refused. However, where the expiration of the limitation period is not apparent on the face of the information the accused may move by way of prohibition and attempt to show, by adducing evidence, that the trial Judge is without jurisdiction to receive the information: *Re Medicine Hat Greenhouses Ltd. and German and The Queen (No. 3)* (1977), 37 C.C.C. (2d) 287, [1977] 5 W.W.R. 532 (Alta. S.C.T.D.); *affd.*, but without reference to the point: 45 C.C.C. (2d) 27, [1979] 1 W.W.R. 296 (Alta. S.C. App. Div.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

The rulings of a trial Judge in such matters as to whether or not to declare a mistrial, as where a Crown witness was seen talking to police officers during a break in his testimony, are within his jurisdiction and prohibition will not lie to review the decision: *Re Stewart and Dalton and The Queen* (1977), 36 C.C.C. (2d) 5 (Ont. C.A.).

**Mandamus / Availability generally** – Where an inferior Court makes an error in law in the course of actually exercising its jurisdiction *mandamus* will not lie, but where the inferior court makes an error in law which leads it away from exercising lawful jurisdiction this remedy may be invoked: *Re Regina and Mann et al.* (1971), 4 C.C.C. (2d) 319, [1971] 5 W.W.R. 84 (B.C.S.C.).

This extraordinary remedy, available to require an inferior court to accept its jurisdic-

tion and discharge its duty will not lie where there is another remedy by appeal available: *Cheyenne Realty Ltd. v. Thompson et al.* (1974), 15 C.C.C. (2d) 49, 42 D.L.R. (3d) 733 (S.C.C.) (5:0).

A finding by the trial Judge that the charge is a nullity as the provision of the federal enactment under which it was laid was *ultra vires* Parliament is tantamount to an acquittal and the Crown must therefore appeal to the Court of Appeal rather than apply for *mandamus*: *Re R. and Kripps Pharmacy Ltd. and Kripps* (1981), 60 C.C.C. (2d) 332, [1981] 5 W.W.R. 190, *sub nom. A.-G. Can. v. Wetmore Co. Ct. J. et al.* (B.C.C.A.), leave to appeal to S.C.C. refused 38 N.R. 180n.

*Mandamus* is available to review the decision of a Judge staying the charges or quashing the information on the basis that the accused's right to trial within a reasonable time as guaranteed by s. 11(b) of the Charter of Rights and Freedoms has been infringed: *Re R. and Thompson* (1983), 8 C.C.C. (3d) 127, 3 D.L.R. (4th) 642 (B.C.C.A.). On the other hand it was held in *Re R. and Beason* (1983), 7 C.C.C. (3d) 20, 36 C.R. (3d) 73 (Ont. C.A.) that such a ruling could also be appealed by the Crown under s. 676 and the latter was the preferable route of review.

In exceptional cases the Court of Appeal has original jurisdiction to make an order of *mandamus* but this jurisdiction should be exercised sparingly, the normal practice being to take the matter to the Court of Queen's Bench first: *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 35 C.C.C. (2d) 497, 77 D.L.R. (3d) 445 (Man. C.A.).

**Preliminary inquiry** – It was held in *Re Depagie and The Queen* (1976), 32 C.C.C. (2d) 89, 1 Alta. L.R. (2d) 30 (2:1) (Alta. S.C. App. Div.) that the principles limiting applications for *certiorari* to cases where the justice conducting the preliminary hearing has lost jurisdiction are equally applicable to an application for *mandamus* with *certiorari* in aid. Assuming a justice was wrong in disallowing certain questions, such error did not cause the Court to lose jurisdiction and *mandamus* with *certiorari* in aid would not lie. In cases where the accused desires to question a ruling by the justice, the proper procedure is to conclude the preliminary hearing and then apply for *certiorari* if the defence feels it is available.

*Mandamus* will not lie at the instance of the Crown to review the decision of a justice ruling inadmissible certain evidence at the accused's preliminary hearing: *Re Regina and Commisso et al.* (No. 2) (1977), 35 C.C.C. (2d) 237 (B.C.S.C.).

## DETENTION ON INQUIRY TO DETERMINE LEGALITY OF IMPRISONMENT.

**775.** Where proceedings to which this Part applies have been instituted before a judge or court having jurisdiction, by or in respect of a person who is in custody by reason that he is charged with or has been convicted of an offence, to have the legality of his imprisonment determined, the judge or court may, without determining the question, make an order for the further detention of that person and direct the judge, justice or provincial court judge under whose warrant he is in custody, or any other judge, justice or provincial court judge, to take any proceedings, hear such evidence or do any other thing that, in the opinion of the judge or court, will best further the ends of justice. *R.S., c. C-34, s. 709.*

## CROSS-REFERENCES

See s. 776 for the special circumstances where a conviction or order can not be removed by *certiorari*. In certain cases of procedural defects made at first instance, ss. 777 and 778 grant the superior court of criminal jurisdiction remedial authority.

See s. 781 for the operation of judicial notice of statutory Acts and rules in place of formal proof so as not to invalidate orders, convictions or other proceedings. See s. 782 for the circumstances in which certain formal defects do not invalidate a warrant of committal.

## SYNOPSIS

This section permits the court to take remedial action on an application for *habeas corpus*, even though that detention is unlawful. The judge hearing the matter may order the continued detention of the applicant and direct the judge or other judicial officer under whose process the applicant is detained to do such other thing or hear such evidence as will best further the ends of justice.

## ANNOTATIONS

This section is not inoperative by reason of s. 2(c) of the Canadian Bill of Rights and may be resorted to although s. 525 of the Criminal Code has not been complied with: *Ex p. Gooden* (1975), 27 C.C.C. (2d) 161 (Ont. H.C.J.); *Kenny v. A.-G. Can. and A.-G. B.C.*, [1977] 5 W.W.R. 393 (B.C.S.C.).

In *R. v. Pomfret* (1990), 53 C.C.C. (3d) 56 (Man. C.A.), while the court did not reach a settled conclusion on the matter, it queried whether this section would violate ss. 9 and 10(c) of the Charter if the court, having found that the accused was not lawfully held, nevertheless ordered that the accused continue to be detained.

Notwithstanding the Court determines that the accused's detention is unlawful, as where it is demonstrated that the review procedure in s. 525 has not been complied with, the Court may still exercise the power under this section and make an order for the further detention of the accused: *Re Ferreira and The Queen* (1981), 58 C.C.C. (2d) 147 (B.C.C.A.).

In *Re Demerais and The Queen* (1978), 42 C.C.C. (2d) 287, 5 C.R. (3d) 229 (Ont. C.A.) the Court found that there was no evidence of planning and deliberation and therefore quashed the accused's committal for trial on charges of first degree murder. However, rather than ordering the accused's discharge the court invoked the provisions of this section and remitted the matter back to the magistrate to permit the Crown to call further evidence, if any, on the charges of first degree murder.

## WHERE CONVICTION OR ORDER NOT REVIEWABLE.

776. No conviction or order shall be removed by *certiorari*

- (a) where an appeal was taken, whether or not the appeal has been carried to a conclusion; or
- (b) where the defendant appeared and pleaded and the merits were tried, and an appeal might have been taken, but the defendant did not appeal. R.S., c. C-34, s. 710.

## CROSS-REFERENCES

See ss. 777 and 778 for the circumstances in which a conviction or order cannot, because of irregularity or insufficiency, be held to be invalid on removal by *certiorari*.

See s. 781 for the operation of judicial notice in place of formal proof. See s. 782 for the circumstances in which particular formal defects do not invalidate a warrant of committal.

## SYNOPSIS

This section prohibits the removal by *certiorari* of a conviction or order where: (a) an appeal has been taken (regardless of whether it has been carried to a conclusion); or (b) the defendant appeared and pleaded, the merits were tried, and the defendant did not appeal.

## ANNOTATIONS

In *Sanders v. The Queen*, [1970] 2 C.C.C.57, 8 C.R.N.S.345 (S.C.C.), the accused made a second application for *habeas corpus ad subjiciendum* with *certiorari* in aid to direct his release from a sentence of preventive detention following a finding that he was a criminal sexual psychopath. It was held (5:4) that s. 776(b) was a bar to the removal by *certiorari* of the preventive detention order. The majority were of the view that Parliament pro-



vided in clear terms by s. 776 that in any case falling within its provisions rectification of an error must be by way of appeal only and furthermore the so-called “exceptional cases” involving absence of jurisdiction or denial of natural justice constitute an erroneous refusal to apply this section. Folld: *R. v. Stewart* (1979), 7 C.R. (3d) 165, [1979] 3 W.W.R. 177 (B.C.C.A.).

The limitations of s. 776 do not, by virtue of s. 17 of the Interpretation Act, R.S.C. 1985, c. I-21, apply to the Crown: *R. v. Eross*, [1970] 5 C.C.C. 169, 73 W.W.R. 398 (B.C.C.A.). Folld: *R. v. Conley* (1979), 47 C.C.C. (2d) 359, [1979] 5 W.W.R. 692 (Alta. S.C. App. Div.). Similarly: *R. v. Moodie* (1984), 13 C.C.C. (3d) 264 (Ont. H.C.J.).

Once the accused has appeared and entered a plea, even if the judge lost jurisdiction because of a subsequent refusal of an adjournment, the defendant’s remedy is by way of appeal and not by *certiorari*: *R. v. Mearns*; *R. v. Kreutziger*, [1970] 5 C.C.C. 226, 73 W.W.R. 435, *sub nom.* *R. v. Kreutziger*, 73 W.W.R. 447 *sub nom.* *R. v. Mearns* (B.C.C.A.) (2:1). Branca, J.A., dissented on the ground that the refusal of the requested adjournment resulted in an *ex parte* trial at which the merits of the defendant’s case were not tried, resulting in a complete and total nullity of proceedings.

In *Re Gallicano and The Queen* (1978), 42 C.C.C. (2d) 113, [1978] 3 W.W.R. 452 (B.C.C.A.) following a plea of guilty the trial Judge imposed a fine but upon learning the accused had a record, imposed a jail sentence. The accused did not appeal but rather applied for *certiorari*. The Court in dismissing the application held that whether the second sentence was a nullity, invalid or otherwise ineffective, para. (b) of this section precluded resort to *certiorari*. A plea of guilty still constituted a trial on the merits.

Even where the section under which the accused was convicted was later held to be *ultra vires*, this section precludes resort to *certiorari* to quash the conviction: *Re Beaupre and The Queen* (1981), 61 C.C.C. (2d) 92, [1981] 5 W.W.R. 278 (Man. C.A.).

A warrant of committal is not a conviction or order within the meaning of this section: *Re Carleton and The Queen* (1982), 2 C.C.C. (3d) 310 (B.C.C.A.).

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#### CONVICTION OR ORDER REMEDIABLE, WHEN / Correcting punishment / Amendment / Sufficiency of statement.

**777. (1)** No conviction, order or warrant for enforcing a conviction or order shall, on being removed by *certiorari*, be held to be invalid by reason of any irregularity, informality or insufficiency therein, where the court before which or the judge before whom the question is raised, on perusal of the evidence, is satisfied

- (a) that an offence of the nature described in the conviction, order or warrant, as the case may be, was committed,
- (b) that there was jurisdiction to make the conviction or order or issue the warrant, as the case may be, and
- (c) that the punishment imposed, if any, was not in excess of the punishment that might lawfully have been imposed,

but the court or judge has the same powers to deal with the proceedings in the manner that he considers proper that are conferred upon a court to which an appeal might have been taken.

**(2)** Where, in proceedings to which subsection (1) applies, the court or judge is satisfied that a person was properly convicted of an offence but the punishment that was imposed is greater than the punishment that might lawfully have been imposed, the court or judge

- (a) shall correct the sentence,
  - (i) where the punishment is a fine, by imposing a fine that does not exceed the maximum fine that might lawfully have been imposed,
  - (ii) where the punishment is imprisonment, and the person has not served a term of imprisonment under the sentence that is equal to or greater than the term of imprisonment that might lawfully have been imposed, by imposing a

- term of imprisonment that does not exceed the maximum term of imprisonment that might lawfully have been imposed, or
- (iii) where the punishment is a fine and imprisonment, by imposing a punishment in accordance with subparagraph (i) or (ii), as the case requires; or
- (b) shall remit the matter to the convicting judge, justice or provincial court judge and direct him to impose a punishment that is not greater than the punishment that may be lawfully imposed.

(3) Where an adjudication is varied pursuant to subsection (1) or (2), the conviction and warrant of committal, if any, shall be amended to conform to the adjudication as varied.

(4) Any statement that appears in a conviction and is sufficient for the purpose of the conviction is sufficient for the purposes of an information, summons, order or warrant in which it appears in the proceedings. R.S., c. C-34, s. 711.

#### CROSS-REFERENCES

This section is deemed to apply in the circumstances set out in s. 778. Section 781 provides that no order, conviction or other proceeding shall be set aside for reason that evidence which by s. 781(2) shall be judicially noticed has not been given. See s. 782 for the circumstances in which defects in form will not invalidate a warrant of committal in proceedings on *certiorari* and *habeas corpus*.

#### SYNOPSIS

This section permits a judge hearing an application for prerogative relief to make certain remedial orders.

Subsection (1) provides that a conviction, warrant or order will not be invalidated on purely technical grounds and confers on the court the same curative powers as those exercisable in appeal proceedings.

Pursuant to subsec. (2) corrective steps may be taken with respect to a sentence which exceeds the maximum provided for by law, including remitting the matter to the trial judge.

#### ANNOTATIONS

This section empowers a Court to amend a carelessly recorded conviction to meet a technical objection first raised upon application for *certiorari*: *R. v. Holuboff* (1961), 130 C.C.C.414 (B.C.S.C.). Folld: *R. v. Ringheim*, [1965] 3 C.C.C.219 (B.C.S.C.).

To amend a faulty conviction the Court only needs to be satisfied that guilt appears upon evidence which has been believed by the trial Judge: *R. v. Hickey, Ex p. Hebb Motors Ltd.*, [1965] 2 C.C.C.170 (N.S.S.C.).

The Court may on *certiorari* remove a warrant of committal and correct the warrant under subsec. (2) where it appears on the face of the warrant that an illegal sentence was imposed. The imposition of a consecutive sentence in circumstances where there is no power to do so falls within the meaning of subsec. (2): *Re Carleton and The Queen* (1982), 2 C.C.C. (3d) 310 (B.C.C.A.).

Under s. 149, a term of imprisonment imposed for escaping custody may be made concurrent to the sentence the accused was serving at the time of the escape or consecutive to such sentence, but not consecutive to a sentence imposed for some further offence. Where the trial judge mistakenly made an order that the escape sentence be consecutive to the sentence for new offences imposed on that day, then on an application in the nature of *certiorari*, rather than simply quashing the illegal sentence, the court, pursuant to this section, may carry out the obvious intention of the trial judge and reverse the sequence of sentences so that the escape sentence runs consecutive to the time remaining unserved and the new sentences run consecutive to the escape sentence: *R. v. Easton* (1989), 8 W.C.B. (2d) 206 (Ont. C.A.), affd [1991] 2 S.C.R. 209.

**IRREGULARITIES WITHIN SECTION 777.**

**778.** Without restricting the generality of section 777, that section shall be deemed to apply where

- (a) the statement of the adjudication or of any other matter or thing is in the past tense instead of in the present tense;
- (b) the punishment imposed is less than the punishment that might by law have been imposed for the offence that appears by the evidence to have been committed; or
- (c) there has been an omission to negative circumstances, the existence of which would make the act complained of lawful, whether those circumstances are stated by way of exception or otherwise in the provision under which the offence is charged or are stated in another provision. R.S., c. C-34, s. 712.

**CROSS-REFERENCES**

See the cross-references under s. 777.

**SYNOPSIS**

This section is a non-exhaustive set of examples of cases in which the remedial powers created by s. 777 may be used. These examples are: (a) where a document is in the past tense as opposed to the present tense; (b) where a punishment is imposed which is less than the maximum; and (c) where there has been a failure to negative circumstances which would have made the act complained of lawful.

**GENERAL ORDER FOR SECURITY BY RECOGNIZANCE / Provisions of Part XXV.**

**779. (1)** A court that has authority to quash a conviction, order or other proceeding on *certiorari* may prescribe by general order that no motion to quash any such conviction, order or other proceeding removed to the court by *certiorari* shall be heard unless the defendant has entered into a recognizance with one or more sufficient sureties, before one or more justices of the territorial division in which the conviction or order was made or before a judge or other officer, or has made a deposit to be prescribed with a condition that the defendant will prosecute the writ of *certiorari* at his own expense, without wilful delay, and, if ordered, will pay to the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the practice of the court where the conviction, order or proceeding is affirmed.

**(2)** The provisions of Part XXV relating to forfeiture of recognizances apply to a recognizance entered into under this section. R.S., c. C-34, s. 713.

**CROSS-REFERENCES**

“Justice” and “territorial division” are defined in s. 2.

By s. 482(1) and (3)(c), every superior court of criminal jurisdiction and every court of appeal, respectively, may make rules of court to regulate, *inter alia*, proceedings with respect to *mandamus*, *certiorari*, *habeas corpus*, prohibition and *procedendo*.

Procedure in respect of the forfeiture of recognizances is governed by s. 770 to 773 of Part XXV.

**SYNOPSIS**

This section makes provision for an order requiring that an applicant for *certiorari* agree to prosecute the matter, at his own expense and without wilful delay, by entering into a recognizance with a condition to that effect. The recognizance may also contain conditions with respect to costs.



**EFFECT OF ORDER DISMISSING APPLICATION TO QUASH.**

**780.** Where a motion to quash a conviction, order or other proceeding is refused, the order of the court refusing the application is sufficient authority for the clerk of the court forthwith to return the conviction, order or proceeding to the court from which or the person from whom it was removed, and for proceedings to be taken with respect thereto for the enforcement thereof. R.S., c. C-34, s. 714.

**CROSS-REFERENCES**

This is a parallel procedure to the old remedy of *procedendo*. The issuance of process to compel reattendance is affected by s. 507(8).

**SYNOPSIS**

This section provides that when a motion to quash is refused, the court order indicating the refusal is sufficient authority for the return forthwith of the original proceeding to the original court or official for enforcement thereof.

**ANNOTATIONS**

This section makes it unnecessary to invoke the old procedure of *procedendo* returning the proceedings back to the inferior Court upon dismissal of the motion to quash: *Batchelor v. The Queen* (1977), 38 C.C.C. (2d) 113, 81 D.L.R. (3d) 241 (S.C.C.) (9:0).

Once the application has been dismissed and the record returned to the lower Court pursuant to this section no particular form of notice is required to secure the accused's attendance in the lower Court. Thus a summons may properly be used for this purpose and should the accused fail to attend Court having been given notice then the Judge may issue a warrant for his arrest: *Re R. and Batchelor* (1980), 56 C.C.C. (2d) 20, 17 C.R. (3d) 349 (Ont. H.C.J.). [Also now see s. 507(8).]

**WANT OF PROOF OF ORDER IN COUNCIL / Judicial notice.**

**781.** (1) No order, conviction or other proceeding shall be quashed or set aside, and no defendant shall be discharged, by reason only that evidence has not been given

- (a) of a proclamation or order of the Governor in Council or the lieutenant governor in council;
- (b) of rules, regulations or by-laws made by the Governor in Council under an Act of Parliament or by the lieutenant governor in council under an Act of the legislature of the province; or
- (c) of the publication of a proclamation, order, rule, regulation or by-law in the *Canada Gazette* or in the official gazette for the province.

(2) Proclamations, orders, rules, regulations and by-laws mentioned in subsection (1) and the publication thereof shall be judicially noticed. R.S., c. C-34, s. 715.

**CROSS-REFERENCES**

Judicial notice must be taken of all Acts of the Imperial Parliament and Parliament of Canada, pursuant to ss. 17 and 18 of the Canada Evidence Act, R.S.C. 1985, c. C-5, which obviates the need for their formal proof. Documentary proof of certain types of proclamation, order, regulation and appointment made under federal or provincial enabling legislation is permitted by ss. 20 to 22 and 24 of the Canada Evidence Act.

By s. 782, a warrant of committal is not invalidated by its formal defects.

**SYNOPSIS**

This section provides that no conviction, order or other proceeding will be set aside or quashed solely by reason of the fact that evidence was not given with respect to proclamations, orders, rules, regulations or by-laws made by the Governor in Council or the

Lieutenant Governor in Council, or of matters published in the official government Gazettes (subsec. (1)). Judicial notice is to be taken of such matters (subsec. (2)).

#### ANNOTATIONS

In *R. v. Steam Tanker "Evgenia Chandris"* (1976), 27 C.C.C. (2d) 241, 65 D.L.R. (3d) 553 (S.C.C.) (7:2) the majority of the Court held that by virtue of s. 23(1) of the Statutory Instruments Act, 1970-71-72 (Can.), c. 38 the trial Judge was required to take judicial notice of certain regulations published in the *Canada Gazette* and therefore there was no need to consider the Crown's alternative submission that s. 715(2) [now s. 781(2)] required that judicial notice be taken of such regulations. Laskin, C.J.C., dissenting as to the effect of s. 23 went on to consider s. 715 [now s. 781] and held that by virtue of s. 708 [now s. 774], s. 715(2) [now s. 781(2)] applied only on proceedings for the prerogative remedies and was not a provision of general application.

#### DEFECT IN FORM.

**782. No warrant of committal shall, on *certiorari* or *habeas corpus*, be held to be void by reason only of any defect therein, where**

- (a) it is alleged in the warrant that the defendant was convicted; and
- (b) there is a valid conviction to sustain the warrant. R.S., c. C-34, s. 716.

#### CROSS-REFERENCES

By s. 781, judicial notice must be taken of federal and provincial proclamations, orders, rules, regulations and by-laws, and no order, conviction or other proceeding shall be quashed or set aside and no defendant discharged by reason only that evidence of such matters has not been given.

See the note to s. 781 for other related provisions.

#### SYNOPSIS

This section states that a warrant of committal is immune from challenge on grounds of defect in form as long as it alleges a valid conviction which exists and which can sustain the warrant.

#### ANNOTATIONS

In general, on a *habeas corpus* application, the Court should only determine whether the face of the warrant discloses lawful authority for detaining a person, and if so, any technical objections should then be dismissed under this section: *Fischer v. Warden Of The Manitoba Penitentiary* (1961), 131 C.C.C. 101, 35 C.R. 191 (Man.Q.B.).

While it is not an order of the court, a warrant of committal, unless it is invalid on its face, must be considered valid until it is set aside. An error in a warrant of committal having been brought to the attention of the court, the clerk of the court has the power to amend the warrant to conform with the sentence as it was imposed by the trial judge: *Ewing v. Mission Institution* (1994), 92 C.C.C. (3d) 484 (B.C.C.A.).

#### NO ACTION AGAINST OFFICIAL WHEN CONVICTION, ETC., QUASHED.

**783. Where an application is made to quash a conviction, order or other proceeding made or held by a provincial court judge acting under Part XIX or a justice on the ground that he exceeded his jurisdiction, the court to which or the judge to whom the application is made may, in quashing the conviction, order or other proceeding, order that no civil proceedings shall be taken against the justice or provincial court judge or against any officer who acted under the conviction, order or other proceeding or under any warrant issued to enforce it. R.S., c. C-34, s. 717.**

#### CROSS-REFERENCES

"Provincial court judge" and "justice" are defined in s. 2.

See generally ss. 25 to 31 regarding the protection of persons administering and enforcing the law.

## SYNOPSIS

This section gives a judge who grants an application for *certiorari* quashing the order of a provincial court judge or justice of the peace the power to make a further order protecting the person who made the order and anyone acting under it from civil proceedings in that connection.

## ANNOTATIONS

In making a determination under this section the Court should consider where there was clear jurisdiction for the Justice of the Peace to act whether he acted with bad faith, malice or ulterior motive. Furthermore, where the law required the Justice to act, and particularly since his decision involved questions of some difficulty and nicety, an order should be made for his protection: *Re Royal Canadian Legion (Branch 177) and Mount Pleasant Branch 177 Savings Credit Union*, [1964] 3 C.C.C.381, 44 C.R.35 (B.C.S.C.).

As a general rule a protection order should be made in the absence of misconduct, malice or an oblique motive by the Judge of the inferior Court: *Mayrand v. Cronier* (1981), 63 C.C.C. (2d) 561, 23 C.R. (3d) 114 (Que. C.A.).

A protection order should not be made where there is some reasonable basis upon which a person complaining of police action might succeed in a civil action: *Re Sieger and Avery and The Queen* (1982), 65 C.C.C. (2d) 449, 27 C.R. (3d) 91 *sub nom.* *Sieger and Avery v. Barker et al.* (B.C.S.C.).

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**APPEAL IN MANDAMUS ETC. / Application of Part XXI / Refusal of application, and appeal / Where writ granted / Appeal from judgment on return of writ / Hearing of appeal.**

**784.** (1) An appeal lies to the court of appeal from a decision granting or refusing the relief sought in proceedings by way of *mandamus*, *certiorari* or prohibition.

(2) Except as provided in this section, Part XXI applies, with such modifications as the circumstances require, to appeals under this section.

(3) Where an application for a writ of *habeas corpus ad subjiciendum* is refused by a judge of a court having jurisdiction therein, no application may again be made on the same grounds, whether to the same or to another court or judge, unless fresh evidence is adduced, but an appeal from such refusal shall lie to the court of appeal, and where on the appeal the application is refused a further appeal shall lie to the Supreme Court of Canada.

(4) Where a writ of *habeas corpus ad subjiciendum* is granted by any judge, no appeal therefrom shall lie at the instance of any party including the Attorney General of the province concerned or the Attorney General of Canada.

(5) Where a judgment is issued on the return of a writ of *habeas corpus ad subjiciendum*, an appeal therefrom lies to the court of appeal, and from a judgment of the court of appeal to the Supreme Court of Canada, with the leave of that Court, at the instance of the applicant or the Attorney General of the province concerned or the Attorney General of Canada, but not at the instance of any other party.

(6) An appeal in *habeas corpus* matters shall be heard by the court to which the appeal is directed at an early date, whether in or out of the prescribed sessions of the court. R.S., c. C-34, s. 719.

## CROSS-REFERENCES

"Court of appeal" is defined in s. 2.



See s. 675 for the rights of appeal of a person convicted in proceedings by indictment.

See s. 676 for the Crown's rights of appeal.

## SYNOPSIS

This section provides for appeals from the granting or refusal of prerogative relief.

Decisions or applications for *certiorari*, *mandamus*, and prohibition may be appealed to the Court of Appeal (subsec. (1)). (**Note:** Leave to appeal to the Supreme Court of Canada must be obtained under s. 40 of the Supreme Court Act.)

Specific rules are set out with respect to *habeas corpus*. (**Note:** The case-law draws a distinction between an application for the writ and a judgment on the merits after the writ has issued. Although historically a two-stage process there is now generally only one hearing at which the merits are determined.)

Where an application for the writ has been dismissed a further application cannot be made on the same grounds unless fresh evidence is adduced. An appeal from such a dismissal lies to the Court of Appeal and, if refused, the matter may be appealed "as of right" to the Supreme Court of Canada (subsec. (3)). No appeal lies from the simple issuance of the writ (subsec. (4)).

A decision on the merits with respect to an application for *habeas corpus* may be appealed to the Court of Appeal and thereafter, with leave, to the Supreme Court of Canada (subsec. (5)). Such appeals are to be heard as soon as possible (subsec. (6)).

## ANNOTATIONS

**Subsec. (1)** – Although this subsection gives an accused a right to appeal from dismissal of an application for *certiorari* including an application to quash an order to stand trial, the accused does not have a right to a stay of the trial proceedings pending the appeal. The power to grant a stay is discretionary, the test being whether the accused can show the existence of a serious question, that unless the stay were granted he would suffer irreparable harm and that the balance of convenience favours granting the stay: *R. v. Boutin* (1990), 58 C.C.C. (3d) 237, [1990] R.J.Q. 1841 (C.A.).

**Subsec. (2)** – In *Re Kipnes and A.-G. Alta.*, [1966] 4 C.C.C. 387, 56 W.W.R. 474 (Alta. S.C. App. Div.), it was held (2:1) that there being no Rule which specifically deals with service of the notice of appeal in this case, it would follow that service in accordance with Rule 39 of the Rules of Court in civil matters would apply.

**Subsec. (3)** – Where the Court of Appeal finds that the superior court judge erred in refusing to issue the writ it need not remit the application to the original judge but rather may deal with application on the merits itself as if the writ had issued, the inmate being present and participating in the application: *R. v. Olson* (1989), 47 C.C.C. (3d) 491, [1989] 1 S.C.R. 296, 68 O.R. (2d) 256n (5:0).

**Subsec. (5)** – Although costs of a *certiorari* application may be ordered under s. 779, there is no such other substantive authority under the Criminal Code for a *habeas corpus* application: *Re Ange*, [1970] 5 C.C.C. 371, [1970] 3 O.R. 153 (C.A.).

An appeal lies under this section to the provincial Court of Appeal from the dismissal of an application for *habeas corpus* in an extradition matter: *Re Federal Republic of Germany and Rauca* (1983), 4 C.C.C. (3d) 385, 34 C.R. (3d) 97, 145 D.L.R. (3d) 638 (Ont. C.A.); *Re Meier and The Queen* (1983), 8 C.C.C. (3d) 210 (B.C.C.A.). And a further appeal lies, with leave of the court, to the Supreme Court of Canada, notwithstanding s. 39 of the Supreme Court Act, R.S.C. 1985, c. S-26: *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193, 58 C.R. (3d) 1, 39 D.L.R. (4th) 18, [1987] 1 S.C.R. 500 (7:0).

## Part XXVII / SUMMARY CONVICTIONS

### *Interpretation*

**DEFINITIONS** / “clerk of the appeal court” / “informant” / “information” / “order” / “proceedings” / “prosecutor” / “sentence” / “summary conviction court” / “trial”.

**785.** In this Part,

“clerk of the appeal court” includes a local clerk of the appeal court;

“informant” means a person who lays an information;

“information” includes

- (a) a count in an information, and
- (b) a complaint in respect of which a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order;

“order” means any order, including an order for the payment of money;

“proceedings” means

- (a) proceedings in respect of offences that are declared by an Act of Parliament or an enactment made thereunder to be punishable on summary conviction, and
- (b) proceedings where a justice is authorized by an Act of Parliament or an enactment made thereunder to make an order;

“prosecutor” means the Attorney General or, where the Attorney General does not intervene, the informant, and includes counsel or an agent acting on behalf of either of them;

“sentence” includes

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 100(2) or 259(1) or (2), section 261 or subsection 736(1), and
- (c) a disposition made under subsection 737(1) or 738(3) or (4);

**NOTE:** The definition “sentence” replaced by 1995, c. 22, s. 7(1) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

“sentence” includes

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 100(2) or 259(1) or (2), section 261, subsection 730(1) or section 737, 738, 739 or 742.3, and
- (c) a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.4(3) or 742.6(9);

**NOTE:** Paragraph (b) of the definition “sentence” replaced by 1995, c. 22, s. 7(2) (to come into force when s. 747.1 as enacted by 1995, c. 22, s. 6 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) an order made under subsection 100(2) or 259(1) or (2), section 261, subsection 730(1), section 737, 738, 739 or 742.3 or subsection 747.1(1), and

**NOTE:** Paragraph (b) of the definition “sentence” replaced 1995, c. 39, s. 156 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) an order made under subsection 110(1) or 259(1) or (2), section 261 or subsection 736(1), and

**NOTE:** Definition “sentence” amended 1996, Bill C-8, s. 76 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996) by striking out the word “and” at the end of para. (b), by adding the word “and” at the end of para. (c) and by adding new para. (d). The text of para. (d), which is not yet in force and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

(d) *an order made under subsection 16(1) of the Controlled Drugs and Substances Act;*

“summary conviction court” means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen and who

- (a) is given jurisdiction over the proceedings by the enactment under which the proceedings are taken,
- (b) is a justice or provincial court judge, where the enactment under which the proceedings are taken does not expressly give jurisdiction to any person or class of persons, or
- (c) is a provincial court judge, where the enactment under which the proceedings are taken gives jurisdiction in respect thereof to two or more justices;

“trial” includes the hearing of a complaint.

R.S., c. C-34, s. 720; 1972, c. 13, s. 61; 1974-75-76, c. 93, s. 85; 1976-77, c. 53, s. 4; R.S.C. 1985, c. 27 (1st Supp.), s. 170; 1992, c. 1, s. 58.

#### CROSS-REFERENCES

Whether an offence is exclusively indictable, prosecutable by summary conviction alone or triable either way (hybrid) is determined by the section creating or prescribing the punishment for the offence.

By virtue of s. 34(1)(a) of the Interpretation Act, R.S.C. 1985, c. I-21, hybrid offences are “indictable” until the prosecution elects to proceed by summary conviction. Part XXVII applies to the trial of a summary conviction offence as well as to any appeal from a summary conviction trial.

#### ANNOTATIONS

“prosecutor”—While counsel may not in the same prosecution and at the same time be agent of both the provincial and federal Attorneys General, he can be duly authorized by both so that his authority cannot be disputed: *R. v. Thomas* (1979), 53 C.C.C. (2d) 472 (B.C.C.A.).

The definition in this section applies only to the trial of summary conviction offences and has no application to indictable offences although the accused has elected to be tried by provincial court judge: *R. v. Edmunds* (1981), 58 C.C.C. (2d) 485, 21 C.R. (3d) 168, [1981] 1 S.C.R. 233 (4:1).

A police officer who was not the informant could only be “agent” for the Attorney-General if he were appointed as such by the Attorney-General. His superior officer could not appoint him. However, prosecution by a police officer properly appointed by the Attorney-General does not offend the fair hearing guarantees in s. 11(d) of the Canadian Charter of Rights and Freedoms: *Re Regina and Hart* (1986), 26 C.C.C. (3d) 438 (Nfld. C.A.).

Nor does it offend the fundamental justice and equality guarantees in ss. 7 and 15 of the Charter of Rights. *R. v. White* (1988), 41 C.C.C. (3d) 236, 69 Nfld. & P.E.I.R. 91 (Nfld. C.A.).

Further, the court has no discretion to refuse a right of audience to an agent who has been properly designated: *R. v. Maher* (1986), 27 C.C.C. (3d) 476 (Nfld. C.A.).

“summary conviction court” – By virtue of para. (b) a justice has jurisdiction to try a Crown option offence where the Crown elects to proceed by way of summary conviction: *R. v. Ashoona*; *R. v. Jonah* (1985), 19 C.C.C. (3d) 377 (N.W.T.S.C.).



**APPLICATION OF PART / Limitation.**

**786. (1) Except where otherwise provided by law, this Part applies to proceedings as defined in this Part.**

**(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose. R.S., c. C-34, s. 721.**

**CROSS-REFERENCES**

There exists no limitation provision of general application in respect of proceedings on indictment. An accused will have the benefit of s. 11(b) of the Charter in terms of being tried within a reasonable time and s. 7 protection against undue delays in the prosecutorial process warranting a stay of proceedings or abuse of process.

Summary conviction proceedings are commenced by laying an information in Form 2, pursuant to s. 788(1).

See s. 789 for the formalities of the information. Proceedings against an accused in respect of an offence are instituted by the issuance of process to compel the accused's appearance or by the confirmation of the already issued process.

**SYNOPSIS**

This section limits the application of this Part to summary conviction proceedings as defined, unless otherwise provided for by law (subsec. (1)). This section also sets the summary conviction offence limitation period of six months from the arising of the subject-matter of the proceedings (subsec. (2)).

**ANNOTATIONS**

**Subsec. (2)** – In *Dressler v. Tallman Gravel & Sand Supply Ltd.*, [1963] 2 C.C.C. 25, 36 D.L.R. (2d) 398 (Man. C.A.), it was held that where a continuing offence was charged, part of which was outside the six-month period of limitation, the information was not void but could be amended by striking the part that was out of time.

An information in respect of a continuing offence which commenced more than six months before the information was laid but continued into the six-month period is valid: *R. v. Belgal Holdings Ltd.*, [1967] 3 C.C.C. 34, [1967] 1 O.R. 405 (H.C.J.).

A summons issued more than six months after the time when the subject-matter of the proceedings arose on the presentment of an information laid within the six months is valid: *R. v. Southwick, ex p. Gilbert Steel Ltd.*, [1968] 1 C.C.C. 356, 2 C.R.N.S. 46 (Ont. C.A.).

It is not open to the court to convict an accused of a summary conviction offence included in an indictable offence where the information was laid outside the six-month limitation period: *R. v. Chausse* (1986), 28 C.C.C. (3d) 412, 51 C.R. (3d) 332 (Que. C.A.); *R. v. Hoskins* (1929), 52 C.C.C. 365, [1930] 1 W.W.R. 85 (Alta. S.C.); *R. v. Halcrow* (1993), 80 C.C.C. (3d) 320, 40 W.A.C. 197 (B.C.C.A.), affd [1995] 1 S.C.R. 440, 95 C.C.C. (3d) 94, 90 W.A.C. 72.

An election by the Crown to proceed by way of summary conviction on a hybrid offence is a nullity where the information was laid outside the six-month limitation period: *R. v. Phelps* (1993), 79 C.C.C. (3d) 550 (Ont. C.A.).

There are conflicting decisions as to whether the attempt by the Crown to relay a charge and proceed by indictment on a Crown option offence in order to avoid the limitation period in this section will constitute an abuse of process. Thus, in *Re Parkin and the Queen* (1986), 28 C.C.C. (3d) 252, 14 O.A.C. 150 (C.A.) and *R. v. Quinn* (1989), 54 C.C.C. (3d) 157, 73 C.R. (3d) 77, 48 C.R.R. 314 (Que. C.A.) the courts did find an abuse of process in the particular circumstances. Those decisions should, however, be compared with *R. v. Belair* (1988), 41 C.C.C. (3d) 329, 64 C.R. (3d) 179 (Ont. C.A.) and *R. v. Jans* (1990), 59 C.C.C. (3d) 398, 108 A.R. 324 (C.A.). See also *R. v. Maramba* (1995), 42 C.R. (4th) 177, 84 O.A.C. 133 (C.A.).

At least with the accused's consent, the Crown may re-elect to proceed by way of summary conviction provided that the charge was laid within the limitation period even though the preliminary inquiry has commenced. The judge would, however, have the ultimate decision to permit or deny such a re-election. Rare and exceptional cases may arise where a joint request to permit the Crown to re-elect to proceed summarily should be refused in view of the judge's overall responsibility to safeguard the integrity of the judicial process: *R. v. Linton* (1994), 90 C.C.C. (3d) 528, 18 O.R. (3d) 647 (Gen Div.).

Also see notes under s. 583.

## Punishment

### GENERAL PENALTY / Imprisonment in default where not otherwise specified.

**787. (1)** Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both.

**(2)** Where the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a period not exceeding six months. R.S., c. C-34, s. 722; R.S.C. 1985, c. 27 (1st Supp.), s. 171(1).

**(3) to (11)** [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 171(2).*]

### CROSS-REFERENCES

A default term must not exceed the term of imprisonment prescribed in respect of the offence pursuant to s. 717(3). See s. 718(3) for default terms respecting indictable offences.

Section 719(b) imposes a maximum fine not exceeding \$25,000 for corporate accused convicted of summary conviction offences subject to exceptions.

Section 718.1 sets out a fine-option program under which an individual accused may discharge a fine wholly or in part.

See ss. 723 and 724 for destination of fines and recovery in civil proceedings respectively. See ss. 725 to 727.9 for restitution orders.

### SYNOPSIS

Unless otherwise provided, the maximum penalty for a summary conviction offence is a fine of \$2000 and/or six months' imprisonment (subsec. (1)).

Unless otherwise provided, the maximum period of imprisonment for non-payment of a fine is six months (subsec. (2)).

### ANNOTATIONS

**Subsec. (2)** – It is open to the Court to pass a sentence that does not provide for imprisonment in default of payment of a fine, leaving recovery thereof to civil process. This section does not offend the Canadian Bill of Rights: *R. v. Natrall* (1972), 9 C.C.C. (2d) 390, 20 C.R.N.S. 265 (2:1) (B.C.C.A.).

This subsection should not be used routinely as a practical method for the Crown to enforce the collection of its financial penalties. Rather, the Court should consider what, if any, rehabilitation or deterrence will occur if the accused is required to serve a term of imprisonment if he is unable to pay the fine within the time specified: *R. v. Yamelst* (1975), 22 C.C.C. (2d) 502, [1975] 3 W.W.R. 546 (B.C.S.C.). Similarly: *R. v. Deeb*; *R. v. Wilson* (1986), 28 C.C.C. (3d) 257 (Ont. Prov. Ct.).

## **Information**

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### **COMMENCEMENT OF PROCEEDINGS / One justice may act before the trial.**

**788. (1) Proceedings under this Part shall be commenced by laying an information in Form 2.**

**(2) Notwithstanding any other law that requires an information to be laid before or to be tried by two or more justices, one justice may**

- (a) receive the information;**
- (b) issue a summons or warrant with respect to the information; and**
- (c) do all other things preliminary to the trial. R.S., c. C-34, s. 723.**

### **CROSS-REFERENCES**

Proceedings must be instituted within six months of the occurrence of the subject matter of the proceedings, under s. 786(2).

An information in Form 2 may charge more than one offence or relate to more than one matter of complaint as long as each is set out in a separate count. The information must be in writing and under oath. The Rules of criminal pleadings in ss. 581 to 593 and s. 601 of Part XX apply to summary conviction proceedings under s. 795 with modifications. There is no need to set out any exception, exemption, proviso, excuse or qualification in an information in summary conviction proceedings under s. 794.

### **SYNOPSIS**

This section prescribes the form for the information which commences the proceedings under this Part and provides that a single justice may receive that information, issue a summons or warrant or do any other preliminary thing, notwithstanding any requirement, as is found in some other federal legislation, that two or more justices be present.

### **ANNOTATIONS**

An information includes the face and back thereof and where the title of the person taking the information is set out on the back of the information but not under his signature on the jurat the information is valid. Such deviation from Form 2 is one permitted by s. 841: *R. v. Deal* (1978), 38 C.C.C. (2d) 425 (N.S.S.C. App. Div.).

Pursuant to this section, an information charging an offence contrary to the Excise Act, R.S.C. 1985, c. 15, which Act requires that a prosecution be brought before a police or stipendiary magistrate or “before any two justices of the peace”, may be laid before a single justice: *R. v. Keefe* (1990), 57 C.C.C. (3d) 573 (P.E.I.S.C.).

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### **FORMALITIES OF INFORMATION / No reference to previous convictions.**

**789. (1) In proceedings to which this Part applies, the information**

- (a) shall be in writing and under oath; and**
- (b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.**

**(2) No information in respect of an offence for which, by reason of previous convictions, a greater punishment may be imposed shall contain any reference to previous convictions. R.S., c. C-34, s. 724.**

### **CROSS-REFERENCES**

The rules of criminal pleadings in ss. 581 to 593 and s. 601 of Part XX apply to summary conviction proceedings under s. 795 with modifications. There is no need to set out any exception, exemption,



proviso, excuse or qualification in an information or count in summary conviction proceedings under s. 794. See s. 664 for similar provision to s. 789(2).

Sections 665 to 667 permit the introduction of evidence of previous convictions. Such evidence applies to summary conviction proceedings under s. 795. Also see Canada Evidence Act, R.S.C. 1985, c. C-5, s. 12.

## SYNOPSIS

This section provides that informations are to be written and under oath and shall divide charges or complaints into separate counts (subsec. (1)). It also provides that no information shall contain references to previous convictions where such convictions might result in a greater punishment (subsec. (2)).

## ANNOTATIONS

**Signature of justice of the peace** [*Also see notes under s. 504*] – In *Re R. v. Welsford*, [1968] 1 C.C.C. 1, 2 C.R.N.S. 5 (Ont. C.A.), it was held that a rubber-stamped facsimile of the signature of a justice of the peace on the jurat invalidated an information on the ground that the use of such a facsimile, which could be applied by anyone, instead of his own signature, which has characteristics that could hardly be denied by him, was an insufficient method of evidencing the administration of a solemn oath on an information. *Affid* [1969] 4 C.C.C. 1, 6 C.R.N.S. 90 (S.C.C.) (9:0).

**Defects in jurat** [*Also see notes under s. 504*] – A typographical error in the jurat so that the year in which the information was sworn is not shown cannot operate to nullify the information. The insertion of the date in the jurat is merely evidence that the oath was administered on a certain date and the date is only relevant and material where the issue of a limitation period arises: *R. v. Dean* (1985), 17 C.C.C. (3d) 410, [1985] 3 W.W.R. 141 (Alta. Q.B.).

**Belief of informant** – Failure of the informant, who did not have personal knowledge of the alleged offence, to employ the alternative phrase “reasonable and probable grounds to believe and does believe” in his information constitutes a failure to comply with the Code and in the absence of the appropriate amendment before the evidence was heard, the conviction must be quashed: *R. v. Lepage*, [1969] 1 C.C.C. 187, 4 C.R.N.S. 61 (Ont. H.C.J.).

The word “oath” includes a solemn affirmation. Accordingly, an information which is affirmed is valid: *Netley v. The Queen and Greer, Prov. J.*, [1983] 5 W.W.R. 508 (B.C.S.C.).

There must not be a wilful disregard of the statutory requirements of laying an information; there need only be reasonable compliance with those provisions. Accordingly, where the informant’s belief was conclusive within the bounds of reasonableness an information sworn on positive, rather than reasonable and probable grounds, was upheld: *McGuffey v. The Queen* (1972), 17 C.R.N.S. 393, [1972] 2 W.W.R. 462 (Sask. Dist. Ct.).

An information regular on its face is presumed to be valid and if the defendant claims a latent defect such that the informant did not have reasonable and probable grounds to believe the alleged offence had been committed, then the onus is upon him to demonstrate his claim upon a balance of probabilities: *R. v. Peavoy* (1974), 15 C.C.C. (2d) 97 (Ont. H.C.J.).

**Duplicity** – The primary test for duplicity is “does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge?” A charge that the accused “did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials” into a river contrary to s. 32(1) of the Ontario Water Resources Act, R.S.O. 1970, c. 332 is not duplicitous within this test. There is nothing ambiguous or uncertain in the charge and the accused knows the case it has to meet. The gist of the offence is pollution which may be committed in one or more of several modes:

*R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (9:0).

Where an information is defective by reason of duplicity it is not null and void *ab initio* but is capable even after the expiry of a limitation period of being amended and resworn to cure the defect: *R. v. Baldassara* (1973), 11 C.C.C. (2d) 17 (Ont.H.C.J.).

**Presence of information in court** – There is no requirement that the information be physically present in Court during every step of the proceedings: *Re Perrault and The Queen* (1982), 65 C.C.C. (2d) 279, 15 Sask. R. 341 (C.A.); *Re Veltri and Veltri Stamping Co. Ltd.* (1986), 3 W.C.B. (2d) 88 (Ont. C.A.).

**Subsec. (2)** – The inadvertent reference by a Crown witness to the fact that the accused had been served with a notice seeking a greater penalty by reason of a previous conviction is not grounds to dismiss the charge: *R. v. Peters* (1991), 35 M.V.R. (2d) 14, 96 Sask. R. 177 (Q.B.).

**Other notes** – The date of the offence in an information is only an allegation and may not be treated as evidence by a court: *R. v. Walker*, [1968] 2 C.C.C. 150, 61 W.W.R. 383 (B.C.S.C.).

Although the use of a stamped signature of the informant in an information is to be deprecated, his manual signature is not required: *R. v. Burton*, [1970] 3 C.C.C. 381, 8 C.R.N.S. 269 (Ont. H.C.J.).

The prefacing of two separate counts with a common date and place of the offence does not invalidate the information: *R. v. Schille* (1976), 28 C.C.C. (2d) 230, [1976] 2 W.W.R. 570 (B.C.C.A.).

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#### ANY JUSTICE MAY ACT BEFORE AND AFTER TRIAL / Two or more justices.

**790. (1)** Nothing in this Act or any other law shall be deemed to require a justice before whom proceedings are commenced or who issues process before or after the trial to be the justice or one of the justices before whom the trial is held.

**(2)** Where two or more justices have jurisdiction with respect to proceedings, they shall be present and act together at the trial, but one justice may thereafter do anything that is required or is authorized to be done in connection with the proceedings. **R.S., c. C-34, s. 725; 1974-75-76, c. 93, s. 86.**

**(3) and (4)** [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 172.*]

#### CROSS-REFERENCES

Subsection (1) permits different justices to receive the information, issue process and adjourn the matter from time to time until trial in the application of ss. 798 to 803. Another summary conviction court may continue summary conviction proceedings under ss. 669.1 and 669.2 rendered applicable to Part XXVII by s. 795. Trials by two or more justices of the peace seem anachronistic in light of s. 483 and para. (c) of the definition “summary conviction court” in s. 785.

#### SYNOPSIS

This section states that the justice who issues process, before or after trial or before whom the trial is commenced, need not be the justice before whom the trial is held (subsec. (1)). Also, where two or more justices are required, they must act together at trial, but any one of them may deal with post-trial matters (subsec. (2)).

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**791. [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 173.*]**

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**792. [*Repealed with above heading. R.S.C. 1985, c. 27 (1st Supp.), s. 174.*]**

793. [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 175.*]

NO NEED TO NEGATIVE EXCEPTION, ETC. / Burden of proving exception, etc.

794. (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information.

(2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information. R.S., c. C-34, s. 730.

#### CROSS-REFERENCES

The rules of criminal pleadings in ss. 581 to 593 and s. 601 of Part XX apply to summary conviction proceedings under s. 795, with modifications. No comparable provision exists for proceedings upon indictment.

#### SYNOPSIS

This section provides that an exemption, or other proviso under which the accused might have a defence, need not be negated or referred to in the information (subsec. (1)). The onus of proving the applicability of the exculpatory proviso rests on the accused, and the prosecutor need not prove the inapplicability even if the proviso is negated in the information (subsec. (2)).

#### ANNOTATIONS

It is only necessary in an information for the Crown to allege the unlawful commission of an offence at a time and place, and the inclusion of any clauses negating any exceptions to the offence, as enumerated in the offence section, is surplusage and does not cast any further onus of proof upon the Crown: *R. v. Hundi* (1971), 3 C.C.C. (2d) 279, [1971] 3 W.W.R. 741 (Alta. S.C. App. Div.).

This section does not apply to defences such as self-defence and necessity: *R. v. Walker* (1979), 48 C.C.C. (2d) 126 (Ont. Co. Ct.).

It has been held that the provincial equivalent of this subsection does not offend the guarantee to the presumption of innocence in s. 11(d) of the Canadian Charter of Rights and Freedoms: *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. (3d) 539, 43 C.R. (3d) 289 (Ont. C.A.).

*R. v. Lee's Poultry Ltd.*, *supra* was followed in *R. v. Daniels* (1990), 60 C.C.C. (3d) 392 (B.C.C.A.), a prosecution under the Fisheries Act (Can.) where it was held that the Crown need not prove that the accused did not have a Minister's permit to take shellfish in a contaminated area.

## Application

#### APPLICATION OF PARTS XVI, XVIII, XX and XX.1.

795. The provisions of Parts XVI and XVIII with respect to compelling the appearance of an accused before a justice, and the provisions of Parts XX and XX.1, in so far as they are not inconsistent with the Part, apply, with such modifications as the circumstances require, to proceedings under this Part. R.S.C. 1985, c. 27 (1st Supp.), s. 176; 1991, c. 43, s. 7.



**CROSS-REFERENCES**

For the provisions of Part XX which are incorporated, see ss. 581 to 593 for rules of pleading and joinder, ss. 601, 794, 606 to 610 and 613 regarding pleas.

**SYNOPSIS**

This section imports the procedures for compelling the appearance of the accused from Parts XVI, XVIII, XX and XX.1 into summary conviction proceedings.

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**796. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 176.]**

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**797. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 176.]**

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**Trial**

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**JURISDICTION.**

**798. Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction. R.S., c. C-34, s. 733.**

**CROSS-REFERENCES**

Terms of the appointment of the court will determine the territorial jurisdiction in which a summary conviction court has jurisdiction. See ss. 476 to 481 for examples of Criminal Code provisions extending territorial jurisdiction.

**ANNOTATIONS**

A case is deemed to have properly proceeded in the summary conviction court where the Crown, on an ambivalent offence, failed to make its election as to mode of procedure: *R. v. Robert* (1973), 13 C.C.C. (2d) 43 (Ont. C.A.).

Once the accused is convicted and sentenced the summary conviction Court is *functus officio* and has no jurisdiction to declare a mistrial: *R. v. Conley* (1979), 47 C.C.C. (2d) 359, [1979] 5 W.W.R. 692 (Alta. S.C. App. Div.).

Nor does the court have power to issue a warrant for arrest of an accused who fails to comply with a term of a probation order that he appear before the court on a specified day: *Re Langlois and The Queen* (1985), 25 C.C.C. (3d) 191 (Que. S.C.).

No judge of the summary conviction court has jurisdiction to hear a pre-trial application, such as an application for an order allowing a defence expert access to the breathalyzer machine used to analyze samples of the accused's breath: *R. v. Delaney* (1989), 48 C.C.C. (3d) 276, 13 M.V.R. (2d) 1, 89 N.S.R. (2d) 253 (C.A.) *sub nom. R. v. How*.

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**NON-APPEARANCE OF PROSECUTOR.**

**799. Where, in proceedings to which this Part applies, the defendant appears for the trial and the prosecutor, having had due notice, does not appear, the summary conviction court may dismiss the information or may adjourn the trial to some other time upon such terms as it considers proper. R.S., c. C-34, s. 734.**

**CROSS-REFERENCES**

Section 803 contains the general authority to adjourn summary conviction proceedings. See s. 840 for scale of fees. A summary conviction court may award and order such costs as it considers reasonable and consistent with the scale of fees, pursuant to s. 809.

The informant, Attorney General or his agent may appeal to the appeal court from an order dismissing an information, under s. 813(b)(i).

See s. 812 for definition of “appeal court”.

## SYNOPSIS

This section allows for dismissal of the information or adjournment of the trial by the summary conviction court where, on due notice, the defendant appears and the prosecutor does not.

## ANNOTATIONS

Where the prosecutor gives evidence of a merely formal nature, such as to prove service of a subpoena, this does not result in the prosecutor’s case being vacant and does not constitute grounds for dismissal of the Crown’s case for want of prosecution: *R. v. Hayward* (1981), 59 C.C.C. (2d) 134, 32 Nfld. & P.E.I.R. 465 (Nfld. C.A.).

## WHEN BOTH PARTIES APPEAR / Counsel or agent / Appearance by corporation.

**800. (1)** Where the prosecutor and defendant appear for the trial, the summary conviction court shall proceed to hold the trial.

**(2)** A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally and may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.

**(3)** Where the defendant is a corporation, it shall appear by counsel or agent, and if it does not appear, the summary conviction court may, on proof of service of the summons, proceed *ex parte* to hold the trial. R.S., c. C-34, s. 735.

## CROSS-REFERENCES

The procedure in summary conviction trials is governed by the provisions of ss. 801 to 803 and those of Part XX, incorporated in summary conviction proceedings by s. 795 to the extent they are consistent with Part XXVII.

A summary conviction trial of either an individual or corporate accused may be held *ex parte* where either has been properly served and has failed to appear or remain in attendance as required.

Sections 804 to 809 outline the adjudicative powers and authority of the summary conviction court. See ss. 812 to 838 for appeal procedures.

## SYNOPSIS

This section provides that, where both defendant and prosecutor appear, the trial should be held (subsec. (1)). A defendant may appear by counsel or agent, but the court may require the defendant’s personal appearance and enforce this requirement through warrant (subsec. (2)). In the case of a corporate defendant, a counsel or agent must appear, and if such a person does not, the court may proceed *ex parte*, on proof of service.

## ANNOTATIONS

**Subsec. (2)** – It was held in *R. v. Fedoruk*, [1966] 3 C.C.C. 118, 55 W.W.R. 251 (Sask. C.A.) that a plea can only be entered on behalf of the person named in the information. Once counsel had done this, it was no longer open for him to argue either that the person named in the information had not been served with the summons, or that he was not appearing for that person named in the information.

The warrant itself should not be issued until there is non-compliance of the Court’s direction that the defendant appear personally: *Richard v. The Queen* (1974), 27 C.R.N.S. 337 (Que. S.C.).

Although this subsection gives the Court power to require the accused to appear personally, it is improper to issue a bench warrant where the accused has appeared by counsel: *R. v. Okanee* (1981), 59 C.C.C. (2d) 149, 9 Sask. R. 10 (C.A.).

A provincial court Judge has power to appoint counsel to represent an indigent

accused in summary conviction proceedings: *Re White and The Queen* (1976), 32 C.C.C. (2d) 478, 73 D.L.R. (3d) 275 (Alta. S.C.T.D.).

**Subsec. (3)** – The Court may adjourn a case for an *ex parte* trial and such adjournment although made in the absence of the accused may be for more than eight days: *Re Saskatoon Custom Drywall (1978) Ltd. and The Queen* (1982), 69 C.C.C. (2d) 441 (Sask. Q.B.).

Once counsel appears on behalf of the corporation identified as the defendant in the information as amended and enters a plea it is not open to the corporation to argue that the Crown has failed to serve a summons on that company: *R. v. Westmin Resources Ltd. (Western Mines Ltd.)*, [1985] 1 W.W.R. 30 (B.C.C.A.), leave to appeal to S.C.C. refused 56 N.R. 240.

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**ARRAIGNMENT / Finding of guilt, conviction or order if charge admitted / Procedure if charge not admitted.**

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**801. (1)** Where the defendant appears for the trial, the substance of the information laid against him shall be stated to him, and he shall be asked,

- (a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction; or
- (b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

**(2)** Where the defendant pleads guilty or does not show sufficient cause why an order should not be made against him, as the case may be, the summary conviction court shall convict the defendant, discharge the defendant under section 736 or make an order against him accordingly.

**NOTE:** Subsection (2) amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

**(3)** Where the defendant pleads not guilty or states that he has cause to show why an order should not be made against him, as the case may be, the summary conviction court shall proceed with the trial, and shall take the evidence of witnesses for the prosecutor and the defendant in accordance with the provisions of Part XVIII relating to preliminary inquiries. R.S., c. C-34, s. 736; R.S.C. 1985, c. 27 (1st Supp.), s. 177(1).

**(4) and (5)** [*Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 177(2).*]

**CROSS-REFERENCES**

No reference is made in subsec. (1) to the availability of the special pleas. The incorporation of the provisions of Part XX by s. 795 to the extent they are consistent with Part XXVII, include the special plea provisions in ss. 607 to 610. Also, the procedure followed at trial under Part XXVII is substantially the same as under Part XX, subject to some specific provisions in the former. There is no authorization in this section for the trial of separate informations together. The section does not permit the joint trial of summary conviction and indictable offences by a provincial court judge sitting under Part XIX and XXVII. The prosecution should elect the mode of procedure before opting for summary conviction or indictment in cases triable either way.

**SYNOPSIS**

This section states the procedure on arraignment. The defendant is to be asked for a plea or to show cause why an order against him should not be made, as the case may be. Where the plea is guilty or no cause is shown, the court shall convict, discharge or make the order. Where the plea is not guilty, or intent to show cause is indicated, the trial shall proceed according to the provisions of Part XVIII relating to preliminary inquiries.



## ANNOTATIONS

**Special pleas [subsec. (1)]** – The special pleas to an indictment are also available to a defendant upon an information: *R. v. Riddle* (1977), 36 C.C.C. (2d) 391, [1977] 5 W.W.R. 58 (Alta. S.C. App. Div.), affd 48 C.C.C. (2d) 365, [1980] 1 W.W.R. 592 (S.C.C.) (7:0).

**Arraignment and plea** – Since in British Columbia it has been the practice of counsel in summary conviction trials to enter a plea vicariously on behalf of the defendant, where the Crown enters the plea in the presence of counsel and the defendant no error has been committed. Furthermore, the stating of the substance of the information to the defendant is a statutory requirement going to jurisdiction, and as such as a special jurisdiction over the defendant it may be, as it was in the facts of this case, waived: *R. v. Franiek* (1970), 13 C.R.N.S. 230, [1971] 1 W.W.R. 104 (B.C.S.C.).

The arraignment of the defendant to identify him to the Judge and the members of the public is an established procedure, and the power of the Court under s. 800(2) to require the personal appearance of the defendant includes the power to require him to identify himself in open Court: *Re Conrad and The Queen* (1973), 12 C.C.C. (2d) 405 (N.S.S.C.).

A judge may decline to accept a plea until the defendant appears before him at the commencement of trial: *R. v. Jones* (1973), 26 C.R.N.S. 398, [1974] 2 W.W.R. 396 (B.C.S.C.).

**Joint trial of information [Also see notes under s. 591]** – A provincial court judge may jointly try summary and indictable offences, even where they are contained on separate informations, provided that the accused has not elected trial by a higher court in respect of the indictable offence. In the event of any conflict as to the applicable procedure, indictable offences procedures would apply. Where joinder of offences or accused are being considered, the court should seek the consent of both of the accused and the prosecution. If consent is withheld, the reasons should be explored. Whether the accused consents or not, joinder should only occur when, in the opinion of the court, it is in the interests of justice to proceed jointly and the offences or the accused could initially have been jointly charged. Where the accused wishes to testify in respect of only one of the informations, then consent to a joint trial would be withheld. Furthermore, where the separate informations involve two accused, the Crown may not compel one accused to testify against the other: *R. v. Clunas*, [1992] 1 S.C.R. 595, 70 C.C.C. (3d) 115, 11 C.R. (4th) 238 (5:0).

**Recording of evidence [subsec. (3)]** – Where the summary conviction court fails to record the evidence in accordance with s. 540 the superior court judge, upon motion for *certiorari*, will be unable to review the evidence pursuant to s. 804 and accordingly must quash the conviction: *R. v. Lichty, ex p. Zerawsky* (1970), 2 C.C.C. (2d) 581, [1971] 2 O.R. 193 (H.C.J.).

In *Re Boylan and The Queen* (1979), 46 C.C.C. (2d) 415, 8 C.R. (3d) 36, [1979] 3 W.W.R. 435 (Sask. C.A.) Culliton, C.J.S., held that the provisions of s. 540 are mandatory, and in *obiter* expressed the opinion that failure to comply with those provisions in a summary conviction trial is the failure to carry out a basic requirement of the trial, in the absence of which a verdict rendered cannot stand and on appeal the Court would order a new trial.

## RIGHT TO MAKE FULL ANSWER AND DEFENCE / Examination of witnesses / On oath.

**802. (1)** The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.

**(2)** The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

**(3) Every witness at a trial in proceedings to which this Part applies shall be examined under oath. R.S., c. C-34, s. 737.**

#### CROSS-REFERENCES

The general order in which evidence is addressed on indictment is followed in summary conviction proceedings. The incorporation by s. 795 of s. 655 applicable in trials upon indictment permits admissions to be made in summary conviction proceedings.

Reception of evidence given by affirmation under the Canada Evidence Act, R.S.C. 1985, c. C-5, s. 14 is permissible notwithstanding the "under oath" provision in subsec. (3). The general adjectival rules of evidence apply in summary conviction procedures, including evidentiary provisions in Part XX, incorporated by reference in s. 795. See s. 785 for definition of "prosecutor" as "the Attorney General or where the Attorney General does not intervene, the informant and including counsel or an agent acting on behalf of either of them". Pursuant to s. 801(3), the evidence given at trial is taken in accordance with the provisions of Part XVIII regarding preliminary inquiries.

#### SYNOPSIS

This section sets further rules for summary conviction proceedings. The prosecutor is entitled to conduct the case personally and the accused is entitled to make full answer and defence (subsec. (1)). The prosecutor and the accused may examine and cross-examine through counsel or agent (subsec. (2)) and every witness shall testify under oath (subsec. (3)).

#### ANNOTATIONS

While inability to make full answer and defence is a substantive defence, it would seem that delay in laying the charge, provided it is laid within the statutory limitation period in s. 786(2), does not give rise to such a defence: *R. v. Field* (1983), 6 C.C.C. (3d) 182, 57 N.S.R. (2d) 35 (S.C. App. Div.).

This section is not inconsistent with the right of a provincial Crown Attorney to intervene in the prosecution of an offence: *Re Bradley and The Queen* (1975), 24 C.C.C. (2d) 482, 335 C.R.N.S. 192 (Ont. C.A.).

It is a fatal error for the Court to convict and sentence the defendant without giving him an opportunity to make his defence: *R. v. Pestell* (1976), 31 C.C.C. (2d) 436 (Ont. H.C.J.).

See also cases under s. 650(3), *supra*.

#### ADJOURNMENT / Non-appearance of defendant / Consent of Attorney General required / Non-appearance of prosecutor.

**803. (1) The summary conviction court may, in its discretion, before or during the trial, adjourn the trial to a time and place to be appointed and stated in the presence of the parties or their counsel or agents.**

**(2) Where a defendant to whom an appearance notice that has been confirmed by a justice under section 508 has been issued or who has been served with a summons does not appear at the time and place appointed for the trial and the issue of the appearance notice or service of the summons within a reasonable time before the appearance was required is proved, or where a defendant does not appear for the resumption of a trial that has been adjourned in accordance with subsection (1), the summary conviction court**

- (a) may proceed *ex parte* to hear and determine the proceedings in the absence of the defendant as fully and effectually as if the defendant had appeared; or**
- (b) may, if it thinks fit, issue a warrant in Form 7 for the arrest of the defendant and adjourn the trial to await his appearance pursuant thereto.**

**(3) Where, at the trial of a defendant, the summary conviction court proceeds in the manner described in paragraph (2)(a), no proceedings under section 145 arising out**

of the failure of the defendant to appear at the time and place appointed for the trial or for the resumption of the trial shall be instituted or if instituted shall be proceeded with, except with the consent of the Attorney General.

(4) Where the prosecutor does not appear at the time and place appointed for the resumption of an adjourned trial, the summary conviction court may dismiss the information with or without costs. R.S., c. C-34, s. 738; R.S., c. 2 (2nd Supp.), s. 15; 1972, c. 13, s. 63; 1974-75-76, c. 93, s. 87; 1994, c. 44, s. 79.

(5) [Repealed. 1991, c. 43, s.9.]

(6) [Repealed. 1991, c. 43, s.9.]

(7) [Repealed. 1991, c. 43, s.9.]

(8) [Repealed. 1991, c. 43, s.9.]

#### CROSS-REFERENCES

The laying of an information under s. 505 is required procedure to confirm an appearance notice issued by a police officer. See s. 508 regarding the conduct of the hearing. Liability may be attracted under s. 145(2), (4) or (5) and the issuance of a warrant of arrest under subsec. (2)(b) of this section, in the event the accused fails to appear or reattend a trial in response to a confirmed appearance notice or summons. Section 475 provides the authority to proceed with trial of an indictable offence where the accused absconds during the course of the trial. Section 475 is not made applicable to summary conviction proceedings under s. 795. See s. 544 for similar provision regarding preliminary inquiries. Section 799 permits the court to dismiss the information or adjourn the trial in the event that the prosecution fails to appear for trial.

Note that s. 672.1 defines “court” for the purposes of Part XX.1 [Mental Disorder] to include a summary conviction court and, thus, a judge of that court may make the various orders provided for in that Part including an assessment order under s. 672.11. Further, s. 672.1 defines “accused” for the purposes of Part XX.1 to include a defendant in summary conviction proceedings and, thus, the procedures respecting fitness to stand trial are governed by Part XX.1 as are the consequences of a verdict of not criminally responsible on account of mental disorder.

#### SYNOPSIS

The court may adjourn the proceedings from time to time, but no adjournment can be for greater than eight clear days unless both parties consent (subsec. (1)).

If the accused does not appear or remain in attendance for the trial, the matter can be continued on an *ex parte* basis. Alternatively, an arrest warrant can be issued and the proceedings adjourned (subsec. (2)). In the event the trial proceeds in the absence of the accused, a failure to appear charge (see s. 145) cannot be laid without the consent of the Attorney General (subsec. (3)).

An Information may be dismissed, with or without costs, if the prosecutor does not appear (subsec. (4)).

Where, at any time before verdict or sentence, the court is of the opinion that the accused is mentally ill, it can direct the accused to attend for observation or remand the accused in custody, for a period not exceeding 30 days, for that purpose. Such an order must be based on the evidence of one doctor. If both parties agree, a report by the doctor can be filed in lieu of calling *viva voce* evidence (subsec. (5)). In special circumstances, the remand may be for up to 60 days (subsec. (6)).

A remand for up to 30 days may be made without the evidence or report of a doctor, if the circumstances warrant and a doctor is not readily available to assist the court in this regard (subsec. (6)).

If reason exists to doubt the accused’s fitness to stand trial, the court can proceed with a hearing to determine this question (subssecs. (7), (8)).



## ANNOTATIONS

**Adjournment [subsec. (1)]** – The limitation of adjournments without consent to eight days applies only until the conclusion of the taking of the evidence: *R. v. Welsh*, [1968] 4 C.C.C. 243 (Sask. Q.B.).

An adjournment verbally correct, but recorded in error as to the date causes a loss of jurisdiction over the defendant only, and may be remedied by his counsel's right to correct this error: *R. v. Wick* (1974), 20 C.C.C. (2d) 203, [1974] 6 W.W.R. 335 *sub nom. R. ex rel. Seale v. Wick* (Sask. Q.B.).

A case adjourned to a holiday which being a non-juridical day, is a *dies non*, shall be considered as being adjourned to the following day: *Re Brand and The Queen* (1974), 20 C.C.C. (2d) 253, [1975] 2 W.W.R. 356 (Alta.S.C.).

A court will not lose jurisdiction by adjourning a case in the absence of the defendant or his representative: *R. v. Szoboszloi*, [1970] 5 C.C.C. 366, [1970] 3 O.R. 485 (C.A.).

Where the accused and Crown counsel are unable to agree on a date for trial the proper course is for the Judge to fix a date for trial and then adjourn the case for periods not exceeding eight days until the trial date is reached: *Batchelor v. The Queen* (1978), 38 C.C.C. (2d) 113, 81 D.L.R. (3d) 241 (S.C.C.); however, see *Mayrand v. Cronier* (1981), 63 C.C.C. (2d) 561, 23 C.R. (3d) 114 (Que. C.A.).

**Ex parte trial** – Although the accused has been released on an undertaking rather than an appearance notice, the Court may still proceed *ex parte* if he fails to appear personally or by counsel or agent on the date set for trial: *R. v. Okanee* (1981), 59 C.C.C. (2d) 149, 9 Sask. R. 10 (C.A.). *Contra*: *R. v. Grimwood* (1984), 15 C.C.C. (3d) 318 (B.C.Co.Ct.) where it was also held that the trial does not commence before a plea is entered and therefore there can be no "resumption" of a trial unless there has been a plea. Thus, the court had no jurisdiction to proceed *ex parte* where the accused was released on an undertaking, appeared to set a trial date but did not enter a plea prior to failing to appear on the date set for trial.

The Court should not proceed *ex parte* under para. (a) where the accused has been prevented from attending Court by reasons beyond his control, such as weather conditions: *McLeod v. The Queen* (1983), 36 C.R. (3d) 378, 49 A.R. 321 (N.W.T.S.C.).

The judge is not precluded from proceeding *ex parte* under this subsection although he has earlier issued a warrant for the accused's arrest: *R. v. Tarrant* (1984), 13 C.C.C. (3d) 219, 10 D.L.R. (4th) 751 (B.C.C.A.).

Provision for an *ex parte* trial does not offend the rights guaranteed in ss. 7 and 11(d) of the Charter of Rights and Freedoms: *R. v. Tarrant* (1984), 13 C.C.C. (3d) 219, 10 D.L.R. (4th) 751 (B.C.C.A.); *R. v. Rogers*, [1984] 6 W.W.R. 89, 34 Sask. R. 284 (C.A.).

## Adjudication

### FINDING OF GUILT, CONVICTION, ORDER OR DISMISSAL.

**804.** When the summary conviction court has heard the prosecutor, defendant and witnesses, it shall, after considering the matter, convict the defendant, discharge him under section 736, make an order against the defendant or dismiss the information, as the case may be. R.S., c. C-34, s. 739; R.S.C. 1985, c. 27 (1st Supp.), s. 178.

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736 with s. 730.

### CROSS-REFERENCES

Section 806 requires a minute or memorandum of the order of the court be made where a conviction is recorded of an order made. An accused may request an order of dismissal under s. 808.

See s. 809 for costs. See ss. 813 and 830 for rights of appeal in summary conviction matters and ss. 812 to 838 for procedure.

## SYNOPSIS

This section states the options of the summary conviction court after hearing the prosecutor, defendant and witnesses. It shall convict, discharge, make an order or dismiss the information.

## ANNOTATIONS

**Motion for dismissal / directed verdict** [*Also see notes under s. 650*] – In *Vander-Beek and Albright v. The Queen* (1970), 2 C.C.C. (2d) 45, 12 C.R.N.S. 168 (S.C.C.), at trial the motion of the two appellants for dismissal at the conclusion of the Crown's case on the ground that there was no evidence upon which they could be convicted was dismissed and their immediately succeeding motion that they be acquitted on the ground that there was insufficient evidence for conviction was reserved by the judge until he heard all of the evidence. Their counsel took no further part in the evidence, even when the third accused testified to raise a reasonable doubt on his part at the expense of his other two co-accused. The trial judge acquitted Ellsworth on his evidence and, excluding his evidence as against the two co-accused, acquitted them. It was held (9:0) that the case was not concluded until all of the evidence was in and that all the testimony heard was evidence for or against each accused. Further, *per* Laskin, J., the accused's closing of his case at the conclusion of the Crown's case does not allow a co-accused to separate his trial from the joint trial.

At the close of the Crown's case the trial judge, if requested by the defendant, must rule whether or not a *prima facie* case has been established: *R. v. Kennedy* (1973), 11 C.C.C. (2d) 263, 21 C.R.N.S. 251 (Ont. C.A.), *apld* *R. v. Snyder* (1974), 16 C.C.C. (2d) 331, [1974] 3 W.W.R. 372 (Sask.Q.B.).

A trial Judge must dispose of a motion for dismissal before he may put the defendant to his election as to calling evidence: *R. v. Angelatoni* (1975), 28 C.C.C. (2d) 179, 31 C.R.N.S. 342 (Ont. C.A.).

**Charter remedies** – In addition to the dispositions set out in this section, the summary conviction court may enter a stay of proceedings pursuant to s. 24(1) of the Charter of Rights and Freedoms where such a remedy is appropriate for violation of a provision of the Charter: *R. v. Cutforth*, [1988] 1 W.W.R. 274 (Alta. C.A.).

**Other notes** – Failure of the Crown to notify a defendant, who neither himself nor by agent or counsel was present for the verdict, of his conviction constitutes a denial of natural justice: *R. v. Welsh*, [1968] 4 C.C.C. 243 (Sask. Q.B.).

**805. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 179.]**

**MEMO OF CONVICTION OR ORDER / Warrant of committal / Admissibility of certified copy.**

**806. (1)** Where a defendant is convicted or an order is made in relation to the defendant, a minute or memorandum of the conviction or order shall be made by the summary conviction court indicating that the matter was dealt with under this Part and, on request by the defendant, the prosecutor or any other person, the court shall cause a conviction or order in Form 35 or 36, as the case may be, and a certified copy of the conviction or order to be drawn up and shall deliver the certified copy to the person making the request.

**(2)** Where a defendant is convicted or an order is made against him, the summary conviction court shall issue a warrant of committal in Form 21 or 22, and section 528 applies in respect of a warrant of committal issued under this subsection.

**(3) Where a warrant of committal in Form 21 is issued by a clerk of a court, a copy of the warrant of committal, certified by the clerk, is admissible in evidence in any proceeding. R.S., c. C-34, s. 741; 1972, c. 13, s. 64; 1994, c. 44, s. 80.**

#### CROSS-REFERENCES

Section 734 deals with execution of warrant of committal. The accused is taken, together with the warrant, to the prison named therein. The delivering officer is given a receipt in Form 43 detailing the state and condition of accused upon delivery.

The accused may request an order of dismissal under s. 808. See s. 809 for costs. Also see references cited under s. 804.

#### SYNOPSIS

This section provides that upon a conviction or the making of an order by the summary conviction court, there shall be a memo recording same made up, and that a party is entitled to a certified copy of the conviction or order on request (subsec. (1)). In these circumstances, there shall also be a warrant of committal issued, which may be enforced by endorsement as provided for in s. 528 (subsec. (2)).

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#### DISPOSAL OF PENALTIES WHEN JOINT OFFENDERS.

**807. Where several persons join in committing the same offence and on conviction each is adjudged to pay an amount to a person aggrieved, no more shall be paid to that person than an amount equal to the value of the property destroyed or injured or the amount of the injury done, together with costs, if any, and the residue of the amount adjudged to be paid shall be applied in the manner in which other penalties imposed by law are directed to be applied. R.S., c. C-34, s. 742.**

#### CROSS-REFERENCES

Sections 725 to 727.8 govern restitution payments to aggrieved persons. Also see s. 737(2)(e) for terms of probation order.

Sections 722(4), 727.3 and 727.8(4) and (5) deal with application of money penalties. A V.F.S. under s. 727.9 is a payment to a fund to assist victims as prescribed by the Governor in Council, not a payment to a person aggrieved, and does not fall within s. 807.

#### SYNOPSIS

This section provides that the total of multiple payments made to the victim by multiple convicted accused shall not exceed the damage done to that victim, plus costs, and that any excess shall be applied against other penalties imposed by law.

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#### ORDER OF DISMISSAL / Effect of certificate.

**808. (1) Where the summary conviction court dismisses an information, it may, if requested by the defendant, draw up an order of dismissal and shall give to the defendant a certified copy of the order of dismissal.**

**(2) A copy of an order of dismissal, certified in accordance with subsection (1) is, without further proof, a bar to any subsequent proceedings against the defendant in respect of the same cause. R.S., c. C-34, s. 743.**

#### CROSS-REFERENCES

Section 570 governs records of conviction, acquittal and orders in non-jury trials.

Under s. 795, special pleas in ss. 607 to 610 apply in summary conviction proceedings. See s. 11(h) of the Charter for relation to provisions of subsec. (2).

Rights of appeal of informant, Attorney General or his agent are dealt with in ss. 813(b) and 830(1). See s. 809 for costs.



## SYNOPSIS

This section gives a defendant for whom an information has been dismissed the right to request and receive a certified copy of the order of dismissal, and such copy acts, absent other proof, as a bar to subsequent proceedings on the same subject-matter.

## ANNOTATIONS

The procedure under this section does not supplant the common law right to raise the special pleas of *autrefois* but merely serves to supplement those rights and provide a second and convenient method of proving a previous acquittal to bar subsequent proceedings. Further, the plea of *autrefois acquit* is available where following a plea of not guilty the Crown offers no evidence: *R. v. Riddle* (1979), 48 C.C.C. (2d) 365, [1980] 1 W.W.R. 592 (S.C.C.) (7:0).

It was also held in *R. v. Riddle, supra*, that the drawing up of the order of dismissal and the giving of a certified copy of the order to the accused is a purely administrative act which may be performed at any time subsequent to the trial. The doctrine of *functus officio* has no application to such acts.

An order of dismissal under this section is not a bar to further proceedings where the magistrate was without jurisdiction to hear the charge because the information was not sworn: *R. v. Nazaroff* (1959), 123 C.C.C. 134 (B.C.S.C.).

An order of dismissal obtained after the dismissal of an information because the offence charged was *ultra vires* Parliament is not a bar to a subsequent charge under valid provincial legislation for the same conduct: *R. v. Logan* (1981), 64 C.C.C. (2d) 238, 25 C.R. (3d) 35 (N.S.S.C. App. Div.).

In *Re R. v. Rothman*, [1966] 4 C.C.C. 316, [1966] 2 O.R. 481 (H.C.J.), it was stated that a certificate issued under s. 715 [now s. 808] is only a bar to subsequent proceedings by way of summary conviction and not to proceedings by way of indictment.

Where the accused has pleaded not guilty and the Crown, because it was refused an adjournment, offered no evidence so that the charge was dismissed the accused is entitled to request a certificate under this section: *R. v. Canadian Pacific Ltd.* (1976), 32 C.C.C. (2d) 14, [1977] 1 W.W.R. 203 (Alta. S.C. App. Div.) (5:0) and *semble*, *R. v. Davis and Lakehead Bag Co. Ltd.* (1977), 34 C.C.C. (2d) 388, 37 C.R.N.S. 302 (Ont. C.A.).

Similarly, where the Crown, having been refused an amendment to the charge, offered no evidence the magistrate properly dismissed the charge and issued the certificate under this section: *R. v. Pirri* (1978), 41 C.C.C. (2d) 499, 27 N.S.R. (2d) 41 (S.C. App. Div.).

**COSTS / Order set out / Costs are part of fine / Where no fine imposed / Definition of "costs".**

**809. (1) The summary conviction court may in its discretion award and order such costs as it considers reasonable and not inconsistent with such of the fees established by section 840 as may be taken or allowed in proceedings before that summary conviction court, to be paid**

- (a) to the informant by the defendant, where the summary conviction court convicts or makes an order against the defendant; or
- (b) to the defendant by the informant, where the summary conviction court dismisses an information.

**(2) An order under subsection (1) shall be set out in the conviction, order or order of dismissal, as the case may be.**

**(3) Where a fine or sum of money or both are adjudged to be paid by a defendant and a term of imprisonment in default of payment is imposed, the defendant is, in default of payment, liable to serve the term of imprisonment imposed, and for the purposes of this subsection, any costs that are awarded against the defendant shall be deemed to be part of the fine or sum of money adjudged to be paid.**

(4) Where no fine or sum of money is adjudged to be paid by a defendant, but costs are awarded against the defendant or informant, the person who is liable to pay them is, in default of payment, liable to imprisonment for one month.

(5) In this section, "costs" includes the costs and charges, after they have been ascertained, of committing and conveying to prison the person against whom costs have been awarded. R.S., c. C-34, s. 744.

#### CROSS-REFERENCES

See ss. 826, 834(1) and 839(3) for other costs provisions in summary conviction proceedings. Specific costs provisions in indictable matters include s. 599(3) for change of venue granted at prosecution's request, ss. 728 to 729 for defamatory libel, and s. 601(5) and (6) for adjournment granted because accused was misled by the form of the indictment.

#### SYNOPSIS

Costs may be ordered in summary conviction proceedings (subsec. (1), s. 840).

If the accused is ordered to pay both a fine and costs the latter will be deemed to be part of the fine for the purposes of any term of imprisonment that is imposed for non-payment of the fine (subsec. (3)).

If the accused is not fined, but is ordered to pay costs, the maximum period of incarceration in default of payment that can be imposed is 2 months (subsec. (4)).

#### ANNOTATIONS

The summary conviction Court has no power to grant an adjournment conditional on the party requesting it paying the costs of the day and has no power to award costs to the defendant's counsel: *R. v. Cross* (1978), 42 C.C.C. (2d) 277, 6 C.R. (3d) 16 (P.E.I.S.C. in banco).

A summary conviction court is a court of competent jurisdiction within the meaning of s. 24(1) of the Charter for the purpose of awarding costs against the Crown as a remedy for a Charter violation, in this case, delayed disclosure: *R. v. Pang* (1994), 95 C.C.C. (3d) 60, 35 C.R. (4th) 371, [1994] 4 W.W.R. 442 (Alta. C.A.).

## *Sureties to Keep the Peace*

WHERE INJURY OR DAMAGE FEARED / Duty of justice / Adjudication / Conditions / Idem / Forms / Procedure.

810. (1) An information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person will cause personal injury to him or her or to his or her spouse or child or will damage his or her property.

(2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.

(3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the person on whose behalf the information was laid has reasonable grounds for his or her fears,

- (a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance, including the conditions set out in subsections (3.1) and (3.2), as the court considers desirable for securing the good conduct of the defendant; or

(b) commit the defendant to prison for a term not exceeding twelve months if he or she fails or refuses to enter into the recognizance.

(3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the recognizance and that the defendant surrender any firearms acquisition certificate that the accused possesses and, where the justice or summary conviction court decides that it is not desirable, in the interests of the safety of the defendant or of any other person, for the defendant to possess any of those things, the justice or summary conviction court may add the appropriate condition to the recognizance.

**NOTE:** Subsection (3.1) replaced 1995, c. 39, s. 157 by subssecs. (3.1) to (3.12) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Conditions / Surrender, etc. / Reasons.*

*(3.1) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the defendant or of any other person, to include as a condition of the recognizance that the defendant be prohibited from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, for any period specified in the recognizance and, where the justice or summary conviction court decides that it is so desirable, the justice or summary conviction court shall add such a condition to the recognizance.*

*(3.11) Where the justice or summary conviction court adds a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall specify in the order the manner and method by which*

*(a) the things referred to in that subsection that are in the possession of the accused shall be surrendered, disposed of, detained, stored or dealt with; and*

*(b) the authorizations, licences and registration certificates held by the person shall be surrendered.*

*(3.12) Where the justice or summary conviction court does not add a condition described in subsection (3.1) to a recognizance order, the justice or summary conviction court shall include in the record a statement of the reasons for not adding the condition.*

(3.2) Before making an order under subsection (3), the justice or the summary conviction court shall consider whether it is desirable, in the interests of the safety of the informant, of the person on whose behalf the information was laid or of that person's spouse or child, as the case may be, to add either or both of the following conditions to the recognizance, namely, a condition

(a) prohibiting the defendant from being at, or within a distance specified in the recognizance from, a place specified in the recognizance where the person on whose behalf the information was laid or that person's spouse or child, as the case may be, is regularly found; and

(b) prohibiting the defendant from communicating, in whole or in part, directly or indirectly, with the person on whose behalf the information was laid or that person's spouse or child, as the case may be.

(4) A recognizance and committal to prison in default of recognizance under subsection (3) may be in Forms 32 and 23 respectively.

**NOTE:** Subsection (4.1) enacted by 1995, c. 22, s. 8 (to come into force by order of the



Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Modification of recognizance.*

(4.1) *The justice or the summary conviction court may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.*

**(5) The provisions of this Part apply, with such modifications as the circumstances require, to proceedings under this section. R.S., c. C-34, s. 745; 1974-75-76, c. 93, s. 88; 1980-81-82-83, c. 125, s. 28; 1991, c. 40, s. 33; 1994, c. 44, s. 81.**

## CROSS-REFERENCES

An information laid before a justice under this section does not contain a formal charge. Under s. 524, a similar procedure without laying an information initiates a misconduct hearing. The inquiry is to determine whether evidence indicates the informant had reasonable grounds for fear, not guilt or innocence of accused. Committal is for failure or refusal to enter recognizance. No plea is entered.

Breach of recognizance is a summary conviction offence under s. 811.

An accused under Part XXVII proceedings may appeal an order against him pursuant to s. 813(b). A party to Part XXVII proceedings may appeal against determination of a summary conviction court under s. 830(1), on specified grounds.

## SYNOPSIS

This section authorizes a Provincial Court judge or justice of the peace to require an individual to enter into a recognizance (sometimes known as a "peace bond") where grounds exist to believe that he or she will cause injury to, or damage the property of another person, or will injure the spouse or child of the other person. The application must be supported by an information and there must be a hearing (subsecs. (1) and (2)).

The recognizance can be for a period of up to 12 months and may contain such conditions as the judge considers desirable for ensuring the defendant's good conduct. If the defendant refuses to sign the recognizance he or she can be imprisoned for up to 12 months (subsec. (3)). Subsections (3.1) and (3.2) require the justice to consider inclusion of specific terms respecting possession of firearms, ammunition or explosives, non-attendance at certain premises and non-communication.

## ANNOTATIONS

**Subsec. (1)** – The provisions respecting the sufficiency of informations apply to an information under this section: *R. v. Boyko* (1978), 43 C.C.C. (2d) 408 (Ont. Prov. Ct.).

This section is *intra vires* Parliament, being a valid exercise of the criminal law power although it is directed at prevention of harm and does not create an offence: *R. v. Dhesi* (1983), 9 C.C.C. (3d) 149, 4 D.L.R. (3d) 714, [1984] 1 W.W.R. 185 (B.C.S.C.).

**Subsec. (3)** – In addition to the authority of subsec. (3)(a) a judge has common law jurisdiction on facts established to his satisfaction to bind anyone over to keep the peace: *R. v. White, ex p. Chohan*, [1969] 1 C.C.C. 19, 5 C.R.N.S. 30 *sub nom. R. v. Chohan* (B.C.S.C.).

Along with his common law jurisdiction the judge must have before him sufficient evidence and he must first accord any person who might be affected by such jurisdiction an opportunity to be fully heard: *R. v. Shaben* (1972), 8 C.C.C. (2d) 422, 19 C.R.N.S. 35 *sub nom. Shaben, Ferrar and Talbot (Re)* (Ont.H.C.J.).

The judge's common law jurisdiction to dispense "preventative justice" must not be exercised arbitrarily or unfairly and without giving the person bound over notice and an opportunity to be heard. It is a denial of natural justice resulting in a loss of jurisdiction to make an order against the petitioner on an application under this section when she has been given no notice that she, as well as the defendant, would be bound over: *R. v. Compton* (1978), 42 C.C.C. (2d) 163, 3 C.R. (3d) S-7 (B.C.S.C.).

A defendant on a charge of assault need not be specifically warned that the judge intends to dismiss that charge but exercise his common law jurisdiction to bind the defendant over to keep the peace: *R. v. Broomes* (1984), 12 C.C.C. (3d) 220 (Ont. H.C.J.).

The ordinary rules precluding admission of evidence of an accused's disposition for violence do not apply to proceedings under subsec. (3). The actions of the defendant in the past may well assist the court in determining the reasonableness of the informant's fears and the likelihood that the defendant will carry out his threats: *R. v. Patrick* (1990), 75 C.R. (3d) 222 (B.C. Co. Ct.).

**Subsec. (5)** – The person against whom an Information has been laid under this section may be dealt with pursuant to the provisions of Part XVI including s. 515 of the Criminal Code. Thus, the judge may order the release of the accused on an undertaking with conditions pursuant to s. 515 pending the determination of the proceedings under this section: *R. v. Wakelin* (1991), 71 C.C.C. (3d) 115 (Sask. C.A.). *Contra: MacAusland (Informant) v. Pyke* (1995), 96 C.C.C. (3d) 373, 37 C.R. (4th) 321, 139 N.S.R. (2d) 142 (S.C.).

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**WHERE FEAR OF SEXUAL OFFENCE / Duty of provincial court judge / Adjudication / Judge may vary recognizance / Other provisions to apply.**

**810.1 (1)** Any person who fears on reasonable grounds that another person will commit an offence under section 151, 152, 155 or 159, subsection 160(2) or (3), section 170 or 171, subsection 173(2) or section 271, 272 or 273, in respect of one or more persons who are under the age of fourteen years, may lay an information before a provincial court judge, whether or not the person or persons in respect of whom it is feared that the offence will be committed are named.

(2) A provincial court judge who receives an information under subsection (1) shall cause the parties to appear before the provincial court judge.

(3) The provincial court judge before whom the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for the fear, order the defendant to enter into a recognizance and comply with the conditions fixed by the provincial court judge, including a condition prohibiting the defendant from engaging in any activity that involves contact with persons under the age of fourteen years and prohibiting the defendant from attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre, for any period fixed by the provincial court judge that does not exceed twelve months.

(4) The provincial court judge may, on application of the informant or the defendant, vary the conditions fixed in the recognizance.

(5) Subsections 810(4) and (5) apply, with such modifications as the circumstances require, to recognizances made under this section. 1993, c. 45, s. 11.

#### CROSS-REFERENCES

Also see s. 161 which allows for the making of a prohibition order where the accused is actually found guilty of one of the offences named in this section. The recognizance made under this section is similar to the recognizance under s. 810 and so reference should be made to cases noted under that section.

#### SYNOPSIS

This section allows anyone to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance including conditions that he

not engage in activity that involves contact with persons under 14 years of age and prohibiting him from attending certain places where persons under 14 years of age are likely to be present. The informant must fear, on reasonable grounds, that the defendant will commit one of the specified sexual offences in respect of children under 14 years of age. The judge makes the order where satisfied on evidence that the informant has reasonable grounds for the fear. The maximum duration of the order is 12 months and the conditions may be varied by the judge on application of the informant or the defendant. Note that, unlike s. 810, no express provision is made for committing the defendant to prison if he refuses to sign the recognizance.

#### ANNOTATIONS

The principles of fundamental justice in s. 7 of the Charter require that there be a residual discretion to issue process. Subsection (2) must therefore be read down so that the word "may" should replace the word "shall": *R. v. Budreo* (1996), 104 C.C.C. (3d) 245 (Ont. Ct. (Gen. Div.)).

The inclusion of the term "community centre" in the restrictions imposed under subsec. (3), without a requirement that children be reasonably expected to be there, is overly broad and therefore a violation of s. 7 of the Charter. The appropriate remedy is to declare the term "community centre" inoperative. The provision is otherwise valid: *R. v. Budreo, supra*.

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#### BREACH OF RECOGNIZANCE.

**811. A person bound by a recognizance under section 810 or 810.1 who commits a breach of the recognizance is guilty of**

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction. R.S., c. C-34, s. 746; 1993, c. 45, s. 11; 1994, c. 44, s. 82.

#### ANNOTATIONS

An allegation that the defendant violated the terms of a recognizance made under s. 810 must be charged under this section. The general provisions in s. 145 respecting breach of recognizance are not applicable: *R. v. Simanek* (1993), 82 C.C.C. (3d) 576 (Ont. C.A.).

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## Appeal

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#### DEFINITION OF "APPEAL COURT".

**812. For the purposes of sections 813 to 828 "appeal court" means**

- (a) in the Province of Ontario, the Ontario Court (General Division) sitting in the region, district or county or group of counties where the adjudication was made;
- (b) in the Province of Quebec, the Superior Court;
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, the Court of Queen's Bench;
- (e) [*Repealed*. 1992, c. 51, s. 43(2).]
- (f) in the Province of Prince Edward Island, the Trial Division of the Supreme Court;
- (g) in the Province of Newfoundland, the Trial Division of the Supreme Court;
- (h) in the Yukon Territory and Northwest Territories, a judge of the Supreme Court thereof. R.S., c. C-34, s. 747; 1972, c. 13, s. 65, c. 17, s. 2; 1974-75-76,



c. 19, s. 1; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 11 (1st Supp.), s. 2; c. 27 (2nd Supp.), s. 10.; 1990, c. 16, s. 7; 1990, c. 17, s. 15; 1992, c. 51, s. 43.

**NOTE:** Paragraph (h) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(h) *in the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court.*

#### CROSS-REFERENCES

Section 813 confers rights of appeal. Section 815 deals with filing of notice of appeal. Appeal procedures are governed by ss. 821 to 823 and s. 482(2). Sections 816 and 819 authorize the judicial interim release of an appellant who was a defendant in summary conviction proceedings.

Sections 817 and 818 govern appeals by a prosecutor other than the Attorney General or counsel acting on his behalf. Appeals under s. 813 are determined on the record in accordance with ss. 683 and 689, except for ss. 683(3) and 686(5), made applicable to summary conviction appeals by s. 822(1). An appeal may be determined by a trial *de novo* under s. 822(4) to (7) in certain circumstances. Further appeal lies under s. 839(1)(a).

#### SYNOPSIS

This section defines “appeal court” for each of the provinces and territories for the purposes of appeals from summary conviction.

#### ANNOTATIONS

**Para. (c)** – A County Court Judge who has heard summary conviction appeals in criminal proceedings has jurisdiction to deliver judgment after his resignation on reserved appeals if provincial legislation so provides. Such legislation is validly enacted under the province’s power to legislate with respect to the constitution, maintenance and organization of the Courts pursuant to s. 92(14) of the British North America Act, 1867: *R. v. Ritcey* (1980), 50 C.C.C. (2d) 481, 106 D.L.R. (3d) 1 (S.C.C.) (7:0).

#### APPEAL BY DEFENDANT, INFORMANT OR ATTORNEY GENERAL.

**813. Except where otherwise provided by law,**

- (a) the defendant in proceedings under this Part may appeal to the appeal court
  - (i) from a conviction or order made against him,
  - (ii) against a sentence passed on him, or
  - (iii) against a verdict of unfit to stand trial or not criminally responsible on account of mental disorder; and
- (b) the informant, the Attorney General or his agent in proceedings under this Part may appeal to the appeal court
  - (i) from an order that stays proceedings on an information or dismisses an information,
  - (ii) against a sentence passed upon a defendant, or
  - (iii) against a verdict of not criminally responsible on account of mental disorder or unfit to stand trial,

and the Attorney General of Canada or his agent has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province or his agent has under this paragraph. R.S., c. C-34, s. 748; R.S.C. 1985, c. 27 (1st Supp.), s. 180; 1991, c. 43, s. 9.

#### CROSS-REFERENCES

See s. 812 for definition of “appeal court”, s. 785 for “informant” and “proceedings” and s. 2 for “Attorney General”. “Prosecutor” as used throughout Part XXVII does not appear in s. 813. See

ss. 675 and 676 for corresponding rights of appeal in proceedings by indictment by accused and Attorney General respectively. Also see reference cited under s. 812.

See s. 672.1 for definition of "verdict of not criminally responsible on account of mental disorder" and s. 2 for definition of "unfit to stand trial".

## SYNOPSIS

This section gives rights of appeal, except where otherwise provided by law, to defendants against conviction, order, sentence, finding of unfitness or verdict of not criminally responsible and to informants or the Crown (provincial or federal) against stay, dismissal or sentence.

## ANNOTATIONS

**Right of appeal [para. (a)(i)]** – It is the nature of the trial proceedings, and not the ultimate conviction that determines the appeal procedure so where a summary conviction is the result of an indictable offence trial, appeal only lies under Part XXI of the Code: *R. v. Yaworski* (1959), 124 C.C.C. 151, 31 C.R. 55 (Man. C.A.).

Imposition of sentence is not a prerequisite to the hearing of an appeal against conviction: *R. v. Benson* (1978), 40 C.C.C. (2d) 271 (B.C.C.A.); *R. v. MacNeil* (1979), 46 C.C.C. (2d) 383 (Ont. C.A.). *Contra*: *R. v. Hofer* (1977), 36 C.C.C. (2d) 426, [1977] 4 W.W.R. 645 (Man. Co. Ct.).

**Procedure [para. (a)(ii)]** – Unless an appeal is specifically lodged against sentence the appeal court has no jurisdiction to deal with it: *R. v. Praisley*, [1965] 1 C.C.C. 316, 44 C.R. 296 (B.C.C.A.), and *R. v. Ferencsik*, [1970] 4 C.C.C. 166, 10 C.R.N.S. 273 (Ont. C.A.).

**Crown appeal generally [para. (b)(i)]** – Where a summary conviction Court refuses to dispose of a case on the ground that it lacks jurisdiction the only remedy is for the informant to *mandamus* the Court into dismissing the information and then appeal that dismissal: *R. ex rel. Hickman v. Marshall* (1960), 127 C.C.C. 76, 32 C.R. 271 (Ont. C.A.). [However, also see s. 830.]

Similarly where before plea objections are raised to an information and the summary conviction Court endorses it "no jurisdiction" no appeal lies under this section: *R. ex rel. Lees v. Wacker et al.* (1958), 121 C.C.C. 185, 28 C.R. 214 (Ont. C.A.).

A notice of appeal styled as "Her Majesty the Queen, (Informant) Appellant" and signed on her behalf by the Attorney-General's Agent as her solicitor is proper: *R. v. Genser & Sons Ltd.*, [1969] 3 C.C.C. 87, 6 C.R.N.S. 140 (Man. C.A.).

It was held prior to the amendment of this paragraph permitting an appeal against a stay of proceedings as well as a dismissal that this paragraph gives the Crown a right of appeal only where the disposition by the summary conviction Court is in the nature of a judgment or verdict of acquittal or what is tantamount to an acquittal, that is, a disposition made after the issue raised in the information has been tried on the merits, in law or on the facts. An order quashing an information on an objection being taken to its form does not give a right of appeal. Dispositions which would give rise to a right of appeal are, for example, where the charge is dismissed on the ground that the information does not disclose an offence known to law, where the offence alleged is *ultra vires*, or where the prosecutor fails to appear. Where the summary conviction Court dismisses an information for failure of the Crown to supply particulars as previously ordered, such disposition gives the Crown a right of appeal only where the failure to provide particulars left the information in a state where it disclosed no offence known to law. Otherwise, the order is not an acquittal or tantamount to an acquittal as it does not purport to dispose of the issue raised in the information on the merits, in law or on the facts, and the Crown's remedy is by way of *mandamus*: *R. v. Canadian Pacific Ltd.* (1976), 32 C.C.C. (2d) 14, [1977] 1 W.W.R. 203 (Alta. S.C. App. Div.) (5:0).

An order quashing an information for failure to comply with s. 581 does not constitute

an order dismissing an information and the appeal should be taken pursuant to s. 830: *R. v. Moore* (1987), 38 C.C.C. (3d) 471, 2 M.V.R. (2d) 169 (Ont. C.A.).

**Crown appeal from dismissal of information** – An order dismissing an information for want of prosecution is an appealable order: *R. v. Allen* (1960), 128 C.C.C. 409, 34 C.R. 240 (B.C.Co.Ct.); *Re R. and Yanke* (1983), 4 C.C.C. (3d) 26 (Sask. C.A.).

It is not necessary for appeal purposes that a formal dismissal order be taken out; it is sufficient if the trial Court made a finding of not guilty: *R. v. Leblanc*, [1964] 3 C.C.C. 40 (N.S.Co.Ct.).

Where a piece of evidence essential to the success of the prosecution is ruled inadmissible the Crown may elect to call no further evidence and proceed immediately to appeal upon dismissal of the charge: *R. v. Aleksich* (1979), 50 C.C.C. (2d) 62 (B.C.C.A.); *Re R. and Croquet* (1973), 12 C.C.C. (2d) 331, 23 C.R.N.S. 374, [1973] 5 W.W.R. 654 (B.C.C.A.); and similarly *R. v. Davis and Lakehead Bag Co. Ltd.* (1977), 34 C.C.C. (2d) 388, 37 C.R.N.S. 302 (Ont. C.A.) where as a result of certain rulings the verdict was a “foregone conclusion”.

Dismissal of a charge prior to plea on the basis that the enactment under which the charge was laid is *ultra vires* is a dismissal within the meaning of this paragraph against which the Crown may appeal: *R. v. Miracle Mart Inc.* (1982), 68 C.C.C. (2d) 242, 67 C.P.R. (2d) 80 (Que. S.C.).

**Appeal by informant** – An appellant is not entitled to be represented by an agent: *R. v. Hammond* (1972), 24 C.R.N.S. 309 (Ont.Co.Ct.).

An appeal against dismissal brought by the informant does not abate with his death: *R. v. Fillmore* (1974), 17 C.C.C. (2d) 66, 27 C.R.N.S. 357 (N.S.Co.Ct.).

While the informant has an unfettered right to appeal to the summary conviction appeal court from an order staying proceedings on an information or dismissing an information whether or not the prosecution at trial was conducted by an agent of the Attorney-General, the Attorney-General or his agent may intervene, either by taking carriage of the appeal itself or by indicating that he does not wish that the matter be further prosecuted by way of appeal. Where there is such active opposition by the Attorney-General or his agent, then the appeal by the informant must be dismissed: *Bouree v. Parsons* (1986), 29 C.C.C. (3d) 126 (Ont. Dist. Ct.).

#### MANITOBA AND ALBERTA / Saskatchewan / British Columbia / Yukon and Northwest Territories.

**814. (1)** In the Provinces of Manitoba and Alberta, an appeal under section 813 shall be heard at the sittings of the appeal court that is held nearest to the place where the cause of the proceedings arose, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

**(2)** In the Province of Saskatchewan, an appeal under section 813 shall be heard at the sittings of the appeal court at the judicial centre nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

**(3)** In the Province of British Columbia, an appeal under section 813 shall be heard at the sittings of the appeal court that is held nearest to the place where the adjudication was made, but the judge of the appeal court may, on the application of one of the parties, appoint another place for the hearing of the appeal.

**(4)** In the Yukon Territory and the Northwest Territories, an appeal under section 813 shall be heard at the place where the cause of the proceedings arose or at the place nearest thereto where a court is appointed to be held. R.S., c. C-34, s. 749; 1984, c. 41, s. 2.

**NOTE:** Subsection (4) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999).



The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Territories.*

*(4) In the Yukon Territory, the Northwest Territories and Nunavut, an appeal under section 813 shall be heard at the place where the cause of the proceedings arose or at the place nearest thereto where a court is appointed to be held.*

CROSS-REFERENCES

Section 822(4) to (7) is authority to have appeal heard and determined as trial *de novo*. Also see references cited under s. 812.

NOTICE OF APPEAL / Extension of time.

**815. (1) An appellant who proposes to appeal to the appeal court shall give notice of appeal in such manner and within such period as may be directed by rules of court.**

**(2) The appeal court or a judge thereof may at any time extend the time within which notice of appeal may be given.** R.S., c. C-34, s. 750; 1972, c. 13, s. 66; 1974-75-76, c. 93, s. 89.

CROSS-REFERENCES

Section 482(2) is authority for the appeal court to pass rules consistent with the Criminal Code or other federal Acts governing procedures on appeals under s. 813. These rules determine the form of the notice of appeal, filing and service provisions.

An order, conviction or sentence must be appealed to challenge its validity under s. 820(2) and the onus is on the accused to establish appeal. Under s. 813, payment of fine does not waive accused's right of appeal.

Payment of a fine or other pecuniary penalty may be suspended by the court pending the determination of the appeal as authorized by the incorporation of s. 683(5) by s. 822(1). Section 689 authorizes stay in respect of restitution orders and is available to summary conviction appeals under s. 822(1).

SYNOPSIS

This section states that the appellant shall give notice of appeal according to the rules of court and that the appeal court or a judge thereof may extend the time for notice to be given.

ANNOTATIONS

**Notice of appeal [subsec. (1)]** – Failure to include the appellant's address for service as required by the rule of Court is not fatal to hearing of the appeal. The proper procedure is to permit amendment of the notice and proceed with the hearing of the appeal: *R. v. Saad* (1978), 45 C.C.C. (2d) 318 (Que. C.A.).

**Extension of time generally / Extension of time sought by Crown** – The Court has no power to grant the Crown an extension of time *ex parte* without notice to the accused whether the application for the extension is made after expiration of the appeal period: *Neal v. A.-G. Sask. et al.* (1977), 56 C.C.C. (2d) 128, [1977] 2 S.C.R. 624, 115 D.L.R. (3d) 20 (9:0); or before expiration of the appeal period: *R. v. Taylor* (1980), 56 C.C.C. (2d) 86, 28 N.B.R. (2d) 704 (Q.B.).

In *R. v. Ruffo* (1982), 1 C.C.C. (3d) 358 (Ont. C.A.) the Court considered *Neal v. A.-G. Sask. et al.*, *supra*, but held that in exceptional circumstances the Court could grant the Crown an extension of time on an *ex parte* application as where it was impossible to give notice of the application because the respondent could not be found. In the absence of the most unusual circumstances there must be evidence by way of affidavit, documen-

tary evidence or *viva voce* testimony as to the basis for the *ex parte* application. On the other hand, where objection to an order for an extension of time is taken at the hearing of the appeal it would be open to the appeal Court to grant an extension, on notice at that time, in which event the notice of appeal could then be re-served.

The order extending time for service on the accused/respondent must also provide for an extension of time in which to file the notice of appeal. A Judge on an application for extension of time has no power to validate the prior service of a notice of appeal made out of time. Where the notice of appeal is served out of time it must be re-served within the extended time: *R. v. Holmes* (1982), 2 C.C.C. (3d) 471, 18 M.V.R. 92 (Ont. C.A.). *Contra: R. v. Fenrich*, [1985] 6 W.W.R. 269 (Sask. Q.B.), where it was held that the court has power to grant an order *nunc pro tunc* to validate service already made.

There being no evidence that the Crown had an intention to appeal within the appeal period and no explanation having been offered for the long delay an extension of time should not be granted: *R. v. Osgoode Sand & Gravel Ltd.* (1978), 41 C.C.C. (2d) 503 (Ont. Div. Ct.).

**Principles in granting extension of time** – Although subsec. (2) was probably enacted to prevent miscarriages of justice, extensions of time should only be granted for substantial reasons and in exercising his discretion a Judge should consider: (1) whether the party applying has shown a *bona fide* intention to appeal while the right of appeal existed; (2) whether it is at least arguable that the judgment sought to be appealed is wrong; and (3) whether the appellant acted with reasonable diligence or has a reasonable excuse for the delay in not having launched his appeal within the prescribed time: *R. v. Cole* (1976), 33 C.C.C. (2d) 242 (Nfld. Dist. Ct.).

**Setting aside dismissal of appeal** – The appeal Court has a discretionary jurisdiction to rescind a notice of abandonment filed by the accused, set aside the dismissal of his appeal and restore the appeal for hearing on the merits: *R. v. Robertson* (1978), 45 C.C.C. (2d) 344 (Ont. C.A.).

## Interim Release of Appellant

### UNDERTAKING OR RECOGNIZANCE OF APPELLANT / Application of certain provisions of section 525.

**816. (1)** A person who was the defendant in proceedings before a summary conviction court and by whom an appeal is taken under section 813 shall, if he is in custody, remain in custody unless the appeal court at which the appeal is to be heard orders that the appellant be released

- (a) on his giving an undertaking to the appeal court, without conditions or with such conditions as the appeal court directs, to surrender himself into custody in accordance with the order,
- (b) on his entering into a recognizance without sureties in such amount, with such conditions, if any, as the appeal court directs, but without deposit of money or other valuable security, or
- (c) on his entering into a recognizance with or without sureties in such amount, with such conditions, if any, as the appeal court directs, and on his depositing with that appeal court such sum of money or other valuable security as the appeal court directs,

and the person having the custody of the appellant shall, where the appellant complies with the order, forthwith release the appellant.

**(2)** The provisions of subsections 525(5), (6) and (7) apply with such modifications as the circumstances require in respect of a person who has been released from custody

**under subsection (1). R.S., c. C-34, s. 752; R.S., c. 2 (2nd Supp.), s. 16; 1974-75-76, c. 39, s. 91; R.S.C. 1985, c. 27 (1st Supp.), s. 181.**

#### CROSS-REFERENCES

Section 819 permits the hearing of an appeal to be expedited if not commenced within 30 days of the notice of appeal. There is no statutory right of review of an order made under s. 816 nor under subsec. (2) in the application of the provisions of s. 525(7).

Section 679(3) and (4) govern judicial interim release in indictable appeal proceedings.

Where the appellant under s. 813 is a private prosecutor, he is required by s. 817 to give an undertaking or enter into a recognizance. A private prosecutor must appear personally or by counsel at the sittings of the appeal court. Section 818 governs review by the court of appeal of an order of a justice under s. 817.

#### SYNOPSIS

This section provides for the granting of bail pending appeal to an accused appealing the decision of a summary conviction court. The court can order that the accused be released from custody on an undertaking or recognizance with or without sureties on deposit.

#### ANNOTATIONS

Bearing in mind that, generally, summary conviction offences are less serious, the principles governing release pending appeal on indictable matters as set out in s. 679 apply on an application under this section. Further, in Ontario, no rules having been adopted as to the proper procedure to be followed on the application, the provisions of the Criminal Rules relating to bail pending appeal in indictable matters should be applied by analogy: *R. v. Simpson* (1978), 44 C.C.C. (2d) 109 (Ont. Co. Ct.).

A judge of the summary conviction appeal Court has an inherent jurisdiction to stay the terms of a probation order pending an appeal to that Court: *R. v. Anderson* (1982), 70 C.C.C. (2d) 253 (Ont. Co. Ct.).

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#### UNDERTAKING OR RECOGNIZANCE OF PROSECUTOR / Condition / Appeals by Attorney General / Form of undertaking or recognizance.

**817. (1) The prosecutor in proceedings before a summary conviction court by whom an appeal is taken under section 813 shall, forthwith after filing the notice of appeal and proof of service thereof in accordance with section 815, appear before a justice, and the justice shall, after giving the prosecutor and the respondent a reasonable opportunity to be heard, order that the prosecutor**

**(a) give an undertaking as prescribed in this section; or**

**(b) enter into a recognizance in such amount, with or without sureties and with or without deposit of money or other valuable security, as the justice directs.**

**(2) The condition of an undertaking or recognizance given or entered into under this section is that the prosecutor will appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard.**

**(3) This section does not apply in respect of an appeal taken by the Attorney General or by counsel acting on behalf of the Attorney General.**

**(4) An undertaking under this section may be in Form 14 and a recognizance under this section may be in Form 32. R.S., c. 2 (2nd Supp.), s. 16.**

#### CROSS-REFERENCES

An order of a justice is reviewable by the court of appeal under s. 818.

See s. 785 for definition of "prosecutor", "proceedings" and "summary conviction court" which apply strictly to Part XXVII. Section 816 contains the judicial interim release provisions where the appellant is the accused.



See also references cited under s. 816.

## SYNOPSIS

Where the prosecutor, other than the Attorney General, is the appellant an undertaking or recognizance, with or without sureties or deposit containing a condition with respect to appearing for the hearing must be entered into before a justice of the peace. Both the prosecutor and the respondent must be given the opportunity to be heard before the justice.

## ANNOTATIONS

The failure to give the respondent an opportunity to be heard is a substantive, not procedural, error and a loss of the appeal Court's jurisdiction follows: *R. v. Esam Construction Ltd.* (1974), 15 C.C.C. (2d) 335, 2 O.R. (2d) 344 (H.C.J.).

In *Re Broadfoot and The Queen* (1977), 35 C.C.C. (2d) 493 (Ont. C.A.) it was held that this section is mandatory and while compliance therewith is not a condition precedent to the right of appeal it is a condition precedent to the hearing of the appeal.

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### APPLICATION TO APPEAL COURT FOR REVIEW / Disposition of application by appeal court / Effect of order.

818. (1) Where a justice makes an order under section 817, either the appellant or the respondent may, before or at any time during the hearing of the appeal, apply to the appeal court for a review of the order made by the justice.

(2) On the hearing of an application under this section, the appeal court, after giving the appellant and the respondent a reasonable opportunity to be heard, shall

(a) dismiss the application; or

(b) if the person applying for the review shows cause, allow the application, vacate the order made by the justice and make the order that in the opinion of the appeal court should have been made.

(3) An order made under this section shall have the same force and effect as if it had been made by the justice. R.S., c. 2 (2nd Supp.), s. 16; 1974-75-76, c. 93, s. 91.1.

## CROSS-REFERENCES

No similar right of review exists where a judicial interim release order has been determined respecting an accused who is an appellant under s. 819.

See references cited under s. 816.

## SYNOPSIS

This section provides that either party may apply to the summary conviction appeal court to review the order made by a justice of the peace with respect to the undertaking or recognizance of the appellant/prosecutor (see s. 817).

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### APPLICATION TO FIX DATE FOR HEARING OF APPEAL / Order fixing date.

819. (1) Where, in the case of an appellant who has been convicted by a summary conviction court and who is in custody pending the hearing of his appeal, the hearing of his appeal has not commenced within thirty days from the day on which notice of his appeal was given in accordance with the rules referred to in section 815, the person having the custody of the appellant shall, forthwith upon the expiration of those thirty days, apply to the appeal court to fix a date for the hearing of the appeal.

(2) On receiving an application under subsection (1), the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, fix a date for the hearing of the appeal and give such directions as it thinks necessary for expediting the hearing of the appeal. R.S., c. 2 (2nd Supp.), s. 16; 1974-75-76, c. 93, s. 92.

**CROSS-REFERENCES**

See s. 525 for similar provision regarding delays in trial proceedings where accused is charged with an offence not listed in s. 469.

Section 526 is authority for expediting proceedings where accused appears before a court under Part XVI. Section 679(10) confers authority on a judge of the court of appeal in indictable matters.

**SYNOPSIS**

If the appeal of an appellant who is in custody has not commenced within 30 days of the filing of the notice of appeal the person who has custody of the appellant shall apply forthwith for a hearing date (subsec. (1)).

The court, in setting the date, may give such directions as are necessary to expedite the matter. The prosecutor must be given a reasonable opportunity to be heard before the date is set (subsec. (2)).

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**PAYMENT OF FINE NOT A WAIVER OF APPEAL / Presumption.**

**820. (1) A person does not waive his right of appeal under section 813 by reason only that he pays the fine imposed upon conviction, without in any way indicating an intention to appeal or reserving the right to appeal.**

**(2) A conviction, order or sentence shall be deemed not to have been appealed against until the contrary is shown. R.S., c. C-34, s. 753.**

**CROSS-REFERENCES**

Section 683(5) permits the suspension of pecuniary penalty obligations pending appeal.

Section 689 permits the suspension, pending appeal, of a restitution order under ss. 725 to 727. The appeal court has, under s. 822(1), similar authority in summary conviction appeals under s. 813.

**SYNOPSIS**

This section provides that the payment of a fine does not act as a waiver of the right to appeal (subsec. (1)). An appeal is deemed not to be taken until the contrary is shown (subsec. (2)).

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***Procedure on Appeal***

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**NOTIFICATION AND TRANSMISSION OF CONVICTION, ETC. / Saving / Appellant to furnish transcript of evidence.**

**821. (1) Where a notice of appeal has been given in accordance with the rules referred to in section 815, the clerk of the appeal court shall notify the summary conviction court that made the conviction or order appealed from or imposed the sentence appealed against of the appeal and on receipt of the notification that summary conviction court shall transmit the conviction, order or order of dismissal and all other material in its possession in connection with the proceedings to the appeal court before the time when the appeal is to be heard, or within such further time as the appeal court may direct, and the material shall be kept by the clerk of the appeal court with the records of the appeal court.**

**(2) An appeal shall not be dismissed by the appeal court by reason only that a person other than the appellant failed to comply with the provisions of this Part relating to appeals.**

**(3) Where the evidence on a trial before a summary conviction court has been taken by a stenographer duly sworn or by a sound recording apparatus, the appellant shall,**

unless the appeal court otherwise orders or the rules referred to in section 815 otherwise provide, cause a transcript thereof, certified by the stenographer or in accordance with subsection 540(6), as the case may be, to be furnished to the appeal court and the respondent for use on the appeal. R.S., c. C-34, s. 754; 1972, c. 13, s. 67; 1974-75-76, c. 93, s. 93.

#### CROSS-REFERENCES

Evidence of witnesses in summary conviction proceedings is governed by the provisions relating to preliminary inquiries in Part XVIII, under s. 801(3).

Section 822 provides the authority of the appeal court to hear appeals under s. 813. The appeal is usually determined on the record of the lower court but a trial *de novo* under s. 822(4) to (7) may be necessary. Under s. 825, the appeal court may dismiss an appeal for appellant's failure to comply with orders under ss. 816 and 817 or failure to prosecute the appeal. See ss. 826 to 828 for cost provisions.

#### SYNOPSIS

This section deals with the transfer of the record from the trial court to the summary conviction appeal court. The appellant will not be held responsible if another person fails to comply with these provisions (subsecs. (1) and (2)).

Unless the appeal court orders otherwise it is the appellant's responsibility to obtain, file and serve transcripts of the evidence, if available (subsec. (3)).

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**CERTAIN SECTIONS APPLICABLE TO APPEALS / New trial / Order of detention or release / Trial *de novo* / Former evidence / Appeal against sentence / General provisions re appeals.**

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**822. (1)** Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 686(5), apply, with such modifications as the circumstances require.

**(2)** Where an appeal court orders a new trial, it shall be held before a summary conviction court other than the court that tried the defendant in the first instance, unless the appeal court directs that the new trial be held before the summary conviction court that tried the accused in the first instance.

**(3)** Where an appeal court orders a new trial, it may make such order for the release or detention of the appellant pending the trial as may be made by a justice pursuant to section 515 and the order may be enforced in the same manner as if it had been made by a justice under that section, and the provisions of Part XVI apply with such modifications as the circumstances require to the order.

**(4)** Notwithstanding subsections (1) to (3), where an appeal is taken under section 813 and where, because of the condition of the record of the trial in the summary conviction court or for any other reason, the appeal court, on application of the defendant, the informant, the Attorney General or his agent, is of the opinion that the interests of justice would be better served by hearing and determining the appeal by holding a trial *de novo*, the appeal court may order that the appeal shall be heard by way of trial *de novo* in accordance with such rules as may be made under section 482 and for this purpose the provisions of sections 793 to 809 apply with such modifications as the circumstances require.

**(5)** The appeal court may, for the purpose of hearing and determining an appeal under subsection (4), permit the evidence of any witness taken before the summary conviction court to be read if that evidence has been authenticated in accordance with section 540 and if

(a) the appellant and respondent consent,



- (b) the appeal court is satisfied that the attendance of the witness cannot reasonably be obtained, or
  - (c) by reason of the formal nature of the evidence or otherwise the court is satisfied that the opposite party will not be prejudiced,
- and any evidence that is read under the authority of this subsection has the same force and effect as if the witness had given the evidence before the appeal court.
- (6) Where an appeal is taken under subsection (4) against sentence, the appeal court shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against and may, on such evidence, if any, as it thinks fit to require or receive, by order,
- (a) dismiss the appeal, or
  - (b) vary the sentence within the limits prescribed by law for the offence of which the defendant was convicted,
- and in making any order under paragraph (b) the appeal court may take into account any time spent in custody by the defendant as a result of the offence.
- (7) The following provisions apply in respect of appeals under subsection (4):
- (a) where an appeal is based on an objection to an information or any process, judgment shall not be given in favour of the appellant
    - (i) for any alleged defect therein in substance or in form, or
    - (ii) for any variance between the information or process and the evidence adduced at the trial, unless it is shown
    - (iii) that the objection was taken at the trial, and
    - (iv) that an adjournment of the trial was refused notwithstanding that the variance referred to in subparagraph (ii) had deceived or misled the appellant; and
  - (b) where an appeal is based on a defect in a conviction or an order, judgment shall not be given in favour of the appellant, but the court shall make an order curing the defect. R.S., c. C-34, s. 755; R.S., c. 2 (2nd Supp.), s. 17; 1974-75-76, c. 93, s. 94; 1984, c. 40, s. 20; 1991, c. 43, s. 9.

#### CROSS-REFERENCES

Section 482(2) contains authority for the appeal court to make rules under s. 813. Such rules require the approval of the Lieutenant Governor in Council and must be consistent with the Criminal Code and other federal Acts. The nature of the rules passed under s. 482(2) prescribes the procedure to be followed. Procedure on trial *de novo* imitates that prescribed in trial proceedings before a summary conviction court and includes the provisions of Parts XVI and XVIII (compelling accused's appearance), as well as those of Parts XX and XX.1 provided they are consistent with Part XXVII, which are incorporated by s. 795 with modifications.

An accused who is an appellant may be remanded or directed to attend for observation in accordance with s. 681 under s. 823. Costs may be awarded under s. 826. Appeal may be dismissed under s. 825 for failure to appear or want of prosecution.

#### SYNOPSIS

The provisions apply to verdicts which include a verdict of unfit to stand trial or not criminally responsible on account of mental disorder.

Certain of the provisions applicable to appeals in indictable matters apply to appeals under s. 813 (subsec. (1)).

Unless the appeal court directs otherwise a new trial is to be heard by a different judge (subsec. (2)).

The appeal court can grant bail or continue detention pending a new trial (subsec. (3)).

If it determines that such would be in the interests of justice an appeal court can hear

an appeal by way of a trial *de novo*, on application of one of the parties (subsec. (4)). For this purpose the court can permit evidence from the trial to be “read in” (subsec. (5)).

On a sentence appeal, the court will consider the fitness of the sentence imposed and may vary the same within the limits prescribed by law (subsec. (6)).

Technical objections to the information or process will not succeed unless (a) the objection in question was raised at trial, and (b) in the case of a variance between the information or process and the evidence, an adjournment of the trial was refused. The appeal court may cure any defect in the formal conviction or order (subsec. (7)).

## ANNOTATIONS

**Representation by counsel** [subsec. (1)] – In *R. v. Chmilar*, [1963] 3 C.C.C. 373, 40 C.R. 105 (B.C.C.A.), it was held that attendance of counsel at the date set for hearing a summary conviction appeal does not constitute waiver of objection to jurisdiction.

An appellant may not be represented by an agent: *R. v. Duggan* (1976), 31 C.C.C. (2d) 167 (Ont. C.A.).

**Procedure** – While the mere filing of the appeal does not stay or suspend the operation of the conviction, order or sentence appealed against the appeal Court does have the power to stay or suspend the operation of an order which is subject to review on an appeal pending before the Court: *R. v. Borger Industries Ltd. and Ladco Co. Ltd.* (1979), 49 C.C.C. (2d) 527, [1979] 6 W.W.R. 474 (Man. Co. Ct.).

**Nature of jurisdiction to review findings of fact** – The summary convictions appeal Court has no jurisdiction to retry the case. Its jurisdiction is limited to determining whether the evidence is so weak that a verdict of guilty was unreasonable: *R. v. Colbeck* (1978), 42 C.C.C. (2d) 117 (Ont. C.A.); *R. v. Arthur* (1981), 63 C.C.C. (2d) 117, [1982] 1 W.W.R. 122 (B.C.C.A.), leave to appeal to S.C.C. refused December 21, 1981. However, this jurisdiction is not limited to cases where there is no evidence but like the Court of Appeal in indictable matters under s. 686(1)(a)(i), includes the power to allow an appeal where the verdict cannot be supported by the evidence or is unreasonable: *R. v. Ponsford* (1978), 41 C.C.C. (2d) 433, 6 Alta. L.R. (2d) 370 (S.C. App. Div.). And even where the conviction turns on questions of credibility, if the Court is satisfied that the basis for a finding of credibility is so tenuous that it would be an unreasonable basis for a conviction: *R. v. Saikaley* (1979), 52 C.C.C. (2d) 191 (Ont. C.A.).

**Crown appeal on issues of fact** – Despite the changes in procedure governing summary conviction appeals so that the primary procedure is an appeal on the record rather than by way of trial *de novo*, the Crown may appeal the dismissal of a charge on a question of fact alone. The amendments change the procedure on appeal but not the jurisdiction of the appeal court: *R. v. Antonelli* (1977), 38 C.C.C. (2d) 206 (B.C.C.A.); *R. v. Purves and Purves* (1979), 50 C.C.C. (2d) 211, 12 C.R. (3d) 362, [1980] 1 W.W.R. 148 (Man. C.A.); *R. v. Wilke* (1980), 56 C.C.C. (2d) 61 (Ont. C.A.); *R. v. Nelson*, [1979] 3 W.W.R. 97, 3 Sask. R. 45 (C.A.); *R. v. Sall* (1990), 54 C.C.C. (3d) 48 (Nfld. C.A.).

At least where the Crown appeal proceeds on the record in the lower court rather than by way of trial *de novo*, the availability of an appeal on questions of fact does not violate the Charter of Rights and Freedoms guarantees to fundamental justice, equality and protection against double jeopardy: *R. v. Century 21 Ramos Realty Inc. and Ramos* (1987), 32 C.C.C. (3d) 353, 56 C.R. (3d) 150, 37 D.L.R. (4th) 649 (Ont. C.A.), leave to appeal to S.C.C. refused 44 D.L.R. (4th) vii, 22 O.A.C. 319n, 80 N.R. 313n.

Although the Crown has a right of appeal on questions of fact the limitations on the appeal court's jurisdiction in appeals by the accused also apply to Crown appeals and, in particular, the appeal court has no right to retry the case: *R. v. Sall*, *supra*.

It may be that where the Crown appeal is not on a question of law alone the appeal Court's only power is to order a new trial, and that the Court would have no power to enter a conviction in view of the wording of s. 686(4)(b)(ii) which is applicable *mutatis mutandis* and which founds the Court's jurisdiction to enter a conviction on a Crown

appeal on the error in law: *R. v. Medicine Hat Greenhouses Ltd. and German* (1981), 59 C.C.C. (2d) 257, [1981] 3 W.W.R. 587 (Alta. C.A.), leave to appeal to S.C.C. refused 30 A.R. 360n, 38 N.R. 180n. Also see the discussion of this point in *R. v. Century 21 Ramos Realty Inc. and Ramos*, *supra*, and *R. v. Sall*, *supra*, where however the court left the issue open.

**Trial *de novo* [subsec. (4)]** – The words “or for any other reason” should be given a restrictive interpretation and the trial *de novo* procedure should be resorted to only where there was a denial of natural justice in the summary conviction Court or a deficiency in the transcript of the trial. In particular a trial *de novo* should not be ordered solely because the accused, having elected to call no evidence in the summary conviction Court, wishes to present a defence on appeal. Nor should the Court allow such evidence to be called on the appeal under the power to hear fresh evidence pursuant to s. 683 of the Criminal Code made applicable to summary conviction appeals to subsec. (1): *R. v. Faulkner* (1977), 37 C.C.C. (2d) 26, 39 C.R.N.S. 331 (N.S. Co. Ct.).

Although the circumstances did not warrant the ordering of a trial *de novo* the accused may still be entitled to have evidence admitted on the appeal as fresh evidence pursuant to s. 683: *R. v. Winters* (1981), 59 C.C.C. (2d) 454, 21 C.R. (3d) 230 (B.C.C.A.).

However, in appropriate circumstances the discovery of fresh evidence may be grounds for allowing an application under subsec. (4): *R. v. Steinmiller* (1979), 47 C.C.C. (2d) 151 (Ont. C.A.).

On the hearing of an application under subsec. (4) the judge has no jurisdiction to dispose of the appeal itself and allow a new trial: *R. v. Steinmiller*, *supra*.

Where, because of the state of the record, the Court has ordered that the accused's appeal proceed by way of trial *de novo*, the Court may allow the appeal and enter an acquittal when neither the informant nor his counsel appear on the date set for the trial *de novo*: *R. v. Lacasse* (1979), 55 C.C.C. (2d) 337 (Que. C.A.).

It has now been held that provincial legislation which gave the Crown a right of appeal by way of trial *de novo* from an acquittal for a provincial offence was of no force and effect by reason of s. 11(h) of the Charter of Rights and Freedoms: *Corporation Professionnelles des Medecins du Quebec v. Thibault* (1988), 42 C.C.C. (3d) 1, 63 C.R. (3d) 273, [1988] 1 S.C.R. 1033 (6:0). It may well be that similar reasoning would apply to preclude an application by the Crown under this subsection.

Where the transcript is unavailable due to a malfunctioning of the recording equipment an application for a trial *de novo* on a Crown appeal against an acquittal should be granted: *R. v. Street* (1981), 60 C.C.C. (2d) 376, 10 Sask. R. 266 (Dist. Ct.).

**Sentence appeals [subsec. (6)]** – In *R. v. Sproule* (1978), 39 C.C.C. (2d) 430 (Ont. C.A.) a case decided under the former s. 755(3) which is worded in a similar manner to this subsection the Court of Appeal held that the summary conviction appeal Court had no jurisdiction on an appeal by the accused against his sentence to increase the sentence, at least in the absence of notice by the Crown that it would be seeking such an increase. This decision accords generally with the decision of the Supreme Court of Canada in *Hill v. The Queen* (No. 2) (1975), 25 C.C.C. (2d) 6, 62 D.L.R. (3d) 193, [1977] 1 S.C.R. 827 which considered an appeal against sentence in an indictable offence under s. 687 and is therefore likely applicable to an ordinary sentence appeal pursuant to subsec. (1).

**Defects in information [subsec. (7)]** – Where a charge omits or makes a defective statement of an essential element, but contains in substance a statement that the defendant committed the offence, an appellate Court may, if the absence of the correct averment did not cause any substantial wrong or miscarriage of justice, amend the information and affirm the conviction: *R. v. Major* (1975), 25 C.C.C. (2d) 62, 10 N.S.R. (2d) 348 (S.C. App. Div.), *revd* on other grounds (1976), 27 C.C.C. (2d) 239n, 14 N.S.R. (2d) 705n (S.C.C.) (9:0). In any event inclusion of the offence section number will provide a reasonable description of the transaction alleged: *R. v. Cote* (1977), 33 C.C.C. (2d) 353, 73 D.L.R. (3d) 752 (S.C.C.) (6:2).



An information that is duplicitous or multifarious contains a defect apparent on its face and must be raised at trial. Where no objection is taken at trial this subsection prevents the raising of the matter on appeal. Nor may the objection be raised on a further appeal to the Court of Appeal under s. 839(1)(a): *R. v. City of Sault Ste. Marie* (1976), 30 C.C.C. (2d) 257, 70 D.L.R. (3d) 430 (Ont. C.A.). On further appeal (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299 (9:0) the Court found that the information was not duplicitous and therefore did not find it necessary to deal with this issue.

### 823. [Repealed. 1991, c. 43, s. 9.]

### ADJOURNMENT.

**824. The appeal court may adjourn the hearing of the appeal from time to time as may be necessary. R.S., c. C-34, s. 756.**

### CROSS-REFERENCES

The hearing of an appeal may be ordered expedited where accused is in custody and the appeal is not commenced within 30 days of notice of appeal, under s. 819(2).

Under s. 825, an appeal may be dismissed for failure to appear or want of prosecution.

### ANNOTATIONS

An adjournment for judgment may be made *sine die*: *Hawryluk v. McLellan* (1967), 3 C.R.N.S. 66 (Sask.Q.B.).

### DISMISSAL FOR FAILURE TO APPEAR OR WANT OF PROSECUTION.

**825. The appeal court may, on proof that notice of an appeal has been given and that**  
**(a) the appellant has failed to comply with any order made under section 816 or**  
**817 or with the conditions of any undertaking or recognizance given or entered**  
**into as prescribed in either of those sections, or**  
**(b) the appeal has not been proceeded with or has been abandoned,**  
**order that the appeal be dismissed. R.S., c. C-34, s. 757; R.S., c. 2 (2nd Supp.),**  
**s. 18.**

### CROSS-REFERENCES

The appeal court may summarily determine frivolous appeals under s. 795. A similar provision is s. 685 in indictable matters. The court is not given the added authority of s. 825 in indictable matters. Formal notice of the applicable rules passed under s. 482(2) may be abandoned by the provisions of those rules.

### ANNOTATIONS

It is open to the appeal Court to find that the appeal has not been proceeded with within the meaning of para. (b) where the appellant has failed to comply with the Rules of the Court requiring the filing of a memorandum at a certain time prior to the hearing: *R. v. Clarke* (1981), 62 C.C.C. (2d) 442, [1981] 6 W.W.R. 289 (Alta. C.A.).

### COSTS.

**826. Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable. R.S., c. C-34, s. 758.**

### CROSS-REFERENCES

Section 827 provides for remedies in the event of non-payment of costs and directions as to whom costs are payable.

Costs may be awarded under s. 809 in summary conviction trial proceedings if they are consistent with the s. 840 provisions. Section 826 has no similar limitation.

Costs may be awarded under s. 839(3) where a further appeal is brought under s. 839(1)(a).

### ANNOTATIONS

It was held in *R. v. Masurak* (1962), 132 C.C.C. 279, 37 C.R. 5 (Sask. C.A.) that the making of an order for costs of appeal is within the discretion of the judge. His failing to do so does not raise a question of law upon which to base an appeal to the Court of Appeal.

The power to award costs under this section includes the power to award costs against the Crown: *R. v. Ouellette* (1979), 50 C.C.C. (2d) 346 (Que. C.A.), affd 52 C.C.C. (2d) 336, [1980] 1 S.C.R. 568, 15 C.R. (3d) 372 (7:0).

The appeal court has the power to order imprisonment of the appellant in default of payment of costs: *R. v. Duguay* (1990), 57 C.C.C. (3d) 309 (Que. C.A.).

Provincial legislation limiting costs against the Crown to \$50 is inapplicable to criminal proceedings: *R. v. Hughes* (1981), 60 C.C.C. (2d) 16, 31 Nfld. & P.E.I.R. 349 (P.E.I.S.C. *in banco*).

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### TO WHOM COSTS PAYABLE, AND WHEN / Certificate of non-payment of costs / Committal.

**827. (1)** Where the appeal court orders the appellant or respondent to pay costs, the order shall direct that the costs be paid to the clerk of the court, to be paid by him to the person entitled to them, and shall fix the period within which the costs shall be paid.

**(2)** Where costs are not paid in full within the period fixed for payment and the person who has been ordered to pay them has not been bound by a recognizance to pay them, the clerk of the court shall, on application by the person entitled to the costs, or by any person on his behalf, and on payment of any fee to which the clerk of the court is entitled, issue a certificate in Form 42 certifying that the costs or a part thereof, as the case may be, have not been paid.

**(3)** A justice having jurisdiction in the territorial division in which a certificate has been issued under subsection (2) may, on production of the certificate, by warrant in Form 26, commit the defaulter to imprisonment for a term not exceeding one month, unless the amount of the costs and, where the justice thinks fit so to order, the costs of the committal and of conveying the defaulter to prison are sooner paid. R.S., c. C-34, s. 759.

### CROSS-REFERENCES

Section 809 governs the awarding and enforcement of costs at a summary conviction trial. Authorization for the award of costs on an appeal under s. 813 may be found in s. 826. For similar provisions relating to appeals under s. 830, see s. 834(1) and for costs on further summary conviction appeals, see s. 839(3).

### SYNOPSIS

This section makes the clerk of the court the administrator of the enforcement of cost orders under s. 826 (subsecs. (1) and (2)). On failure to pay such costs, a justice may order the defaulter imprisoned for up to one month, unless costs and costs of committal, if ordered, are paid sooner.

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### ENFORCEMENT OF CONVICTION OR ORDER BY COURT OF APPEAL / Enforcement by justice / Duty of clerk of court.

**828. (1)** A conviction or order made by the appeal court may be enforced

- (a) in the same manner as if it had been made by the summary conviction court; or  
 (b) by process of the appeal court.

(2) Where an appeal taken against a conviction or order adjudging payment of a sum of money is dismissed, the summary conviction court that made the conviction or order or a justice for the same territorial division may issue a warrant of committal as if no appeal had been taken.

(3) Where a conviction or order that has been made by an appeal court is to be enforced by a justice, the clerk of the appeal court shall send to the justice the conviction or order and all writings relating thereto, except the notice of intention to appeal and any recognizance. R.S., c. C-34, s. 760.

#### CROSS-REFERENCES

Sections 701 to 708 of Part XXII provide for the service and execution of process to compel the attendance of witnesses. See Part XXV regarding enforcement of recognizances. The enforcement of sentences is described in Part XXIII, which applies without the need for express incorporation in Part XXVII proceedings. A court of appeal decision under s. 839(1) is enforceable under s. 839(4) in the same manner as if made in summary conviction trial proceedings. See s. 835 for a similar provision regarding s. 830 appeals.

#### SYNOPSIS

This section provides that a conviction or order of the appeal court may be enforced by that court or the original court, and in the event of a dismissal the original court may proceed by way of warrant of committal as if there had been no appeal (subsecs. (1) and (2)). Where a conviction or order of the appeal court is to be enforced by a justice, the clerk of the court shall forward to that justice the documentary record except the notice of appeal and recognizances (subsec. (3)).

#### ANNOTATIONS

In *R. v. Green*, [1967] 2 C.C.C. 95, 50 C.R. 281 (Sask. Dist. Ct.) it was held that “process of the appeal court” includes processes available to enforce judgments in civil proceedings, so that where imprisonment for default is not ordered, judgment may be enforced by the Crown.

### *Summary Appeal on Transcript or Agreed Statement of Facts*

**Editor’s Note:** The above heading and the following ss. 829 to 838 were substituted for old heading “*Stated Case*” and ss. 761 to 770 by the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.), s. 182.

#### *Transitional provision*

**Note:** R.S.C. 1985, c. 27 (1st Supp.), s. 206, proclaimed in force December 4, 1985, provides as follows:

206. The *Criminal Code*, as it read immediately before the coming into force of the amendments made by section 182 of this Act, continues to apply to any case in which the notice of application to state a case was served on the summary conviction court before the coming into force of that amendment.

#### DEFINITION OF “APPEAL COURT”.

**829.** For the purposes of sections 830 to 838, “appeal court” means, in any province, the superior court of criminal jurisdiction for the province. R.S.C. 1985, c. 27 (1st Supp.), s. 182.



**CROSS-REFERENCES**

See s. 812 for the definition of "appeal court" for the purposes of ss. 813 to 828. It contains territorial limitations respecting provinces where the "appeal court" is not also the superior court of criminal jurisdiction. Section 829 has no such limitation.

Section 830 deals with the right of appeal and the form and manner for commencement, hearing and determination of such appeals. Pursuant to s. 836, an appeal under s. 830 precludes an appeal under s. 813 from the same decision.

Section 830 creates no right of appeal if none is otherwise provided by law.

Sections 816 and 819 govern the judicial interim release of an appellant who was the defendant at trial, made applicable by s. 831. Under ss. 831 and 832, an appeal by a private prosecutor requires compliance with s. 817. See s. 834 for the authority of the court of appeal to make determinations under s. 830 and for consequential enforcement provisions under s. 835.

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**APPEALS / Form of appeal / Rules for appeals / Rights of Attorney General of Canada.**

**830. (1) A party to proceedings to which this Part applies or the Attorney General may appeal against a conviction, judgment, verdict of acquittal or verdict of not criminally responsible on account of mental disorder or of unfit to stand trial or other final order or determination of a summary conviction court on the ground that**

- (a) it is erroneous in point of law;**
- (b) it is in excess of jurisdiction; or**
- (c) it constitutes a refusal or failure to exercise jurisdiction.**

**(2) An appeal under this section shall be based on a transcript of the proceedings appealed from unless the appellant files with the appeal court, within fifteen days of the filing of the notice of appeal, a statement of facts agreed to in writing by the respondent.**

**(3) An appeal under this section shall be made within the period and in the manner directed by any applicable rules of court and where there are no such rules otherwise providing, a notice of appeal in writing shall be served on the respondent and a copy thereof, together with proof of service, shall be filed with the appeal court within thirty days after the date of the conviction, judgment or verdict of acquittal or other final order or determination that is the subject of the appeal.**

**(4) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this section. R.S.C. 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.**

**CROSS-REFERENCES**

The "Attorney General", as defined in s. 2, retains a right of appeal under s. 830(1), even where he did not intervene at trial and thereby become the prosecution and a party to the trial proceedings.

See s. 672.1 for definition of "verdict of not criminally responsible on account of mental disorder" and s. 2 for definition of "unfit to stand trial".

Also see references cited under s. 829.

**SYNOPSIS**

This section provides for summary conviction appeals, to a superior court of criminal jurisdiction, on points of law or jurisdiction. Such are argued on the trial transcript unless an agreed statement of facts is filed within 15 days of the filing of the notice of appeal (subsecs. (1) and (2)).

Unless the rules of court otherwise provide the notice of appeal must be served on the respondent and filed within 30 days of the decision under appeal (subsec. (3)).

## ANNOTATIONS

**Subsec. (1) – Note:** Some of the following cases were decided under former s. 762 which determined the availability of an appeal by way of stated case. These cases were considered to be of continuing relevancy to issues which may arise on summary appeals, but the differences in wording and procedure must be borne in mind, particularly the change from “conviction, order, determination or other proceeding” and the broadening of the grounds to include a “refusal or failure to exercise jurisdiction”.

It was held in *R. v. Canadian Pacific Ltd.* (1976), 32 C.C.C. (2d) 14, [1977] 1 W.W.R. 203 (Alta. S.C. App. Div.) that an appeal by way of stated case lies only from a final judgment, that is, one that determines the issue raised on the information. Thus no appeal lies where the information is dismissed for failure of the Crown to supply particulars as ordered by the Court. The Crown’s remedy is by way of *mandamus*. The correctness of the holding, that the decision must be “final” in the sense of determining the issue raised in the information rather than merely “final” in the sense that it brings to an end that particular proceeding was doubted in *R. v. B & B Stone Ltd. (No. 2)* (1977), 34 C.C.C. (2d) 464 (Ont. C.A.) where it was held that the quashing of an information in summary conviction proceedings on the grounds of duplicity is a final order or determination and an appeal by way of stated case under this section is the appropriate remedy, not an application by way of *mandamus*. However, where the Judge finds the information is a nullity and so declines jurisdiction the proper remedy is by way of *mandamus*.

A stay of proceedings as an abuse of process is a “determination” within the meaning of subsec. (1) from which the Crown may appeal by way of stated case: *R. v. Kathis* (1977), 36 C.C.C. (2d) 551 (Ont. H.C.J.).

An interlocutory order dismissing an application to quash an information is not a final order and hence is not appealable by way of stated case: *R. v. Goldrick* (1974), 17 C.C.C. (2d) 74, 25 C.R.N.S. 389 (Ont. H.C.J.), and *R. v. Appleby* (1974), 21 C.C.C. (2d) 282, 18 C.P.R. (2d) 194 (N.B.S.C. App. Div.). *Contra: Chisholm v. The Queen* (1973), 21 C.R.N.S. 181 (Que. S.C.).

The decision of a judge quashing an information prior to plea, because the signature of the justice of the peace who took the information was illegible, was a refusal or failure to exercise jurisdiction within the meaning of para. (c) against which the Crown may appeal: *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.J.).

This section gives a right of appeal only to a party, which would include the informant, and the Attorney-General. Thus, in a prosecution under the Canada Elections Act while the police officer who laid the charge would have a right of appeal, the Commissioner of Elections would not, even though the police officer in laying the charge was acting on the Commissioner’s instructions: *R. v. Trimarchi* (1987), 40 C.C.C. (3d) 433, 62 C.R. (3d) 204, 49 D.L.R. (4th) 382 (Ont. C.A.).

**Subsec. (3) –** It was held with respect to the former procedure by way of stated case that where the Criminal Code is silent as to the method of service then resort may be had to the Criminal Rules promulgated by the provincial Supreme Court: *R. v. Hummell* (1972), 9 C.C.C. 380, [1973] 1 W.W.R. 663 (B.C.C.A.).

## APPLICATION.

**831.** The provisions of sections 816, 817, 819 and 825 apply, with such modifications as the circumstances require, in respect of an appeal under section 830, except that on receiving an application by the person having the custody of an appellant described in section 819 to appoint a date for the hearing of the appeal, the appeal court shall, after giving the prosecutor a reasonable opportunity to be heard, give such directions as it thinks necessary for expediting the hearing of the appeal. R.S.C. 1985, c. 27 (1st Supp.), s. 182.

## CROSS-REFERENCES

These provisions should apply in conjunction with s. 832 which permits the appeal court to order the appellant to appear before a justice to enter into a recognizance or give an undertaking under ss. 816 or 817.

Also see references cited under ss. 816, 817, 819, 825 and 829.

## SYNOPSIS

This section states that the provisions with respect to recognizances (ss. 816 and 817), applications by persons having custody (s. 819) and dismissal for failure to comply or proceed (s. 825) apply to summary appeals, with the exception that no date for hearing need be fixed.

## UNDERTAKING OR RECOGNIZANCE / Attorney General.

**832. (1)** When a notice of appeal is filed pursuant to section 830, the appeal court may order that the appellant appear before a justice and give an undertaking or enter into a recognizance as provided in section 816 where the defendant is the appellant, or as provided in section 817, in any other case.

(2) Subsection (1) does not apply where the appellant is the Attorney General or counsel acting on behalf of the Attorney General. R.S.C. 1985, c. 27 (1st Supp.), s. 182.

## CROSS-REFERENCES

The provisions of ss. 816 and 817 to appeals under s. 830 are incorporated by s. 831.

Also see references cited under ss. 816, 817, 819, 825 and 829.

## NO WRIT REQUIRED.

**833.** No writ of *certiorari* or other writ is required to remove any conviction, judgment, verdict or other final order or determination of a summary conviction court for the purpose of obtaining the judgment, determination or opinion of the appeal court. R.S.C. 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

## CROSS-REFERENCES

Section 830 appeals are characterized as "summary appeal on transcript or agreed statement of facts" indicating the rationale for the section. A provision, similar to s. 821 and applicable to s. 825 appeals, requires the summary conviction court to transmit the record to the "appeal court" under s. 829.

See Part XXVI for the "Extraordinary Remedies" of *certiorari*, *habeas corpus*, *mandamus*, *procedendo* and prohibition.

## SYNOPSIS

This section states that no writ is required to obtain the reversal of a summary conviction court from a court on summary appeal.

## POWERS OF APPEAL COURT / Authority of judge.

**834. (1)** When a notice of appeal is filed pursuant to section 830, the appeal court shall hear and determine the grounds of appeal and may

(a) affirm, reverse or modify the conviction, judgment, verdict or other final order or determination, or

(b) remit the matter to the summary conviction court with the opinion of the appeal court,

and may make any other order in relation to the matter or with respect to costs that it considers proper.



(2) Where the authority and jurisdiction of the appeal court may be exercised by a judge of that court, such authority and jurisdiction may, subject to any applicable rules of court, be exercised by a judge of the court sitting in chambers as well in vacation as in term time. R.S.C. 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

#### CROSS-REFERENCES

The authority of the appeal court over s. 830 appeals is much more restrictive than that given to the appeal court by s. 822(1) over s. 813 appeals. None of the disposition or ancillary powers of the court of appeal in indictable matters are incorporated under s. 834.

Section 835 contains enforcement provisions for decisions of the court in s. 830 appeals.

#### SYNOPSIS

The appeal court has the power to affirm, reverse or modify the decision under appeal. In addition, it can remit the matter to the trial judge to continue the proceedings in a manner consistent with the opinion expressed on the appeal and may make any other order, including an order with respect to costs. These powers may be exercised in chambers.

#### ANNOTATIONS

The following cases were decided under former s. 768 which contained the powers of the appeal court in relation to an appeal by way of stated case. The wording of this section is similar, however, to former s. 768 and therefore these cases were considered to be of continuing relevancy to issues which may arise under this section.

The superior Court has no power to dismiss an appeal merely because the error at trial did not result in a substantial wrong or miscarriage of justice: *R. v. Tunke* (1975), 25 C.C.C. (2d) 518 (Alta. S.C.).

In *R. v. McMullen* (1979), 47 C.C.C. (2d) 499, 100 D.L.R. (3d) 671 (Ont. C.A.) the Court remitted the matter to the summary conviction Court under para. (c) [now (b)] and therefore left open the question whether under this section the appeal Court has power to order a new trial rather than merely a resumption of the impugned trial.

However, in the subsequent case of *R. v. Giambalvo* (1982), 70 C.C.C. (2d) 324, 39 O.R. (2d) 588 (C.A.) the Court held that s. 771(2) [now s. 839] did not give the Court of Appeal any wider powers than the Superior Court hearing the initial appeal possessed under this section. The Court noted that there did not appear to be any case where a new trial had been ordered such as may be ordered under s. 686(2)(b).

An extension of time was granted to the Crown where it launched an application for *mandamus* within 30 days of the decision quashing an information but realized later that an appeal lay under s. 830. The Crown had established a *bona fide* intention to impeach the correctness of the decision of the judge within the appeal period: *R. v. Kapoor* (1989), 52 C.C.C. (3d) 41 (Ont. H.C.J.).

#### ENFORCEMENT / Idem.

**835. (1)** Where the appeal court renders its decision on an appeal, the summary conviction court from which the appeal was taken or a justice exercising the same jurisdiction has the same authority to enforce a conviction, order or determination that has been affirmed, modified or made by the appeal court as the summary conviction court would have had if no appeal had been taken.

(2) An order of the appeal court may be enforced by its own process. R.S.C. 1985, c. 27 (1st Supp.), s. 182.

#### CROSS-REFERENCES

Section 828(1) contains a similar provision which applies to appeals under s. 813.

See also references cited under s. 828.

**SYNOPSIS**

This section provides that the appeal court, the original court or a justice with the same jurisdiction as the original court may enforce the decision of the summary appeal court.

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**APPEAL UNDER SECTION 830.**

**836.** Every person who appeals under section 830 from any conviction, judgment, verdict or other final order or determination in respect of which that person is entitled to an appeal under section 813 shall be taken to have abandoned all the person's rights of appeal under section 813. R.S.C. 1985, c. 27 (1st Supp.), s. 182; 1991, c. 43, s. 9.

**CROSS-REFERENCES**

Section 813 rights of appeal permit appeals from conviction, orders made against a defendant, staying proceedings or dismissing an information and sentence. The grounds of appeal are not restricted. An appeal may be taken against a conviction, judgment or verdict of acquittal or other final order or decision, under s. 830, upon questions of law or allegations of jurisdictional error.

**SYNOPSIS**

This section provides that an appellant who proceeds by way of summary appeal (s. 830) is deemed to have given up his rights of regular appeal (s. 813).

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**APPEAL BARRED.**

**837.** Where it is provided by law that no appeal lies from a conviction or order, no appeal under section 830 lies from such a conviction or order. R.S.C. 1985, c. 27 (1st Supp.), s. 182.

**CROSS-REFERENCES**

There is no similar provision relating to s. 813 appeals.

**SYNOPSIS**

This section bars summary appeals where the law states that there is no appeal from a conviction or order.

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**EXTENSION OF TIME.**

**838.** The appeal court or a judge thereof may at any time extend any time period referred to in section 830, 831 or 832. R.S.C. 1985, c. 27 (1st Supp.), s. 182.

**CROSS-REFERENCES**

The criteria used in determining whether to order an extension of time is not contained in this section. The statutory provision may be supplemented by rules of court passed under s. 482(1).

A judge of the appeal court, as defined in s. 812, may extend the time within which notice of appeal is to be given, under s. 815(2).

Rights of appeal to the "appeal court", as defined in s. 829, are conferred under s. 830 which establishes time limits for the service and filing of notice of appeal and agreed statement of facts. Time limits relating to service and filing of notice of appeal apply only where no applicable rules of court provide to the contrary.

Interim release of a defendant who is an appellant under s. 830 is dealt with in ss. 831 and 832, as well as the obligation of a private prosecutor to give an undertaking or enter into a recognizance to prosecute an appeal in which he is the appellant.

## Appeals to Court of Appeal

**APPEAL ON QUESTION OF LAW / Sections applicable / Costs / Enforcement of decision / Right of Attorney General of Canada to appeal.**

**839.** (1) An appeal to the court of appeal as defined in section 673 may, with leave of that court or a judge thereof, be taken on any ground that involves a question of law alone, against

(a) a decision of a court in respect of an appeal under section 822; or

(b) a decision of an appeal court under section 834, except where that court is the court of appeal.

(2) Sections 673 to 689 apply with such modifications as the circumstances require to an appeal under this section.

(3) Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.

(4) The decision of the court of appeal may be enforced in the same manner as if it had been made by the summary conviction court before which the proceedings were originally heard and determined.

(5) The Attorney General of Canada has the same rights of appeal in proceedings instituted at the instance of the Government of Canada and conducted by or on behalf of that Government as the Attorney General of a province has under this Part. R.S., c. C-34, s. 771; R.S.C. 1985, c. 27 (1st Supp.), s. 183.

### CROSS-REFERENCES

The Supreme Court Act, R.S.C. 1985, c. S-26, s. 41, governs appeals to the Supreme Court of Canada in summary conviction matters.

See references cited under ss. 673 to 689, incorporated by subsec. (2) for discussion of those provisions.

### SYNOPSIS

The decision of a summary conviction appeal court may be appealed, with leave, to the court of appeal. Such appeals are restricted to questions of law alone. However, no such appeal is available where the first appeal was heard by a court of appeal sitting as a superior court of criminal jurisdiction (see ss. 2 and 829) (subsec. (1)).

Costs may be awarded on the appeal (subsec. (3)).

(Note: Leave to appeal to the Supreme Court of Canada must be obtained under s. 40 of the Supreme Court Act.)

### ANNOTATIONS

**Determinations from which appeal lies [subsec. (1)]** – The refusal of a trial *de novo* court [now summary conviction appeal court], upon a preliminary objection, to hear an appeal is a decision of that Court which may be appealed: *R. v. Dennis* (1960), 125 C.C.C. 321, 32 C.R. 210 (S.C.C.) (7:0).

It was held in *R. v. Canadian Pacific Ltd.* (1976), 32 C.C.C. (2d) 14, [1977] 1 W.W.R. 203 (Alta. S.C. App. Div.) that an appeal lies under this section only where the order made by the Court below has the effect of disposing of the appeal. Thus in that case it was held that no appeal lay from an order setting down for hearing the appeal (which at that time was an appeal by way of trial *de novo*). *Folld: R. v. Hunt* (1978), 39 C.C.C. (2d) 135, 25 N.S.R. (2d) 1 (S.C. App. Div.).

Thus an appeal under this section *did* lie where the Judge refused to set the appeal down for hearing: *R. v. Cuthill* (1976), 32 C.C.C. (2d) 495, 73 D.L.R. (3d) 720 (Alta. S.C. App. Div.).



An appeal to the Court of Appeal is from the judgment of the Summary Conviction Appeal Court, not the trial Judge: *R. v. Emery* (1981), 61 C.C.C. (2d) 84 (B.C.C.A.), leave to appeal to S.C.C. refused 40 N.R. 358n.

**Right of appeal** – Even if a question of law alone is raised on a Crown application the Court may refuse leave to appeal: *R. v. Giftwares Wholesale Co. Ltd.* (No. 2) (1980), 53 C.C.C. (2d) 380, [1980] 3 W.W.R. 573 (Man. C.A.).

The informant as well as the Attorney-General may appeal to the Court of Appeal from the decision of the summary conviction appeal Court: *Scullion v. Canadian Breweries Transport Ltd.* (1956), 114 C.C.C. 337, 24 C.R. 223, [1956] S.C.R. 512; *R. v. Lacasse* (1979), 55 C.C.C. (2d) 337 (Que. C.A.).

**Question of law** – While the question whether there is any evidence to support a conviction is a question of law, the question whether on the evidence an inference of guilt should be drawn cannot be said to involve a question of law alone: *R. v. Waite*, [1965] 1 C.C.C. 301, 46 C.R. 23 (N.B.S.C.App.Div.).

An inference to be drawn from proved facts is in itself a question of fact, and not of law: *R. v. Hook* (1955), 113 C.C.C. 248, 22 C.R. 378 (Ont. C.A.) (2:1).

**Sentence appeal** – Where the error as to sentence was so bound up as to be inherent in it, then that decision involves a question of law alone: *R. v. Paterson*, [1963] 2 C.C.C. 369 and 375, 39 C.R. 156 and 195 (B.C.C.A.).

Where a judge in refusing a discharge holds that the discharge provisions are primarily applicable to young offenders he errs in law and since the sentence imposed is inextricably bound up in this error an appeal lies to the Court of Appeal as a question of law alone is involved. The Court of Appeal may therefore grant leave to appeal and consider the fitness of the sentence: *R. v. Culley* (1977), 36 C.C.C. (2d) 433 (Ont. C.A.).

It was held in *R. v. S. S. Kresge Co. Ltd.* (1975), 27 C.C.C. (2d) 420, 65 D.L.R. (3d) 628 (P.E.I.C.A.) considering the former s. 755(3) [now s. 822(6)] that as the summary conviction appeal Court is required to consider the “fitness of the sentence appealed against” whether or not the sentence was proper in the circumstances is a question of law upon which an appeal lies under this section to the Court of Appeal.

It was held, however, in *R. v. Thomas* (No. 2) (1980), 53 C.C.C. (2d) 285 (B.C.C.A.) that fitness of sentence *per se* does not raise a question of law alone.

To a similar effect is *R. v. Guida* (1989), 51 C.C.C. (3d) 305 (Que. C.A.), where a majority of the court held that whether or not the sentence is too severe, whether or not it is a fit sentence, does not raise a question of law alone. Also see *R. v. Loughery* (1992), 73 C.C.C. (3d) 411 (Alta. C.A.).

**Procedure** – Where the Court of Appeal restores a conviction, but the respondent had also appealed his sentence to the summary conviction appeal court, the case must be remitted to that Court to complete the sentence appeal. The Court of Appeal may only impose sentence on a Crown appeal where no sentence was imposed by the trial court, by invoking s. 686(4)(b)(ii): *R. v. Broda* (1983), 7 C.C.C. (3d) 161, [1983] 5 W.W.R. 747 (Sask. C.A.).

The Court of Appeal has no jurisdiction to review the decision of a single judge of the Court of Appeal under subsec. (1) refusing leave to appeal: *R. v. Gelz* (1990), 55 C.C.C. (3d) 425 (B.C.C.A.).

**Costs [subsec. (3)]** – In *R. v. Danyleyko* (1962), 39 W.W.R. 576 (B.C.C.A.) it was held that the case was one in which appellant ought to have costs of the appeal.

The Court's power under this subsection includes the power to award costs against the Crown: *R. v. Ouellette* (1980), 52 C.C.C. (2d) 336, [1980] 1 S.C.R. 568, 15 C.R. (3d) 372 (7:0).

Costs should be awarded in criminal matters only in special circumstances as in the case of a successful appeal by the accused where the prosecution was frivolous, con-

ducted for an oblique motive or taken by the Crown as a test case: *R. v. King* (1986), 26 C.C.C. (3d) 349 (B.C.C.A.).

An appellant who successfully appeals his conviction to the Supreme Court of Canada is not automatically entitled to costs: *Trask v. The Queen* (1987), 37 C.C.C. (3d) 92, 59 C.R. (3d) 179, [1987] 2 S.C.R. 304 (6:0).

## ***Fees and Allowances***

### **FEES AND ALLOWANCES / Order of lieutenant governor in council.**

**840.** (1) Subject to subsection (2), the fees and allowances mentioned in the schedule to this Part are the fees and allowances that may be taken or allowed in proceedings before summary conviction courts and justices under this Part.

(2) The lieutenant governor in council of a province may order that all or any of the fees and allowances mentioned in the schedule to this Part shall not be taken or allowed in proceedings before summary conviction courts and justices under this Part in that province and, when the lieutenant governor in council so orders, he or she may fix other fees and allowances for items similar to those mentioned in the schedule to be taken or allowed instead. R.S., c. C-34, s. 772; 1994, c. 44, s. 83.

### **SCHEDULE**

#### **(Section 840)**

#### **Fees and Allowances that may be Charged by Summary Conviction Courts and Justices**

1. Information .....	\$1.00
2. Summons or warrant .....	0.50
3. Warrant where summons issued in first instance .....	0.30
4. Each necessary copy of summons or warrant .....	0.30
5. Each subpoena or warrant to or for witnesses .....	0.30
(A subpoena may contain any number of names. Only one subpoena may be issued on behalf of a party in any proceeding, unless the summary conviction court or the justice considers it necessary or desirable that more than one subpoena be issued.)	
6. Information for warrant for witness and warrant for witness .....	1.00
7. Each necessary copy of subpoena to or warrant for witness .....	0.20
8. Each recognizance .....	1.00
9. Hearing and determining proceeding .....	1.00
10. Where hearing lasts more than two hours .....	2.00
11. Where two or more justices hear and determine a proceeding, each is entitled to the fee authorized by item 9.	
12. Each warrant of committal .....	0.50
13. Making up record of conviction or order on request of a party to the proceedings .....	1.00
14. Copy of a writing other than a conviction or order, on request of a party to the proceedings; for each folio of one hundred words .....	0.10
15. Bill of costs, when made out in detail upon request of a party to the proceedings .....	0.20

(Items 14 and 15 may be charged only where there has been an adjudication.)

16. Attending to remand prisoner .....	1.00
17. Attending to take recognizance of bail .....	1.00

#### Fees and Allowances that may be Allowed to Peace Officers

18. Arresting a person on a warrant or without a warrant .....	\$1.50
19. Serving summons or subpoena .....	0.50
20. Mileage to serve summons or subpoena or to make an arrest, both ways, for each mile .....	0.10
(Where a public conveyance is not used, reasonable costs of transportation may be allowed.)	
21. Mileage where service cannot be effected, on proof of a diligent attempt to effect service, each way, for each mile .....	0.10
22. Returning with prisoner after arrest to take him before a summary conviction court or justice at a place different from the place where the peace officer received the warrant to arrest, if the journey is of necessity over a route different from that taken by the peace officer to make the arrest, each way, for each mile .....	0.10
23. Taking a prisoner to prison on remand or committal, each way, for each mile .....	0.10
(Where a public conveyance is not used, reasonable costs of transportation may be allowed. No charge may be made under this item in respect of a service for which a charge is made under item 22.)	
24. Attending summary conviction court or justice on summary conviction proceedings, for each day necessarily employed .....	2.00
(No more than \$2.00 may be charged under this item in respect of any day notwithstanding the number of proceedings that the peace officer attended on that day before that summary conviction court or justice.)	

#### Fees and Allowances that may be Allowed to Witnesses

25. Each day attending trial .....	\$4.00
26. Mileage travelled to attend trial, each way, for each mile .....	0.10

#### Fees and Allowances that may be Allowed to Interpreters

27. Each half day attending trial .....	\$2.50
28. Actual living expenses when away from ordinary place of residence, not to exceed per day .....	10.00
29. Mileage travelled to attend trial, each way, for each mile .....	0.10

R.S., c. C-34, Sch. to Part XXIV.

#### CROSS-REFERENCES

See ss. 809, 826, 830(1) and 839(3) for authority to award costs in summary conviction trial and appeal proceedings.

#### ANNOTATIONS

It was held in *Lockett v. City of Kingston*, [1966] 2 O.R. 843, 58 D.L.R. (2d) 689, that



this section does not entitle a justice of the peace who issues summonses and warrants and receives informations to charge the municipality for all such services, but rather sets out a limitation on the costs that may be awarded against an informant or defendant in such proceedings.

This schedule has no application once an appeal has been launched and thus in particular the appellant must pay for the transcript on the basis of the fees set by the appeal Court rules not at the rate provided for in para. 14: *R. v. Dubuc* (1978), 49 C.C.C. (2d) 54 (Que. S.C.).

While there have been some minor amendments to this section and the companion provision s. 809 since the decision of the court in *A.-G. Que. v. A.-G. Can.* (1945), 84 C.C.C. 369, [1945] 4 D.L.R. 305, [1945] S.C.R. 600, it would still appear to be the case as there held that only the fees and allowances set out in this schedule may be awarded by a summary conviction court. Thus the court has no power to award a counsel fee: *R. v. Abram et al.* (1945), 1 C.R. 151 (Ont. Co. Ct.); *R. v. Cross* (1978), 42 C.C.C. (2d) 277, 6 C.R. (3d) 16 (P.E.I.S.C. *in banco*).

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## Part XXVIII / FORMS

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### FORMS / Seal not required / Official languages.

**841. (1)** The forms set out in this Part varied to suit the case or forms to the like effect shall be deemed to be good, valid and sufficient in the circumstances for which, respectively, they are provided.

**(2)** No justice is required to attach or affix a seal to any writing or process that he is authorized to issue and in respect of which a form is provided by this Part.

**(3)** Any pre-printed portions of a form set out in this Part varied to suit the case or of a form to the like effect shall be printed in both official languages. R.S., c. C-34, s. 773; R.S.C. 1985, c. 31 (4th Supp.), s. 97.

### ANNOTATIONS

The provisions of s. 26(5) of the Interpretation Act, R.S.C. 1970, c. I-23, which provide that “where a form is prescribed, deviations therefrom, not affecting the substance or calculated to mislead, do not invalidate the form used” apply to these forms: *R. v. Crawford* (1981), 23 C.R. (3d) 83 (B.C.S.C.).

The failure of the Crown to comply with the provisions of subsec. (3) in respect of an information in Form 2 does not render the information a nullity and does not necessitate the quashing of the information: *R. v. Goodine* (1992), 71 C.C.C. (3d) 146 (N.S.C.A.). Failure of the Crown to translate the preprinted portions of the form is a defect within the meaning of s. 601(3)(c) which is capable of amendment when the omission has not caused irreparable prejudice to the accused. The proper course is for the trial judge to order that the preprinted portions of the information be translated into the other official language: *R. v. Sorensen* (1990), 59 C.C.C. (3d) 211 (Ont. Ct. (Gen. Div.)).

Failure to employ the French language in the pre-printed portions of Form 35 was not a matter of substance and therefore did not invalidate the form: *R. v. Langlois* (1991), 67 C.C.C. (3d) 375 (B.C.S.C.).

**FORM 1**

(Section 487)

**Information to obtain a search warrant**

Canada,  
Province of ..... ,  
(territorial division).

This is the information of A.B., of ..... in the said (territorial division),  
(occupation), hereinafter called the informant, taken before me.

The informant says that (*describe things to be searched for and offence in respect of which search is to be made*), and that he believes on reasonable grounds that the said things, or some part of them, are in the (*dwelling-house, etc.*) of C.D., of ..... in the said (territorial division). (*Here add the grounds of belief, whatever they may be.*)

Wherefore the informant prays that a search warrant may be granted to search the said (*dwelling-house, etc.*) for the said things.

Sworn before me this ..... day of .....  
....., A.D. ...., (Signature of Informant)  
at .....

.....  
A Justice of the Peace in and  
for .....

---

**FORM 2**

(Sections 506 and 788)

**Information**

Canada,  
Province of ..... ,  
(territorial division).

This is the information of C.D., of ..... , (occupation), hereinafter called the informant.

The informant says that (*if the informant has no personal knowledge state that he believes on reasonable grounds and state the offence.*)

Sworn before me this ..... day of .....  
....., A.D. ...., (Signature of Informant)  
at .....

.....  
A Justice of the Peace in and  
for .....

**Note:** The date of birth of the accused may be mentioned on the information or indictment.

---

## FORM 3

[Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 184(2).]

## FORM 4

(Sections 566, 580 and 591)

## Heading of Indictment

Canada,

Province of ..... ,  
(territorial division).

In the (set out name of the court)

Her Majesty the Queen

against

(name of accused)

(Name of accused) stands charged

1. That he (state offence).

2. That he (state offence).

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of signing officer, Agent of  
Attorney General, etc., as the case may be)

Note: The date of birth of the accused may be mentioned on the information or indictment.

## FORM 5

(Section 487)

## Warrant to search

Canada,

Province of ..... ,  
(territorial division).

To the peace officers in the said (territorial division):

Whereas it appears on the oath of A.B., of ..... that there are reasonable grounds for believing that (describe things to be searched for and offence in respect of which search is to be made) are in ..... at ....., hereinafter called the premises:

This is, therefore, to authorize and require you between the hours of (as the justice may direct) to enter into the said premises and to search for the said things and to bring them before me or some other justice.



Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for .....

**FORM 5.1**

(Section 487.1)

**Warrant to search**

Canada,

Province of [*specify province*].

To A.B. and other peace officers in the [*territorial division in which the warrant is intended for execution*]:

Whereas it appears on the oath of A.B., a peace officer in the [*territorial division in which the warrant is intended for execution*], that there are reasonable grounds for dispensing with an information presented personally and in writing; and that there are reasonable grounds for believing that the following things

[*describe things to be searched for*]

relevant to the investigation of the following indictable offence

[*describe offence in respect of which search is to be made*]

are to be found in the following place or premises

[*describe place or premises to be searched*]:

This is, therefore, to authorize you to enter the said place or premises between the hours of [*as the justice may direct*] and to search for and seize the said things and to report thereon as soon as practicable but within a period not exceeding seven days after the execution of the warrant to the clerk of the court for the [*territorial division in which the warrant is intended for execution*].

Issued at [*time*] on the [*day*] of [*month*] A.D. [*year*], at [*place*].

.....  
A Judge of the Provincial  
Court in and for the  
Province of  
[*specify province*].

**To the Occupant:** This search warrant was issued by telephone or other means of telecommunication. If you wish to know the basis on which this warrant was issued, you may apply to the clerk of the court for the territorial division in which the warrant was executed, at [*address*], to obtain a copy of the information on oath.

You may obtain from the clerk of the court a copy of the report filed by the peace officer who executed this warrant. That report will indicate the things, if any, that were seized and the location where they are being held.

R.S.C. 1985, c. 27 (1st Supp.), s. 184(3); R.S.C. 1985, c. 1 (4th Supp.), s. 17.

## FORM 5.2

(Section 489.1)

## Report to a Justice

Canada,

Province of .....,  
(territorial division).

To the justice who issued a warrant to the undersigned pursuant to section 256, 487 or 487.1 of the *Criminal Code* (or another justice for the same territorial division or, if no warrant was issued, any justice having jurisdiction in respect of the matter).

I, (name of the peace officer or other person) have (state here whether you have acted under a warrant issued pursuant to section 256, 487 or 487.1 of the *Criminal Code* or under section 489 of the *Criminal Code* or otherwise in the execution of duties under the *Criminal Code* or other Act of Parliament to be specified)

1. searched the premises situated at .....; and
2. seized the following things and dealt with them as follows:

## Property

Seized  
(describe  
each thing  
seized)

Disposition  
(state, in respect of each thing  
seized, whether

- (a) it was returned to the person lawfully entitled to its possession, in which case the receipt therefor shall be attached hereto, or  
(b) it is being detained to be dealt with according to law, and the location and manner in which, or where applicable, the person by whom it is being detained).

1. ....
2. ....
3. ....
4. ....

In the case of a warrant issued by telephone or other means of telecommunication, the statements referred to in subsection 487.1(9) of the *Criminal Code* shall be specified in the report.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Signature of peace officer  
or other person

R.S.C. 1985, c. 27 (1st Supp.), s. 184(3); R.S.C. 1985, c. 1 (4th Supp.), s. 17.

FORM 5.3

(Section 462.32)

REPORT TO A JUDGE OF PROPERTY SEIZED

Canada,  
Province of..... ,  
(territorial division).

To a judge of the court from which the warrant was issued (specify court):

I, (name of the peace officer or other person) have acted under a warrant issued under section 462.32 of the Criminal Code and have

1. searched the premises situated at .....; and
2. seized the following property:

Property Seized	Location
(describe each item of property seized)	(state, in respect of each item of property seized, the location where it is being detained).

1. ....
2. ....
3. ....
4. ....

Dated this ..... day of ..... A.D. ...., at .....

Signature of peace officer or other person  
R.S.C. 1985, c. 42 (4th Supp.), s. 6.

FORM 6

(Sections 493, 508 and 512)

Summons to a person charged with an offence

Canada,  
Province of..... ,  
(territorial division).

To A.B., of ....., (occupation):

Whereas you have this day been charged before me that (set out briefly the offence in respect of which the accused is charged);

This is therefore to command you, in Her Majesty's name:

(a) to attend court on ..... , the ..... day of ..... A.D....., at ..... o'clock in the ..... noon, at ..... or before any justice for the said (territorial division) who is there, and to attend thereafter as required by the court, in order to be dealt with according to law; and

(b) to appear on ....., the ..... day of ..... A.D....., at ..... o'clock in the .....noon, at ....., for the purposes of the Identification of Criminals Act. (Ignore, if not filled in.)



You are warned that failure without lawful excuse to attend court in accordance with this summons is an offence under subsection 145(4) of the *Criminal Code*.

Subsection 145(4) of the *Criminal Code* states as follows:

“(4) Every one who is served with a summons and who fails, without lawful excuse, the proof of which lies on him, to appear at a time and place stated therein, if any, for the purposes of the *Identification of Criminals Act* or to attend court in accordance therewith, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.”

Section 510 of the *Criminal Code* states as follows:

“510 Where an accused who is required by a summons to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may issue a warrant for the arrest of the accused for the offence with which he is charged.”

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for ..... or Judge

## FORM 7

(Sections 475, 493, 597, 800 and 803)

### Warrant for arrest

Canada,  
Province of .....,  
(territorial division).

To the peace officers in the said (territorial division):

This warrant is issued for the arrest of A.B., of ....., (occupation), hereinafter called the accused.

Whereas the accused has been charged that (set out briefly the offence in respect of which the accused is charged);

And whereas:\*

- (a) there are reasonable grounds to believe that it is necessary in the public interest to issue this warrant for the arrest of the accused [507(4); 512(1)];
- (b) the accused failed to attend court in accordance with the summons served on him [512(2)];
- (c) (an appearance notice or a promise to appear or a recognizance entered into before an officer in charge) was confirmed and the accused failed to attend court in accordance therewith [512(2)];
- (d) it appears that a summons cannot be served because the accused is evading service [512(2)];
- (e) the accused was ordered to be present at the hearing of an application for a review of an order made by a justice and did not attend the hearing [520(5); 521(5)];
- (f) there are reasonable grounds to believe that the accused has contravened or is

about to contravene the (promise to appear *or* undertaking *or* recognizance) on which he was released [542(1); 525(5); 679(6)];

- (g) there are reasonable grounds to believe that the accused has since his release from custody on (a promise to appear *or* an undertaking *or* a recognizance) committed an indictable offence [524(1); 525(5); 679(6)];
- (h) the accused was required by (an appearance notice *or* a promise to appear *or* a recognizance entered into before an officer in charge *or* a summons) to attend at a time and place stated therein for the purposes of the *Identification of Criminals Act* and did not appear at that time and place [502; 510];
- (i) an indictment has been found against the accused and the accused has not appeared or remained in attendance before the court for his trial [597];
- (j) \*\*

This is, therefore, to command you, in Her Majesty's name, forthwith to arrest the said accused and to bring him before (*state court, judge or justice*), to be dealt with according to law.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Judge, Clerk of the Court, Provincial Court  
Judge *or* Justice

\* *Initial applicable recital.*

\*\* *For any case not covered by recitals (a) to (i), insert recital in the words of the statute authorizing the warrant.*

## FORM 8

(Sections 493 and 515)

### Warrant for committal

Canada,  
Province of .....,  
(*territorial division*).

To the peace officers in the said (*territorial division*) and to the keeper of the (*prison*) at .....

This warrant is issued for the committal of A.B., of .....,  
(*occupation*), hereinafter called the accused.

Whereas the accused has been charged that (*set out briefly the offence in respect of which the accused is charged*);

And whereas:\*

- (a) the prosecutor has shown cause why the detention of the accused in custody is justified [515(5)];
- (b) an order has been made that the accused be released on (giving an undertaking *or* entering into a recognizance) but the accused has not yet complied with the order [519(1); 520(9); 521(10); 524(12); 525(8)];\*\*
- (c) the application by the prosecutor for a review of the order of a justice in respect of the interim release of the accused has been allowed and that order has been vacated, and the prosecutor has shown cause why the detention of the accused in custody is justified [521];

- (d) the accused has contravened or was about to contravene his (promise to appear or undertaking or recognizance) and the same was cancelled, and the detention of the accused in custody is justified or seems proper in the circumstances [524(4); 524(8)];
- (e) there are reasonable grounds to believe that the accused has after his release from custody on (a promise to appear or an undertaking or a recognizance) committed an indictable offence and the detention of the accused in custody is justified or seems proper in the circumstances [524(4); 524(8)];
- (f) the accused has contravened or was about to contravene the (undertaking or recognizance) on which he was released and the detention of the accused in custody seems proper in the circumstances [525(7); 679(6)];
- (g) there are reasonable grounds to believe that the accused has after his release from custody on (an undertaking or a recognizance) committed an indictable offence and the detention of the accused in custody seems proper in the circumstances [525(7); 679(6)];
- (h) \*\*\*

This is, therefore, to command you, in Her Majesty's name, to arrest, if necessary, and take the accused and convey him safely to the (prison) at ....., and there deliver him to the keeper thereof, with the following precept:

I do thereby command you the said keeper to receive the accused in your custody in the said prison and keep him safely there until he is delivered by due course of law.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Judge, Clerk of the Court, Provincial Court  
Judge or Justice

\* *Initial applicable recital.*

\*\* *If the person having custody of the accused is authorized under paragraph 519(1)(b) to release him on his complying with an order, endorse the authorization on this warrant and attach a copy of the order.*

\*\*\* *For any case not covered by recitals (a) to (g), insert recital in the words of the statute authorizing the warrant.*

## FORM 9

(Section 493)

APPEARANCE NOTICE ISSUED BY A PEACE OFFICER TO A  
PERSON NOT YET CHARGED WITH AN OFFENCE

Canada,  
Province of .....,  
(territorial division).

To A.B., of ....., (occupation):

You are alleged to have committed (set out substance of offence).

1. You are required to attend court on ..... day, the ..... day of ..... A.D. ...., at ..... o'clock in the ..... noon, in courtroom No. ...., at ..... court, in the municipality of ....., and to attend thereafter as required by the court, in order to be dealt with according to law.



2. You are also required to appear on ..... day, the ..... day of ..... A.D. ...., at ..... o'clock in the ..... noon, at..... (police station), (address), for the purposes of the *Identification of Criminals Act*. (Ignore if not filled in.)

You are warned that failure to attend court in accordance with this appearance notice is an offence under subsection 145(5) of the *Criminal Code*.

Subsections 145(5) and (6) of the *Criminal Code* state as follows:

"(5) Every person who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on the person, to appear at the time and place stated therein, if any, for the purposes of the *Identification of Criminals Act*, or to attend court in accordance therewith, or to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1), is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years;  
or
- (b) an offence punishable on summary conviction.

(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence."

Section 502 of the *Criminal Code* states as follows:

"502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged."

Issued at ..... a.m./p.m. this ..... day of ..... A.D. ...., at .....

.....  
(Signature of peace officer)

.....  
(Signature of accused)  
1994, c. 44, s. 84

## FORM 10

(Section 493)

### PROMISE TO APPEAR

Canada,  
Province of .....,  
(territorial division).

I, A.B., of ....., (occupation), understand that it is alleged that I have committed (set out substance of offence).

In order that I may be released from custody,

1. I promise to attend court on ..... day, the ..... day of ..... A.D. ...., at ..... o'clock in the ..... noon, in courtroom No. ...., at ..... court, in the municipality of ....., and to attend thereafter as required by the court, in order to be dealt with according to law.

2. I also promise to appear on ..... day, the ..... day of ..... A.D. ...., at ..... o'clock in the ..... noon, at ..... (police station), (address), for the purposes of the *Identification of Criminals Act*. (Ignore if not filled in.)

I understand that failure without lawful excuse to attend court in accordance with this promise to appear is an offence under subsection 145(5) of the *Criminal Code*.

Subsections 145(5) and (6) of the *Criminal Code* state as follows:

“(5) Every person who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on the person, to appear at the time and place stated therein, if any, for the purposes of the *Identification of Criminals Act*, or to attend court in accordance therewith, or to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503 (2.1), is guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence.”

Section 502 of the *Criminal Code* states as follows:

“502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged.”

Dated this ..... day of ..... A.D. ...., at .....

(Signature of accused)  
1994, c. 44, s. 84.

## FORM 11

(Section 493)

### RECOGNIZANCE ENTERED INTO BEFORE AN OFFICER IN CHARGE

Canada,  
Province of .....,  
(territorial division).

I, A.B., of ....., (occupation), understand that it is alleged that I have committed (set out substance of offence).

In order that I may be released from custody, I hereby acknowledge that I owe \$ (not exceeding \$500) to Her Majesty the Queen to be levied on my real and personal property if I fail to attend court as hereinafter required.

(or, for a person not ordinarily resident in the province in which the person is in custody or within two hundred kilometres of the place in which the person is in custody)

In order that I may be released from custody, I hereby acknowledge that I owe \$ (not exceeding \$500) to Her Majesty the Queen and deposit herewith (money or other valuable security not exceeding in amount or value \$500) to be forfeited if I fail to attend court as hereinafter required.

1. I acknowledge that I am required to attend court on .....day, the ..... day of ..... A.D. ...., at ..... o'clock in the .....noon, in courtroom No. ...., at ..... court, in the municipality of , and to attend thereafter as required by the court, in order to be dealt with according to law.

2. I acknowledge that I am also required to appear on .....day, the ..... day of ..... A.D. ...., at ..... o'clock in the .....noon, at ..... (police station), (address), for the purposes of the *Identification of Criminals Act*. (Ignore if not filled in.)

I understand that failure without lawful excuse to attend court in accordance with this recognizance to appear is an offence under subsection 145(5) of the *Criminal Code*.

Subsections 145(5) and (6) of the *Criminal Code* state as follows:

"(5) Every person who is named in an appearance notice or promise to appear, or in a recognizance entered into before an officer in charge, that has been confirmed by a justice under section 508 and who fails, without lawful excuse, the proof of which lies on the person, to appear at the time and place stated therein, if any, for the purposes of the *Identification of Criminals Act*, or to attend court in accordance therewith, or to comply with any condition of an undertaking entered into pursuant to subsection 499(2) or 503(2.1), is guilty of

- (a) an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

(6) For the purposes of subsection (5), it is not a lawful excuse that an appearance notice, promise to appear or recognizance states defectively the substance of the alleged offence."

Section 502 of the *Criminal Code* states as follows:

"502. Where an accused who is required by an appearance notice or promise to appear or by a recognizance entered into before an officer in charge to appear at a time and place stated therein for the purposes of the *Identification of Criminals Act* does not appear at that time and place, a justice may, where the appearance notice, promise to appear or recognizance has been confirmed by a justice under section 508, issue a warrant for the arrest of the accused for the offence with which he is charged."

Dated this ..... day of ..... A.D. ...., at .....

.....

(Signature of accused)

1992, c. 1, s. 58; 1994, c. 44, s. 84.

## FORM 11.1

(Sections 493, 499 and 503)

UNDERTAKING GIVEN TO A PEACE OFFICER OR AN OFFICER IN CHARGE

Canada,  
Province of ..... ,  
(territorial division).



I, A.B., of....., (*occupation*), understand that it is alleged that I have committed (*set out substance of the offence*).

In order that I may be released from custody by way of (a promise to appear or a recognizance entered into before an officer in charge), I undertake to (*insert any conditions that are directed*):

- (a) report at (*state times*) to (*name of peace officer or other person designated*);
- (b) remain within (*designated territorial jurisdiction*);
- (c) notify (*name of peace officer or other person designated*) of any change in my address, employment or occupation;
- (d) abstain from communicating with (*name of witness or other person*) or from going to (*name or description of place*) except in accordance with the following conditions: (*as the peace officer or other person designated specifies*); and
- (e) deposit my passport with (*name of peace officer or other person designated*).

I understand that I am not required to give an undertaking to abide by the conditions specified above, but that if I do not, I may be kept in custody and brought before a justice so that the prosecutor may be given a reasonable opportunity to show cause why I should not be released on giving an undertaking without conditions.

I understand that if I give an undertaking to abide by the conditions specified above, then I may apply, at any time before I appear, or when I appear, before a justice pursuant to (a promise to appear or a recognizance entered into before an officer in charge), to have this undertaking vacated or varied and that my application will be considered as if I were before a justice pursuant to section 515 of the *Criminal Code*.

I also understand that this undertaking remains in effect until it is vacated or varied.

Dated this ..... day of ..... A.D. ...., at .....

.....  
(*Signature of accused*)  
1994, c. 44, s. 84.

**Editor's Note:** While ss. 499(2) and 503(2.1) are limited to the imposition of four conditions by 1994, c. 44, ss. 40 and 42, there are five conditions in Form 11.1. The first condition in the Form has not been provided for, but we understand that this will be corrected by future legislation.

## FORM 12

(*Sections 493 and 679*)

### UNDERTAKING GIVEN TO A JUSTICE OR A JUDGE

Canada,  
Province of .....,  
(*territorial division*).

I, A.B., of ....., (*occupation*), understand that I have been charged that (*set out briefly the offence in respect of which accused is charged*).

In order that I may be released from custody, I undertake to attend court on .....day, the ..... day of ..... A.D. ...., and to attend thereafter as required by the court in order to be dealt with according to law (*or, where date and place of appearance before court are not known at the time undertaking is given, to attend at the time and place fixed by the court and thereafter as required by the court in order to be dealt with according to law*).

(and where applicable)

I also undertake to (insert any conditions that are directed)

- (a) report at (state times) to (name of peace officer or other person designated);
- (b) remain within (designated territorial jurisdiction);
- (c) notify (name of peace officer or other person designated) of any change in my address, employment or occupation;
- (d) abstain from communication with (name of witness or other person) except in accordance with the following conditions: (as the justice or judge specifies);
- (e) deposit my passport (as the justice or judge directs); and
- (f) (any other reasonable conditions).

I understand that failure without lawful excuse to attend court in accordance with this undertaking is an offence under subsection 145(2) of the Criminal Code.

Subsections 145(2) and (3) of the Criminal Code state as follows:

“(2) Every one who,

- (a) being at large on his undertaking or recognizance given to or entered into before a justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court in accordance with the undertaking or recognizance, or
- (b) having appeared before a court, justice or judge, fails, without lawful excuse, the proof of which lies on him, to attend court as thereafter required by the court, justice or judge,

or to surrender himself in accordance with an order of the court, justice or judge, as the case may be, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.

(3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance directed by a justice or judge, and every person who is bound to comply with a direction ordered under subsection 515(12) or 522(2.1), and who fails, without lawful excuse, the proof of which lies on that person, to comply with that condition or direction, is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.”

Dated this ..... day of ..... A.D. ...., at .....

(Signature of accused)  
1994, c. 44, s. 84.

FORM 13

(Sections 816, 832 and 834)

Undertaking by appellant (defendant)

Canada,  
Province of .....,  
(territorial division).

I, A.B., of ....., (occupation), being the appellant against conviction (or against sentence or against an order or by way of stated case) in respect of the following matter

(set out the offence, subject-matter of order or question of law) undertake to appear personally at the sittings of the appeal court at which the appeal is to be heard.

(and where applicable)

I also undertake to (insert any conditions that are directed)

- (a) report at (state times) to (name of peace officer or other person designated);
- (b) remain within (designated territorial jurisdiction);
- (c) notify (name of peace officer or other person designated) of any change in my address, employment or occupation;
- (d) abstain from communicating with (name of witness or other person) except in accordance with the following conditions: (as the justice or judge specifies);
- (e) deposit my passport (as the justice or judge directs); and
- (f) (any other reasonable conditions).

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of appellant)

#### FORM 14

(Section 817)

##### Undertaking by appellant (prosecutor)

Canada,  
Province of ..... ,  
(territorial division).

I, A.B., of ..... (occupation), being the appellant against an order of dismissal (or against sentence) in respect of the following charge (set out the name of the defendant and the offence, subject-matter of order or question of law) undertake to appear personally or by counsel at the sittings of the appeal court at which the appeal is to be heard.

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of appellant)

#### FORM 15

(Section 543)

##### Warrant to convey accused before justice of another territorial division

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the said (territorial division):

Whereas A.B., of ..... hereinafter called the accused, has been charged that (state place of offence and charge);

And Whereas I have taken the deposition of X.Y. in respect of the said charge;

And Whereas the charge is for an offence committed in the (territorial division):



This is to command you, in Her Majesty's name, to convey the said A.B., before a justice of the (*last mentioned territorial division*).

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....

---

**FORM 16**

(*Section 699*)

**Subpoena to a witness**

Canada,  
Province of .....,  
(*territorial division*).

To E.F., of ....., (*occupation*):

Whereas A.B. has been charged that (*state offence as in the information*), and it has been made to appear that you are likely to give material evidence for (the prosecution or the defence);

This is therefore to command you to attend before (*set out court or justice*), on .. the .. day of ..... A.D. ... , at ..... o'clock in the ..... noon at ..... to give evidence concerning the said charge.\*

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice or Clerk of the court

(*Seal if required*)

\* *Where a witness is required to produce anything, add the following:*

and to bring with you anything in your possession or under your control that relates to the said charge, and more particularly the following: (*specify any documents, objects or other things required*).

---

**FORM 17**

(*Sections 698 and 705*)

**Warrant for witness**

Canada,  
Province of .....,  
(*territorial division*).

To the peace officers in the (*territorial division*):

Whereas A.B. of ....., has been charged that (*state offence as in the information*);

And Whereas it has been made to appear that E.F. of ....., hereinafter called the witness, is likely to give material evidence for (the prosecution or the defence) and that\*

**\*Insert whichever of the following is appropriate:**

- (a) the said E.F. will not attend unless compelled to do so;
- (b) the said E.F. is evading service of a subpoena;
- (c) the said E.F. was duly served with a subpoena and has neglected (to attend at the time and place appointed therein *or* to remain in attendance);
- (d) the said E.F. was bound by a recognizance to attend and give evidence and has neglected (to attend *or* to remain in attendance).

This is therefore to command you, in Her Majesty's name, to arrest and bring the witness forthwith before (*set out court or justice*) to be dealt with in accordance with section 706 of the *Criminal Code*.

Dated this ..... day of ..... A.D. ...., at .....

.....

A Justice or Clerk of the Court

(Seal if required)

## FORM 18

(Section 704)

### Warrant to arrest an absconding witness

Canada,

Province of .....,  
(territorial division).

To the peace officers in the (territorial division):

Whereas A.B., of ....., has been charged that (*state offence as in the information*);

And Whereas I am satisfied by information in writing and under oath that C.D., of ....., hereinafter called the witness, is bound by recognizance to give evidence on the trial of the accused on the said charge, and that the witness (has absconded *or* is about to abscond);

This is therefore to command you, in Her Majesty's name, to arrest the witness and bring him forthwith before (*the court, judge, justice or provincial court judge before whom the witness is bound to appear*) to be dealt with in accordance with section 706 of the *Criminal Code*.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....

FORM 19

(Sections 516 and 537)

Warrant remanding a prisoner

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division):

You are hereby commanded forthwith to arrest, if necessary, and convey to the (prison) at ..... the persons named in the following schedule each of whom has been remanded to the time mentioned in the schedule:

Person charged	Offence	Remanded to
----------------	---------	-------------

And I hereby command you, the keeper of the said prison, to receive each of the said persons into your custody in the prison and keep him safely until the day when his remand expires and then to have him before me or any other justice at ..... at ..... o'clock in the ..... noon of the said day, there to answer to the charge and to be dealt with according to law, unless you are otherwise ordered before that time.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....

FORM 20

(Section 545)

Warrant of committal of witness for refusing to be  
sworn or to give evidence

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division):

Whereas A.B. of ....., hereinafter called the accused, has been charged that (set out offence as in the information);

And Whereas E.F. of ....., hereinafter called the witness, attending before me to give evidence for (the prosecution or the defence) concerning the charge, against the accused (refused to be sworn or being duly sworn as a witness refused to answer certain questions concerning the charge that were put to him or refused or neglected to produce the following writings, namely ..... or refused to sign his deposition) having been ordered to do so, without offering any just excuse for such refusal or neglect;

This is therefore to command you, in Her Majesty's name, to arrest, if necessary, and take the witness and convey him safely to the prison at ....., and there deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the said witness into your custody in the said prison and safely keep him there for the term of ..... days, unless he sooner consents to do what was required of him, and for so doing this is a sufficient warrant.



Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for .....

### FORM 21

(Sections 570 and 806)

#### Warrant of committal on conviction

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the territorial division of (name) and to the keeper of a federal penitentiary (or provincial correctional institution for the province of ..... , as the case may be)

Whereas (name), hereinafter called the offender was on the ..... day of ..... 19....., convicted by (name of judge and court) of having committed the following offence(s) and it was adjudged that the offender be sentenced as follows:

Offence	Sentence	Remarks
(state offence of which offender was convicted)	(state term of imprisonment for the offence and, in case of imprisonment for default of payment of fine, so indicate together with the amount thereof and costs applicable and whether payable forthwith or within a time fixed)	(state whether concurrent or consecutive to any other sentence imposed at the same time or presently being served by the offender)

**NOTE:** The portion under the heading “Remarks” replaced by 1995, c. 22, s. 9 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(state whether the sentence is consecutive or concurrent, and specify consecutive or concurrent to/with what other sentence)

1. ....

2. ....

3. ....

4. ....

You are hereby commanded, in her Majesty's name, to arrest the offender if it is necessary to do so in order to take the offender into custody, and to take and convey him safely to a federal penitentiary (or provincial correctional institution for the province of ... , as the case may be) and deliver him to the keeper thereof, who is hereby commanded to receive the accused into custody and to imprison him there for the term(s) of his sentence, unless, where a term of imprisonment was imposed only in default of payment of a fine or costs, the said amounts and the costs and charges of the committal and of conveying the offender to the said prison are sooner paid, and this is a sufficient warrant for so doing.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Clerk of the Court, Justice, Judge  
or Provincial Court Judge

FORM 22

(Section 806)

Warrant of committal on an order for the payment of money

Canada,  
Province of .....,  
(territorial division).

To the peace officers in the (territorial division) and to the keeper of the (prison) at .....

Whereas A.B., hereinafter called the defendant, was tried on an information alleging that (*set out matter of complaint*), and it was ordered that (*set out the order made*), and in default that the defendant be imprisoned at the (prison) at ..... for a term of .....

I hereby command you, in Her Majesty's name, to arrest, if necessary, and take the defendant and convey him safely to the (prison) at ....., and deliver him to the keeper thereof, together with the following precept:

I hereby command you, the keeper of the said prison, to receive the defendant into your custody in the said prison and imprison him there for the term of ....., unless the said amounts and the costs and charges of the committal and of conveying the defendant to the prison are sooner paid, and for so doing this is a sufficient warrant.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for .....

## FORM 23

(Sections 810 and 810.1)

## Warrant of committal for failure to furnish recognizance to keep the peace

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division) and to the keeper of the (prison) at .....

Whereas A.B., hereinafter called the accused, has been ordered to enter into a recognizance to keep the peace and be of good behaviour, and has (refused or failed) to enter into a recognizance accordingly;

You are hereby commanded, in Her Majesty's name, to arrest, if necessary, and take the accused and convey him safely to the (prison) at ..... and deliver him to the keeper thereof, together with the following precept:

You, the said keeper, are hereby commanded to receive the accused into your custody in the said prison and imprison him there until he enters into a recognizance as aforesaid or until he is discharged in due course of law.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Clerk of the Court, Justice or Provincial  
Court Judge

(Seal, if required)

1993, c. 45, s. 12.

## FORM 24

(Section 550)

## Warrant of committal of witness for failure to enter into recognizance

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division) and to the keeper of the (prison) at .....

Whereas A.B., hereinafter called the accused, was committed for trial on a charge that (state offence as in the information);

And Whereas E.F., hereinafter called the witness, having appeared as a witness on the preliminary inquiry into the said charge, and being required to enter into a recognizance to appear as a witness on the trial of the accused on the said charge, has (failed or refused) to do so;

This is therefore to command you, in Her Majesty's name, to arrest, if necessary, and take and safely convey the said witness to the (prison) at ..... and there deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the witness into your custody in the said prison and keep him there safely until the trial of the accused upon the said charge, unless before that time the witness enters into the said recognizance.



Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....

**FORM 25**

(Section 708)

**Warrant of committal for contempt**

Canada,  
Province of .....,  
(territorial division).

To the peace officers in the said (territorial division) and to the keeper of the (prison)  
at  
.....:

Whereas E.F. of ....., hereinafter called the defaulter, was on the .....  
day of ..... A.D. ...., at .....,  
convicted before ..... for contempt in that he did not attend before ..... to  
give evidence on the trial of a charge that (state offence as in the information) against A.B.  
of

....., although (duly subpoenaed or bound by recognizance to appear and give evi-  
dence in that behalf, as the case may be) and did not show any sufficient excuse for his  
default;

And Whereas in and by the said conviction it was adjudged that the defaulter (set out  
punishment adjudged);

And Whereas the defaulter has not paid the amounts adjudged to be paid; (delete if not  
applicable)

This is therefore to command you, in Her Majesty's name, to arrest, if necessary, and  
take the defaulter and convey him safely to the (prison) at ..... and there deliver  
him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the defaulter into your custody  
in the said prison and imprison him there\* and for so doing this is a sufficient warrant.

\*Insert whichever of the following is applicable:

- (a) for the term of .....
- (b) for the term of ..... unless the said sums and the costs and charges of the  
committal and of conveying the defaulter to the said prison are sooner paid;
- (c) for the term of ..... and for the term of (if consecutive so state) unless the  
said sums and the costs and charges of the committal and of conveying the defaulter to  
the said prison are sooner paid.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice or Clerk of the Court

(Seal, if required)

## FORM 26

(Section 827)

## Warrant of committal in default of payment of costs of an appeal

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers of (territorial division) and to the keeper of the (prison) at .....

Whereas it appears that on the hearing of an appeal before the (set out court) it was adjudged that A.B., of ....., hereinafter called the defaulter, should pay to the Clerk of the Court the sum of ..... dollars in respect of costs;

And Whereas the Clerk of the Court has certified that the defaulter has not paid the sum within the time limited therefor;

I do hereby command you, the said peace officers, in Her Majesty's name, to take the defaulter and safely convey him to the (prison) at ..... and deliver him to the keeper thereof, together with the following precept:

I do hereby command you, the said keeper, to receive the defaulter into your custody in the said prison and imprison him for the term of ....., unless the said sum and the costs and charges of the committal and of conveying the defaulter to the said prison are sooner paid, and for so doing this is a sufficient warrant.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for .....

## FORM 27

(Section 773)

## Warrant of committal on forfeiture of a recognizance

Canada,  
Province of ..... ,  
(territorial division).

To the sheriff of (territorial division) and to the keeper of the (prison) at .....

You are hereby commanded to arrest, if necessary, and take (A.B. and C.D. as the case may be) hereinafter called the defaulters, and to convey them safely to the (prison) at and deliver them to the keeper thereof, together with the following precept:

You, the said keeper, are hereby commanded to receive the defaulters into your custody in the said prison and imprison them for a period of ..... or until satisfaction is made of a judgment debt of ..... dollars due to Her Majesty the Queen in respect of the forfeiture of a recognizance entered into by ..... on the ..... day of ..... A.D. ....

Dated this ..... day of ..... A.D. ...., at .....

Clerk of the .....

(Seal)

**FORM 28**

*(Sections 487 and 528)*

**Endorsement of warrant**

Canada,  
Province of ..... ,  
(territorial division).

Pursuant to application this day made to me, I hereby authorize the arrest of the accused (or defendant) (or execution of this warrant, in the case of a warrant issued pursuant to section 487), within the said (territorial division).

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....

---

**FORM 29**

*(Section 507)*

**ENDORSEMENT OF WARRANT**

Canada,  
Province of ..... ,  
(territorial division).

Whereas this warrant is issued under section 507, 508 or 512 of the *Criminal Code* in respect of an offence other than an offence mentioned in section 522 of the *Criminal Code*, I hereby authorize the release of the accused pursuant to section 499 of that Act.

Dated this ..... day of ..... A.D. ...., at .....

.....  
A Justice of the Peace in and  
for.....  
1994, c. 44, s. 84.

---

**FORM 30**

*(Section 537)*

**Order for accused to be brought before justice prior  
to expiration of period of remand**

Canada,  
Province of ..... ,  
(territorial division).

To the keeper of the (prison) at .....:



Whereas by warrant dated the ..... day of .....  
 A.D. ...., I committed A.B., hereinafter called the accused, to your  
 custody and required you safely to keep until the ..... day of  
 ..... A.D. ...., and then to have him before me or any  
 other justice at ..... at ..... o'clock in the .....  
 noon to answer to the charge against him and to be dealt with according to law unless you  
 should be ordered otherwise before that time;

Now, therefore, I order and direct you to have the accused before  
 ..... at ..... at ..... o'clock in the .....  
 noon to answer to the charge against him and to be dealt with according to law.

Dated this ..... day of ..... A.D. ...., at .....

.....  
 A Justice of the Peace in and  
 for .....

### FORM 31

(Section 540)

#### Deposition of a witness

Canada,  
 Province of ..... ,  
 (territorial division).

These are the depositions of X.Y., of ..... , and M.N., of  
 ..... , taken before me, this ..... day of ..... A.D.,  
 at ..... , in the presence and hearing of A.B., hereinafter called the accused,  
 who stands charged (*state offence as in the information*).

X.Y., having been duly sworn, deposes as follows: (*insert deposition as nearly as possible in words of witness*).

M.N., having been duly sworn, deposes as follows:

I certify that the depositions of X.Y., and M.N., written on the several sheets of paper  
 hereto annexed to which my signature is affixed, were taken in the presence and hearing of  
 the accused (and signed by them respectively, in his presence *where they are required to be*  
*signed by witness*). In witness whereof I have hereto signed my name.

.....  
 A Justice of the Peace in and  
 for .....

### FORM 32

(Sections 493, 550, 679, 706, 707, 810, 810.1 and 817)

#### Recognizance

Canada,  
 Province of ..... ,  
 (territorial division).

Be it remembered that on this day the persons named in the following schedule person-

ally came before me and severally acknowledged themselves to owe to Her Majesty the Queen the several amounts set opposite their respective names, namely,

Name	Address	Occupation	Amount
A.B.			
C.D.			
E.F.			

to be made and levied of their several goods and chattels, lands and tenements, respectively, to the use of Her Majesty the Queen, if the said A.B. fails in any of the conditions hereunder written.

Taken and acknowledged before me on the ..... day of .....  
A.D. ...., at .....

.....  
Judge, Clerk of the Court, Provincial Court  
Judge or Justice

1. Whereas the said ....., hereinafter called the accused, has been charged that  
(*set out the offence in respect of which the accused has been charged*);

Now, therefore, the condition of this recognizance is that if the accused attends court  
on

..... day, the ..... day of ..... A.D. ....,  
at ..... o'clock in the ..... noon and attends thereafter as required by the court in order  
to be dealt with according to law (*or, where date and place of appearance before court are  
not known at the time recognizance is entered into if the accused attends at the time and  
place fixed by the court and attends thereafter as required by the court in order to be dealt  
with according to law*) [515; 520; 521; 522; 523; 524; 525; 680];

And further, if the accused (*insert in Schedule of Conditions any additional conditions  
that are directed*),

the said recognizance is void, otherwise it stands in full force and effect,

2. Whereas the said ....., hereinafter called the appellant, is an appellant  
against his conviction (*or against his sentence*) in respect of the following charge (*set out  
the offence for which the appellant was convicted*) [679; 680]:

Now, therefore, the condition of this recognizance is that if the appellant attends as  
required by the court in order to be dealt with according to law;

And further, if the appellant (*insert in Schedule of Conditions any additional condi-  
tions that are directed*),

the said recognizance is void, otherwise it stands in full force and effect.

3. Whereas the said ....., hereinafter called the appellant, is an appellant  
against his conviction (*or against his sentence or against an order or by way of stated case*)  
in respect of the following matter (*set out offence, subject-matter of order or question of  
law*) [816; 831; 832; 834];

Now, therefore, the condition of this recognizance is that if the appellant appears per-  
sonally at the sittings of the appeal court at which the appeal is to be heard;

And further, if the appellant (*insert in Schedule of Conditions any additional condi-  
tions that are directed*),

the said recognizance is void, otherwise it stands in full force and effect.

4. Whereas the said ....., hereinafter called the appellant, is an appellant  
against an order of dismissal (*or against sentence*) in respect of the following charge (*set  
out the name of the defendant and the offence, subject-matter of order or question of law*)  
[817; 831; 832; 834];

Now, therefore, the condition of this recognizance is that if the appellant appears personally or by counsel at the sittings of the appeal court at which the appeal is to be heard the said recognizance is void, otherwise it stands in full force and effect.

5. Whereas the said ....., hereinafter called the accused, was ordered to stand trial on a charge that (*set out the offence in respect of which the accused has been charged*);

And whereas A.B. appeared as a witness on the preliminary inquiry into the said charge [550; 706; 707];

Now, therefore, the condition of this recognizance is that if the said A.B. appears at the time and place fixed for the trial of the accused to give evidence on the indictment that is found against the accused, the said recognizance is void, otherwise it stands in full force and effect.

6. The condition of the above written recognizance is that if A.B. keeps the peace and is of good behaviour for the term of ..... commencing on ....., the said recognizance is void, otherwise it stands in full force and effect [810 and 810.1].

#### *Schedule of Conditions*

- (a) reports at (*state times*) to (*name of peace officer or other person designated*);
- (b) remains within (*designated territorial jurisdiction*);
- (c) notifies (*name of peace officer or other person designated*) of any change in his address, employment or occupation;
- (d) abstains from communicating with (*name of witness or other person*) except in accordance with the following conditions: (*as the justice or judge specifies*);
- (e) deposits his passport (*as the justice or judge directs*); and
- (f) (*any other reasonable conditions*).

*Note:* Section 763 and subsections 764(1) to (3) of the *Criminal Code* state as follows:

“763. Where a person is bound by recognizance to appear before a court, justice or provincial court judge for any purpose and the session or sittings of that court or the proceedings are adjourned or an order is made changing the place of trial, that person and his sureties continue to be bound by the recognizance in like manner as if it had been entered into with relation to the resumed proceedings or the trial at the time and place at which the proceedings are ordered to be resumed or the trial is ordered to be held.

764. (1) Where an accused is bound by recognizance to appear for trial, his arraignment or conviction does not discharge the recognizance, but it continues to bind him and his sureties, if any, for his appearance until he is discharged or sentenced, as the case may be.

(2) Notwithstanding subsection (1), the court, justice or provincial court judge may commit an accused to prison or may require him to furnish new or additional sureties for his appearance until he is discharged or sentenced, as the case may be.

(3) The sureties of an accused who is bound by recognizance to appear for trial are discharged if he is committed to prison pursuant to subsection (2).”

7. Whereas a warrant was issued under section 462.32 or a restraint order was made under subsection 462.33(3) of the *Criminal Code* in relation to any property (*set out a description of the property and its location*);

Now, therefore, the condition of this recognizance is that A.B. shall not do or cause anything to be done that would result, directly or indirectly, in the disappearance, dissipation or reduction in value of the property or otherwise affect the property so that all or a part thereof could not be subject to an order of forfeiture under section 462.37 or 462.38 of



the *Criminal Code* or any other provision of the *Criminal Code* or any other Act of Parliament [462.34].

R.S.C. 1985, c. 42 (4th Supp.), s. 7; 1993, c. 45, ss. 13, 14.

FORM 33

(Section 770)

CERTIFICATE OF DEFAULT TO BE ENDORSED ON RECOGNIZANCE

I hereby certify that A.B. (has not appeared as required by this recognizance or has not complied with a condition of this recognizance) and that by reason thereof the ends of justice have been (defeated or delayed, as the case may be).

The nature of the default is ..... and the reason for the default is .....  
(state reason if known).

The names and addresses of the principal and sureties are as follows:

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of justice, judge, provincial  
court judge, clerk of the court, peace  
officer or other person, as the case may be)

(Seal, if required)

FORM 34

(Section 771)

Writ of fieri facias

Elizabeth II by the Grace of God, etc.

To the sheriff of (territorial division), GREETING.

You are hereby commanded to levy of the goods and chattels, lands and tenements of each of the following persons the amount set opposite the name of each:

Name	Address	Occupation	Amount
------	---------	------------	--------

And you are further commanded to make a return of what you have done in execution of this writ.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Clerk of the.....

(Seal)

## FORM 35

(Sections 570 and 806)

## Conviction

Canada,  
Province of ..... ,  
(territorial division).

Be it remembered that on the ..... day of ..... at ..... , A.B., (date of birth) hereinafter called the accused, was tried under Part (XIX or XXVII) of the *Criminal Code* on the charge that (state fully the offence of which accused was convicted), was convicted of the said offence and the following punishment was imposed upon him, namely,\*

Dated this ..... day of ..... A.D. ...., at .....

.....  
Clerk of the Court, Justice or Provincial  
Court Judge

(Seal, if required)

\*Use whichever of the following forms of sentence is applicable:

- (a) that the said accused be imprisoned in the (prison) at ..... for the term of .....
- (b) that the said accused forfeit and pay the sum of ..... dollars to be applied according to law and also pay to ..... the sum of ..... dollars in respect of costs and in default of payment of the said sums forthwith (or within a time fixed, if any), to be imprisoned in the (prison) at ..... for the term of ..... unless the said sums and the costs and charges of the committal and of conveying the accused to the said prison are sooner paid;
- (c) that the said accused be imprisoned in the (prison) at ..... for the term of ..... and in addition forfeit and pay the sum of ..... dollars to be applied according to law and also pay to ..... the sum of ..... dollars in respect of costs and in default of payment of the said sums (forthwith or within a time fixed, if any), to be imprisoned in the (prison) at ..... for the term of ..... (if sentence to be consecutive, state accordingly) unless the said sums and the costs and charges of the committal and of conveying the accused to the said prison are sooner paid.

## FORM 36

(Sections 570 and 806)

## Order against an offender

Canada,  
Province of ..... ,  
(territorial division).

Be it remembered that on the ..... day of ..... A.D. ...., at ..... , A.B., (date of birth) of ..... , was tried on an information (indictment) alleging that (set out matter of complaint or alleged offence), and it was ordered and adjudged that (set out the order made).

Dated this ..... day of ..... A.D. ...., at .....  
.....  
Justice or Clerk of the Court

---

**FORM 37**

(Section 570)

**Order acquitting accused**

Canada,  
Province of ..... ,  
(territorial division).

Be it remembered that on the ..... day of ..... A.D. ...., at ..... A.B., of ..... (occupation), (date of birth), was tried on the charge that (state fully the offence of which accused was acquitted) and was found not guilty of the said offence.

Dated this ..... day of ..... A.D. ...., at .....  
.....  
Provincial Court Judge or Clerk of the  
Court

(Seal, if required)

---

**FORM 38**

(Section 708)

**Conviction for contempt**

Canada,  
Province of ..... ,  
(territorial division).

Be it remembered that on the ..... day of ..... A.D. ...., at ..... in the (territorial division), E.F. of ..... hereinafter called the defaulter, is convicted by me for contempt in that he did not attend before (set out court or justice) to give evidence on the trial of a charge that (state fully offence with which accused was charged), although (duly subpoenaed or bound by recognizance to attend to give evidence, as the case may be) and has not shown before me any sufficient excuse for his default;

Wherefore I adjudge the defaulter for his said default, (set out punishment as authorized and determined in accordance with section 708 of the Criminal Code).

Dated this ..... day of ..... A.D. ...., at .....  
.....  
A Justice or Clerk of the Court

(Seal, if required)

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**FORM 39***(Sections 519 and 550)***Order for discharge of a person in custody**

Canada,  
 Province of ..... ,  
*(territorial division).*

To the keeper of the (*prison*) at .....

I hereby direct you to release E.F., detained by you under a (warrant of committal or order) dated the ..... day of ..... A.D. ...., if the said E.F. is detained by you for no other cause.

.....  
 A Judge, Justice or Clerk of the Court

*(Seal, if required)*

**FORM 40***(Section 629)***Challenge to array**

Canada,  
 Province of ..... ,  
*(territorial division).*

The Queen  
 v.  
 C.D.

The (prosecutor or accused) challenges the array of the panel on the ground that X.Y., (sheriff or deputy sheriff), who returned the panel, was guilty of (partiality or fraud or wilful misconduct) on returning it.

Dated this ..... day of ..... A.D. ...., at .....

.....  
 Counsel for (prosecutor or accused)

**FORM 41***(Section 639)***Challenge for cause**

Canada,  
 Province of ..... ,  
*(territorial division).*

The Queen  
 v.  
 C.D.

The (prosecutor or accused) challenges G.H. on the ground that (*set out ground of challenge in accordance with subsection 638(1) of the Criminal Code*).

.....  
Counsel for (prosecutor or accused)

FORM 42

(Section 827)

Certificate of non-payment of costs of appeal

In the Court of .....

(Style of Cause)

I hereby certify that A.B. (the appellant or respondent, as the case may be) in this appeal, having been ordered to pay costs in the sum of ..... dollars, has failed to pay the said costs within the time limited for the payment thereof.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Clerk of the Court of .....

(Seal)

FORM 43

(Section 734)

Jailer's receipt to peace officer for prisoner

I hereby certify that I have received from X.Y., a peace officer for (territorial division), one A.B., together with a (warrant or order) issued by (set out court or justice, as the case may be).\*

\*Add a statement of the condition of the prisoner

Dated this ..... day of ..... A.D. ...., at .....

.....  
Keeper of (prison)

FORM 44

(Section 667)

I, (name), a fingerprint examiner designated as such for the purposes of section 667 of the Criminal Code by the Solicitor General of Canada, do hereby certify that (name) also known as (aliases if any), FPS Number ....., whose fingerprints are shown reproduced below (reproduction of fingerprints) or attached hereto, has been convicted, discharged under section 736 of the Criminal Code or convicted and sentenced in Canada as follows:

(record)

Dated this ..... day of ..... A.D. ...., at .....

.....  
Fingerprint Examiner

## FORM 45

(Section 667)

I, (name), a fingerprint examiner designated as such for the purposes of section 667 of the *Criminal Code* by the Solicitor General of Canada, do hereby certify that I have compared the fingerprints reproduced in or attached to exhibit A with the fingerprints reproduced in or attached to the certificate in Form 44 marked exhibit B and that they are those of the same person.

Dated this ..... day of ..... A.D. ...., at .....

.....  
Fingerprint Examiner

## FORM 46

(Section 737)

## Probation order

Canada,  
Province of .....,  
(territorial division).

Whereas on the ..... day of ..... at ....., A.B., hereinafter called the accused, (pleaded guilty to or was tried under (*here insert Part Xix, Xx or Xxvii, as the case may be*) of the *Criminal Code* and was (*here insert convicted or found guilty, as the case may be*) on the charge that (*here state the offence to which the accused pleaded guilty or for which the accused was found guilty, as the case may be*));

And whereas on the ..... day of ..... the court adjudged\*

\*Use whichever of the following forms of disposition is applicable:

- (a) that the accused be discharged upon the conditions hereinafter prescribed:
- (b) that the passing of sentence on the accused be suspended and that the said accused be released on the conditions hereinafter prescribed:
- (c) that the accused forfeit and pay the sum of ..... dollars to be applied according to law and in default of payment of the said sum forthwith (*or within a time fixed, if any*), be imprisoned in the (*prison*) at ..... for the term of ..... unless the said sum and charges of the committal and of conveying the said accused to the said prison are sooner paid, and in addition thereto, that the said accused comply with the conditions hereinafter prescribed:
- (d) that the accused be imprisoned in the (*prison*) at ..... for the term of ..... and, in addition thereto, that the said accused comply with the conditions hereinafter prescribed:

Now therefore the said accused shall, for the period of ..... from the date of this order (*or where paragraph (d) is applicable the date of expiration of his sentence of imprisonment*) comply with the following conditions, namely, that the said accused shall keep the peace and be of good behaviour and appear before the court when required to do so by the court, and, in addition,

(*here state any additional conditions prescribed pursuant to subsection 737(2) of the Criminal Code*).

Dated this ..... day of ..... A.D. ...., at .....



.....  
**Clerk of the Court,  
 Justice or Provincial Court Judge**

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the references to ss. 737 and 737(2) with ss. 732.1 and 732.1(3).

**FORM 47**

(Section 462.48)

**ORDER TO DISCLOSE INCOME TAX INFORMATION**

Canada,  
 Province of .....,  
 (territorial division).

To A.B., of ....., (office or occupation):

Whereas, it appears on the oath of C.D., of ....., that there are reasonable grounds for believing that E.F., of ....., has committed or benefited from the commission of the offence of ..... and that the information or documents (*describe information or documents*) are likely to be of substantial value to an investigation of that offence or a related matter; and

Whereas there are reasonable grounds for believing that it is in the public interest to allow access to the information or documents, having regard to the benefit likely to accrue to the investigation if the access is obtained;

This is, therefore, to authorize and require you between the hours of (*as the judge may direct*), during the period commencing on ..... and ending on ....., to produce all the above-mentioned information and documents to one of the following police officers, namely, (*here name police officers*) and allow the police officer to remove the information or documents, or to allow the police officer access to the above-mentioned information and documents and to examine them, *as the judge directs*, subject to the following conditions (*state conditions*): .....

Dated this ..... day of ..... A.D. ...., at .....

.....  
 Signature of judge

R.S., c. C-34, Part XXV; R.S., c. 2 (2nd Supp.), s. 23; 1972, c. 13, s. 68; 1974-75-76, c. 105, s. 24; 1984, c. 40, s. 20; R.S.C. 1985, c. 27 (1st Supp.), ss. 101(2)(e), 184; c. 42 (4th Supp.), s. 8.

**FORM 48**

(Section 672.13)

**Assessment Order**

Canada,  
 Province of .....,  
 (territorial division).

Whereas I have reasonable grounds to believe that evidence of the mental condition of (*name of accused*), who has been charged with ....., may be necessary to determine\*

☐ whether the accused is unfit to stand trial

- ☐ whether the accused suffered from a mental disorder so as to exempt the accused from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code* at the time of the act or omission charged against the accused
- ☐ whether the accused is a dangerous mentally disordered accused under section 672.65 of the *Criminal Code*
- ☐ whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child
- ☐ whether a verdict of unfit to stand trial or a verdict of not criminally responsible on account of mental disorder had been rendered in respect of the accused, the appropriate disposition to be made in respect of the accused pursuant to section 672.54 or 672.58 of the *Criminal Code*
- ☐ where the accused has been convicted of the offence, whether an order under subsection 736.11(1) of the *Criminal Code* should be made in respect of the accused

I hereby order an assessment of the mental condition of (name of accused) to be conducted by/at (name of person or service by whom or place where assessment is to be made) for a period of ..... days.

This order is to be in force for a total of ..... days, including travelling time, during which time the accused is to remain\*

- ☐ in custody at (place where accused is to be detained)
- ☐ out of custody, on the following conditions:  
(set out conditions, where applicable)

\* Check applicable option.

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of justice or judge or clerk of the  
court, as the case may be)  
1991, c. 43, s. 8.

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736.11(1) with s. 747.1(1).

## FORM 49

(Section 672.57)

### WARRANT OF COMMITTAL DISPOSITION OF DETENTION

Canada,  
Province of .....,  
(territorial division).

To the peace officers in the said (territorial division) and to the keeper (administrator, warden) of the (prison, hospital or other appropriate place where the accused is detained).

This warrant is issued for the committal of A.B., of ....., (occupation), hereinafter called the accused.

Whereas the accused has been charged that (set out briefly the offence in respect of which the accused was charged);

And whereas the accused was found\*

- ☐ unfit to stand trial
- ☐ not criminally responsible on account of mental disorder

This is, therefore, to command you, in Her Majesty's name, to take the accused in custody and convey the accused safely to the *(prison, hospital or other appropriate place)* at ....., and there deliver the accused to the keeper *(administrator, warden)* with the following precept:

I do therefore command you the said keeper *(administrator, warden)* to receive the accused in your custody in the said *(prison, hospital or other appropriate place)* and to keep the accused safely there until the the accused is delivered by due course of law.

The following are the conditions to which the accused shall be subject while in your *(prison, hospital or other appropriate place)*:

The following are the powers regarding the restrictions *(and the limits and conditions on those restrictions)* on the liberty of the accused that are hereby delegated to you the said keeper *(administrator, warden)* of the said *(prison, hospital or other appropriate place)*:

\*Check applicable option.

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of judge, clerk of the court,  
provincial court judge or chairperson of the  
Review Board)  
1991, c. 43, s. 8.

FORM 50

(Section 672.7(2))

WARRANT OF COMMITTAL  
PLACEMENT DECISION

Canada,  
Province of .....,  
*(territorial division)*.

To the peace officers in the said *(territorial division)* and to the keeper *(administrator, warden)* of the *(prison, hospital or other appropriate place where the accused is detained)*.

This warrant is issued for the committal of A.B., of ....., *(occupation)*, herein-after called the accused.

Whereas the accused has been charged that *(set out briefly the offence in respect of which the accused was charged)*;

And whereas the accused was found\*

- ☐ unfit to stand trial
- ☐ not criminally responsible on account of mental disorder

And whereas the Review Board had held a hearing and decided that the accused shall be detained in custody;

And whereas the accused is required to be detained in custody pursuant to a warrant of committal issued by *(set out the name of the Judge, Clerk of the Court, Provincial Court Judge or Justice as well as the name of the court and territorial division)*, dated the ..... day of ....., in respect of the offence that *(set out briefly the offence in respect of which the accused was charged or convicted)*;

This is, therefore, to command you, in Her Majesty's name, to\*

- ☐ execute the warrant of committal issued by the court, according to its terms
- ☐ execute the warrant of committal issued herewith by the Review Board



\*Check applicable option.

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of chairperson of the Review  
Board)

1991, c. 43, s. 8.

## FORM 51

(Section 736.11(3))

### HOSPITAL ORDER

Canada,  
Province of .....,  
(territorial division).

Whereas (*name of offender*), who has been convicted of (*offence*) and sentenced to a term of imprisonment of (*length of term of imprisonment*), is suffering from a mental disorder in an acute phase and immediate treatment of the mental disorder is urgently required to prevent significant deterioration of the mental or physical health of the offender or to prevent the offender from causing serious bodily harm to any person;

And whereas (*name of offender*) and (*name of treatment facility*) have consented to this order and its terms and conditions;

I hereby order that (*name of offender*) be detained for treatment at (*name of treatment facility*) for a period not to exceed (*length of period not to exceed sixty days*) subject to the following terms and conditions:

(*set out terms and conditions, where applicable*)

Dated this ..... day of ..... A.D. ...., at .....

.....  
(Signature of justice or judge or clerk of the  
court, as the case may be)

1991, c. 43, s. 8.

**NOTE:** Amended 1995, c. 22, s. 10 (to come into force by order of the Governor in Council) by replacing the reference to s. 736.11(3) with s. 747.1(3).



# CANADA EVIDENCE ACT

R.S.C. 1985, Chap. C-5

Amended R.S.C. 1985, c. 27 (1st Supp.), s. 203(1)

Amended R.S.C. 1985, c. 19 (3rd Supp.), ss. 17 and 18

Amended 1992, c. 1, s. 142(1); Sch. V, item 9(1) in force February 28, 1992; Sch. V, item 9(2) in force September 2, 1994 as provided by s. 142(2)

Amended 1992, c. 47, s. 66; to come into force by order of the Governor in Council

Amended 1993, c. 28, s. 78; to come into force April 1, 1999 or earlier by order of the Governor in Council

Amended 1993, c. 34, s. 15; in force June 23, 1993

Amended 1994, c. 44, ss. 85 to 93; brought into force February 15, 1995

Amended 1995, c. 28, s. 47; in force July 13, 1995

## An Act respecting witnesses and evidence

### SHORT TITLE

#### SHORT TITLE.

1. This Act may be cited as the *Canada Evidence Act*. R.S., c. E-10, s. 1.

### Part I

#### Application

#### APPLICATION.

2. This Part applies to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction. R.S., c. E-10, s. 2.

### Witnesses

#### INTEREST OR CRIME.

3. A person is not incompetent to give evidence by reason of interest or crime. R.S., c. E-10, s. 3.

#### ANNOTATIONS

While an accomplice who is separately charged from the accused and has not yet been sentenced is a competent and compellable witness at the instance of the Crown, a trial judge does have a discretion to exclude his evidence if satisfied that it is in the interests of justice to do so. That discretion however can only be exercised with knowledge of the evidence to be tendered and after inquiry into all the surrounding circumstances. It was not proper for the trial judge to simply refuse to hear the witness: *R. v. Piercey* (1988),



42 C.C.C. (3d) 475, 70 Nfld. & P.E.I.R. 271 (Nfld. C.A.). See also *R. v. Williams* (1974), 21 C.C.C. (2d) 1 (Ct. Mart. App. Ct.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, and *R. v. Caulfield* (1972), 10 C.C.C. (2d) 539, 10 C.R. (3d) (Alta. C.A.).

The fact that the accomplice has not yet been sentenced for his involvement in the offence does not affect the admissibility of the witness's evidence and admission of such evidence does not infringe the accused's rights under s. 7 of the Charter: *R. v. Cruikshanks* (1990), 58 C.C.C. (3d) 26 (B.C.C.A.).

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**ACCUSED AND SPOUSE / Idem / Communications during marriage / Offences against young persons / Saving / Failure to testify.**

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

(2) The wife or husband of a person charged with an offence against subsection 50(1) of the *Young Offenders Act* or with an offence against any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the *Criminal Code*, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the *Criminal Code* where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution. R.S., c. E-10, s. 4; 1980-81-82-83, c. 110, s. 71, c. 125, s. 29; 1984, c. 40, s. 27; R.S.C. 1985, c. 19 (3rd Supp.), s. 17.

**ANNOTATIONS**

**Incompetency of spouse generally [subsec. (1)]** – On the joint trial of two accused on a charge of conspiracy the wife of one accused is not a compellable witness at the instance of the Crown against the co-accused: *R. v. Singh and Amar*, [1970] 1 C.C.C. 299, 69 W.W.R. 297, 7 C.R.N.S. 258 *sub nom.* *R. v. Amar* (B.C.C.A.).

A valid marriage at common law requires that the *verba de praesenti* be pronounced in the presence and with the intervention of an episcopally ordained priest: *Ex p. Cote* (1971), 5 C.C.C. (2d) 49, 122 D.L.R. (3d) 353 (Sask. C.A.).

A so-called “common-law” wife is a competent witness at the instance of the Crown: *R. v. Jackson* (1981), 61 C.C.C. (2d) 540, 23 C.R. (3d) 4 (N.S.S.C. App. Div.). Requiring a “common law” spouse to testify against the accused does not infringe the equality rights of the testifying spouse as guaranteed by s. 15 of the Charter: *R. v. Duviolier* (1990), 60 C.C.C. (3d) 353, 75 O.R. (2d) 203 (Gen. Div.). To a similar effect see: *R. v. Thompson* (1994), 90 C.C.C. (3d) 519, 32 C.R. (4th) 143, [1994] 7 W.W.R. 653 (Alta. C.A.).

A person is the wife or husband of the accused for the purposes of this section even

where the marriage takes place after the incident leading to the charge but before the trial: *R. v. Lonsdale* (1973), 15 C.C.C. (2d) 201, 24 C.R.N.S. 225 (Alta. S.C. App. Div.).

The accused's wife was not a competent witness for the Crown although she and the accused were married after the events giving rise to the charges and notwithstanding evidence that she married the accused to avoid having to testify against the accused: *R. v. Hawkins* (1995), 96 C.C.C. (3d) 503, 37 C.R. (4th) 229, 22 O.R. (3d) 193 (C.A.).

Once the marriage has been dissolved by divorce the common law rule of spousal incompetency no longer applies and the ex-spouse is a compellable witness at the instance of the Crown, notwithstanding the offences were allegedly committed during the marriage: *R. v. Marchand* (1980), 55 C.C.C. (2d) 77, 115 D.L.R. (3d) 403 (N.S.S.C. App. Div.); *R. v. Bailey* (1983), 4 C.C.C. (3d) 21, 32 C.R. (3d) 337 (Ont. C.A.).

The common law exception to spousal incompetency where the spouses have become divorced by the time of trial, although not at the time of the offence, should be extended to cases where there is no reasonable possibility of reconciliation at the time of the trial: *R. v. Salituro* (1991), 68 C.C.C. (3d) 289 (S.C.C.) (5:0).

The fact of irreconcilable separation need only be proved on a balance of probabilities: *R. v. Jeffrey* (1993), 84 C.C.C. (3d) 31, 25 C.R. (4th) 104, 106 D.L.R. (4th) 442 (Alta. C.A.).

An objection to the competency of the accused's former spouse to testify at the instance of the Crown, on the basis that the marriage was not validly dissolved, must be taken at trial and cannot be raised for the first time on appeal: *R. v. Clark* (1983), 7 C.C.C. (3d) 46, 35 C.R. (3d) 357 (Ont. C.A.).

**Competency of employees of corporation** – An officer or employee of an accused corporation although he is determined to be the directing mind and will of the corporation is a compellable witness at the instance of the Crown: *R. v. N. M. Paterson and Sons Ltd.* (1980), 55 C.C.C. (2d) 289, 19 C.R. (3d) 164, [1980] 2 S.C.R. 679, [1981] 2 W.W.R. 103 (7:0). And compelling the officer or employee to testify does not violate s. 11(c) of the Canadian Charter of Rights and Freedoms: *R. v. Amway Corp.* (1989), 68 C.R. (3d) 97 (S.C.C.) (7:0).

**Spousal communications privilege [subsec. (3)]** – It would seem that once the marriage has been dissolved by divorce the marital privilege with respect to communication between spouses may not be claimed: *R. v. Marchand* (1980), 55 C.C.C. (2d) 77, 115 D.L.R. (3d) 403 (N.S. C.A.).

The spouse cannot be compelled to disclose marital communications even if a compellable witness at the instance of the Crown: *R. v. Jean and Piesinger* (1979), 46 C.C.C. (2d) 176, 7 C.R. (3d) 338, 15 A.R. 147 (C.A.), affd [1980] 1 S.C.R. 400, 51 C.C.C. (2d) 192n, 16 C.R. (3d) 193; *R. v. Zylstra* (1995), 99 C.C.C. (3d) 477, 41 C.R. (4th) 130, 82 O.A.C. 394 (C.A.) *Contra*: *R. v. St Jean* (1976), 32 C.C.C. (2d) 438, 34 C.R.N.S. 378 (Que. C.A.).

On the other hand, the spouse is required to assert the privilege in the presence of the jury. However, a special instruction would be required that at least informs the jury that the privilege is that of the witness and that the decision whether or not to assert the privilege lies with the witness, not the accused: *R. v. Zylstra*, *supra*.

By virtue of subsec. (3) when combined with s. 189(5) of the Criminal Code, which preserves the privilege of information obtained by an interception of a private communication, the intercepted private communications between spouses are inadmissible in evidence at the instance of the Crown (except, *semble*, with the consent of the spouse enjoying the privilege): *R. v. Lloyd and Lloyd* (1981), 64 C.C.C. (2d) 169, 31 C.R. (3d) 157, [1981] 2 S.C.R. 645 (6:3).

However, the privilege does not prevent the admission into evidence of communications intercepted prior to the marriage even if the parties to the communication are married by the time of the trial: *R. v. Andrew* (1986), 26 C.C.C. (3d) 111 (B.C.S.C.).

The privilege in subsec. (3) is testimonial only and does not prevent the introduction

into evidence of a document written by the accused and sent to his wife which is later found by police in a search of the accused's home: *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S.C.), affd 13 C.C.C. (3d) 185 (C.A.), leave to appeal to S.C.C. refused November 22, 1984.

**Competency in cases of child victims [subsec. (4)]** – The trend of authority even prior to enactment of this subsection was that the spouse of the accused was a competent witness for the Crown where the case involved violence by one of the spouses to their infant children: *R. v. MacPherson* (1980), 52 C.C.C. (2d) 547, 110 D.L.R. (3d) 582 (N.S. C.A.); *R. v. McNamara* (1979), 48 C.C.C. (2d) 201, 12 C.R. (3d) 210 (Ont. Co. Ct.); *R. v. Fellichle* (1979), 12 C.R. (3d) 207 (B.C.S.C.). Of course, this new subsection is not limited to cases where the victim was the child of the accused or his spouse.

**Common law competency of spouse [subsec. (5)]** – In *R. v. Singh and Amar*, *supra*, the common law exceptions were said to include, broadly speaking, offences where the spouse alleges offences affecting his or her person, health or liberty against the accused spouse.

On the trial of a charge of attempted murder of a wife, she is a competent witness against the accused. This offence being one involving personal violence falls within the category of offences which at common law one spouse is competent to testify against the other even where the spouse is not injured. Further, being a competent witness at common law she is also a compellable witness at the instance of the Crown: *R. v. Lonsdale* (1973), 15 C.C.C. (2d) 201, 24 C.R.N.S. 225 (Alta. C.A.); *R. v. Czipps* (1979), 48 C.C.C. (2d) 166, 12 C.R. (3d) 193 (Ont. C.A.); *R. v. McGinty* (1986), 27 C.C.C. (3d) 36, 52 C.R. (3d) 161, [1986] 4 W.W.R. 97 (Y.T.C.A.).

A spouse is a competent witness at the instance of the Crown where her evidence will disclose an interference with the person, liberty or health of the other spouse whether or not the charge in the information so alleges: *R. v. Sillars* (1978), 45 C.C.C. (2d) 283, 12 C.R. (3d) 202, [1979] 1 W.W.R. 743 (B.C.C.A.); *R. v. Czipps*, *supra*.

An information charging the accused with breach of probation, in that he failed to comply with a term of the probation order that he not harass his wife, on its face alleges an interference with the person, liberty or health of his spouse and she is therefore a competent witness for the prosecution. A *voir dire* is not required to determine the admissibility of her testimony: *R. v. Giroux* (1985), 19 C.C.C. (3d) 153 (Sask. Q.B.).

**Comment by trial judge [subsec. (6)]** – A comment in the trial Judge's charge to the jury that the accused's statement to the police was not under oath and subject to cross-examination was held (4:1) not to be improper: *R. v. Marciniak*, [1963] 2 C.C.C. 212, 40 C.R. 182 (Man.C.A.).

This subsection has no application where a trial Judge is sitting alone: *Pratte v. Maher and The Queen*, [1965] 1 C.C.C. 77, 43 C.R. 214 (Que. C.A.).

The trial judge may only draw an adverse inference from the failure of the accused to testify where the prosecution's evidence has reached the point where, standing alone, it could support a conclusion of guilt beyond a reasonable doubt. The accused's failure to testify is not an independent piece of evidence to be placed on the evidentiary scale, but rather a feature of the trial which may assist in deciding what inferences should be drawn from the evidence. In the face of proven facts calling for an explanation, the failure of the accused to testify has evidentiary significance when the accused is in a unique position to provide such an explanation: *R. v. Johnson* (1993), 79 C.C.C. (3d) 42, 21 C.R. (4th) 336, 12 O.R. (3d) 340 (C.A.).

In *R. v. McConnell and Beer*, [1968] 4 C.C.C. 257, 4 C.R.N.S. 269 (S.C.C.), it was held (3:2), that the trial Judge's re-charge, explaining to the jury that, when he had charged them earlier that they did not have to accept exculpatory statements of the accused, they were not to take it that there was any onus on the accused to prove their innocence by going into the witness-box and testifying, and that they were not to be



influenced by the failure of the accused to testify, did not amount to a violation of this subsection.

This subsection is to be interpreted in a purposive rather than literal manner, that purpose being to protect an accused from the danger of having his right not to testify presented to the jury in such a fashion as to suggest that the accused's silence is being used as a cloak for his guilt. Off-hand comments by the trial judge that evidence should not be disregarded based simply on speculation particularly when it was not contradicted and that the accused did not present a defence do not constitute comments prohibited by this subsection: *R. v. Potvin* (1989), 47 C.C.C. (3d) 289, 68 C.R. (3d) 193 (S.C.C.) (5:0).

It is incorrect for a trial Judge to direct a jury that they must not draw any unfavourable conclusion from the accused's failure to testify. It is open to the jury to draw such an adverse inference particularly where there is alibi evidence in his defence: *R. v. Vezeau* (1976), 28 C.C.C. (2d) 81, 66 D.L.R. (3d) 418, [1977] 2 S.C.R. 277 (7:2).

The statement by the trial Judge at the opening of the trial in outlining trial procedure that at the close of the Crown's case defence counsel may open to the jury and outline the evidence to be called does not infringe this section even where in fact no defence evidence is called: *R. v. Agawa and Mallet* (1975), 28 C.C.C. (2d) 379, 31 C.R.N.S. 293 (Ont. C.A.); *R. v. Sherman* (1979), 47 C.C.C. (2d) 521 (B.C.C.A.).

**Comment by prosecutor [subsec. (6)]** – An explanation by Crown counsel as to why he did not call the accused's wife, that is, that as a matter of law he was prohibited from doing so, was held not to constitute a comment prohibited by this subsection: *R. v. Wildman* (1981), 60 C.C.C. (2d) 289 (Ont. C.A.), rev'd on other grounds 14 C.C.C. (3d) 321, [1985] 2 S.C.R. 311.

A statement by the prosecutor of the obvious fact that the jury had not heard from the accused's wife in a case where the accused's defence was that he was asleep at home at the time of the offence, would seem not to constitute a comment prohibited by this subsection, and in any event did not result in any miscarriage of justice: *R. v. Gray* (1986), 25 C.C.C. (3d) 145 (B.C.C.A.).

A statement by the prosecutor that only the accused, alleged to have killed his common law spouse, knew what really happened and "now the rest of us know", and that the jury should consider the evidence put before them "as well as the evidence not put before you", when considered in context, did not violate this subsection: *R. v. Emile* (1988), 42 C.C.C. (3d) 408, 65 C.R. (3d) 135, [1988] 5 W.W.R. 481 (N.W.T.C.A.).

Subsection (6) does not apply to proceedings under s. 745 to review the period of parole ineligibility of a prisoner serving sentence for murder: *Poulin v. Quebec (Attorney General)* (1991), 68 C.C.C. (3d) 472 (Que. S.C.).

**Application of Charter to subsec. (6)** – Subsection (6) does not violate ss. 7 and 11(c) and (d) of the Charter of Rights. While the prosecutor and the trial judge are precluded from commenting on the failure of the accused to testify, his own counsel may make an appropriate comment and explain that the accused is under no duty to testify. Further, neither s. 11(c) nor (d) of the Charter requires that a trial judge specifically instruct jurors that no adverse inference can be drawn from the failure of the accused to testify: *R. v. Boss* (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123 (Ont. C.A.).

The Charter of Rights does not prevent counsel for one accused commenting on the failure of a co-accused to testify: *R. v. Cuff* (1989), 49 C.C.C. (3d) 65, 75 Nfld. & P.E.I.R. 1 (C.A.).

This section does not prohibit comment by counsel for the co-accused from commenting on an accused's failure to testify. Further, such comment does not violate s. 11(c) of the Charter. This does not mean, however, that counsel has free rein and, accordingly, could encourage the jury to speculate or draw unwarranted inferences: *R. v. Naglik* (1991), 65 C.C.C. (3d) 272, 3 O.R. (3d) 385, 46 O.A.C. 81 (C.A.), rev'd on other grounds 83 C.C.C. (3d) 526, 105 D.L.R. (4th) 712 (S.C.C.).

The accused having been cross-examined by his co-accused, whom he incriminated in

his testimony, as to his failure to give a statement to the police, the trial judge was required to direct the jury that the accused had a right to pre-trial silence. Further, the judge should have instructed the jury that the exercise of this right was not evidence as to guilt or innocence but merely went to credibility: *R. v. Crawford*, [1995] 1 S.C.R. 858, 96 C.C.C. (3d) 481, 37 C.R. (4th) 197.

#### INCRIMINATING QUESTIONS / Answer not admissible against witness.

5. (1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence. R.S., c. E-10, s. 5.

#### ANNOTATIONS

**Effect of provision on common law right** – This section and comparable provincial legislation have abolished the common law right of a witness to refuse to answer a question on the grounds that it may incriminate him and the witness must answer questions put to him, notwithstanding he was then facing criminal charges in a foreign jurisdiction: *Summa Corp v. Meier* (1981), 127 D.L.R. (3d) 238, 30 B.C.L.R. 69 (C.A.), leave to appeal to S.C.C. refused D.L.R. *loc. cit.* 39 N.R. 538.

Absent conduct on the part of the Crown amounting to an abuse of process, a witness who is charged in separate proceedings with the same offence as the accused is a compellable witness at the instance of the Crown at the accused's trial. However, s. 7 of the Charter provides protection to the witness in addition to the protection afforded by this section and s. 13 of the Charter. Thus, derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of the witness ought generally to be excluded under s. 7 of the Charter at the witness' subsequent trial since its admission would tend to affect the fairness of the trial: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1, 36 C.R. (4th) 1. [Also see notes under ss. 7 and 13 of the Charter.]

**Admission of evidence of refusal to comply with investigative tests** – There is no general privilege against self-incrimination. The privilege in its modern form means only the right of a witness as qualified by this section to refuse to answer certain questions, if the answer will tend to incriminate the witness, and the absolute right of the accused to refuse to go into the witness box. Thus, in particular, evidence may be led of the accused's refusal to see a Crown psychiatrist where the accused relies on the defence of insanity: *R. v. Sweeney (No. 2)* (1977), 35 C.C.C. (2d) 245, 76 D.L.R. (3d) 211, 16 O.R. (2d) 814 (C.A.).

The privilege against self-incrimination guaranteed by s. 2(d) of the Canadian Bill of Rights is as set out in this section and with respect to an accused, the privilege is the right to stand mute. The privilege extends to the accused *qua* witness not *qua* accused, and is concerned with testimonial compulsion specifically, not compulsion generally. Thus, in circumstances where it is relevant, evidence may be led by the Crown as to the accused's refusal to participate in a lineup: *Marcoux and Solomon v. The Queen* (1975), 24 C.C.C. (2d) 1, [1976] 1 S.C.R. 763, 60 D.L.R. (3d) 119 (9:0).

Where it can be reasonably anticipated that defence counsel would challenge the ade-

quacy of the police identification procedures the Crown may anticipate that the trial judge or the defence would make adverse comments on the unexplained absence of an identification parade and the danger of a "one on one" or court-room identification and lead evidence as to the accused's refusal to attend for a line-up or provide a photograph for a photo line-up. The evidence is admissible however for a limited purpose, to explain the absence of an identification parade, and not admissible as evidence of a consciousness of guilt: *R. v. Shortreed* (1990), 54 C.C.C. (3d) 292, 75 C.R. (3d) 306 (Ont. C.A.).

Where, however, the suspect's conduct goes beyond a mere refusal to participate in a line-up or provide a photograph and he takes extraordinary efforts to prevent the taking of a photograph by altering or concealing his facial appearance then, in the absence of a plausible explanation, the jury is entitled to draw an inference that he has something to conceal and that this is evidence of a consciousness of guilt: *R. v. Shortreed*, *supra*.

**Application of subsec. (2)** – If a witness does not avail himself of the protection of this section his answers may be given against him at his own trial notwithstanding that he did not know his rights under this subsection: *Tass v. The King* (1946), 87 C.C.C. 97, 2 C.R. 503 (S.C.C.).

The objection may only be made after the question is asked but in practice a trial judge may permit a general objection for the ensuing series of questions to follow: *R. v. Mottola And Vallee* (1959), 124 C.C.C. 288, 31 C.R. 4 (Ont. C.A.); *R. v. Cote* (1979), 50 C.C.C. (2d) 564, 8 C.R. (3d) 171 *sub nom. A.-G. Que. v. Cote* (Que. C.A.), and the objection may even be made by counsel prior to the witness being sworn: *R. v. Chaperon* (1979), 52 C.C.C. (2d) 85 (Ont. C.A.).

However, where the objection is made only part way through the witness' testimony the presiding officer, such as a coroner, has no power to extend the protection of this section retroactively back to the commencement of the testimony: *R. v. Vigeant* (1982), 3 C.C.C. (3d) 445 (Que. C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*, 46 N.R. 260n.

The testimony of an accused on the *voir dire* as to the admissibility of his confession in answer to questions as to whether the confession is true is inadmissible on the trial proper even if the accused does not claim the protection under this subsection. In fact it is doubtful whether this subsection can apply in such circumstances: *R. v. Magdish, Bennett and Sweet* (1978), 41 C.C.C. (2d) 449, 3 C.R. (3d) 377 (Ont. H.C.J.). Support for this view may be found in the statement of Dickson, J., for the plurality in *Erven v. The Queen* (1978), 44 C.C.C. (2d) 76, 92 D.L.R. (3d) 507, 6 C.R. (3d) 97 (S.C.C.) (6:3) that the "accused may testify on the *voir dire* while remaining silent during the trial. Evidence on the *voir dire* cannot be used in the trial itself".

Whatever the scope of this subsection, at least where the statement is ruled inadmissible, the accused may not be cross-examined by the Crown at the trial proper on his testimony given at the *voir dire*: *R. v. Coughlin and Nicholson* (1982), 3 C.C.C. (3d) 259 (Ont. C.A.), applying *Wong Kam-Ming v. The Queen*, [1979] 2 W.L.R. 81 (P.C.).

The words "a prosecution for perjury" refer to that specific offence and thus the protection afforded by this subsection would extend to a subsequent prosecution for giving contradictory evidence contrary to s. 136 of the Criminal Code: *R. v. Chaperon*, *supra*.

This subsection only prevents the use of the previous evidence at the witness' own trial on a charge laid against him: *R. v. Vermette* (No. 3) (1982), 68 C.C.C. (2d) 572 (Que. S.C.).

This section does not prevent cross-examination of an accused on testimony given in an earlier proceeding, notwithstanding an objection under subsec. (2), where the purpose of the cross-examination is to impeach the accused's credibility and not to incriminate him: *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385, [1990] 3 S.C.R. 618, 1 C.R. (4th) 285 (4:3).

**Effect of s. 13 of the Charter of Rights [subsec. (2)]** – Cases under this subsection must now be considered in light of s. 13 of the Canadian Charter of Rights and Freedoms. The



leading case under s. 13 is *Dubois v. The Queen* (1985), 22 C.C.C. (3d) 513, 48 C.R. (3d) 193, [1985] 2 S.C.R. 350 (6:1) where it was held as follows: (1) section 13 applies although the first proceeding took place prior to the Charter's proclamation; (2) section 13 applies to a technically voluntary witness such as the accused at his own trial and its protection does not depend on an objection, unlike this subsection; (3) the evidence need not have been incriminating in the first proceedings; (4) any evidence which the Crown tenders as part of its case against the accused is "used to incriminate" within the meaning of s. 13; (5) the retrial of the same offence following an appeal is another proceeding and the accused's testimony at the first trial can therefore not be tendered at the second trial as part of the Crown's case.

Some of the issues left unresolved by *Dubois v. The Queen* are: (1) whether testimony by an accused at his own preliminary inquiry is admissible at the trial, which in turn may depend on whether s. 541 of the Criminal Code is a reasonable limit within the meaning of s. 1 of the Charter; however, see the pre-*Dubois* case of *R. v. Yakeleya* (1985), 20 C.C.C. (3d) 193, 46 C.R. (3d) 282 (Ont. C.A.); (2) whether the accused's testimony at a *voir dire* at his trial is admissible; however, see dissenting reasons of McIntyre J. in *Dubois* at p. 528 C.C.C.

In the subsequent case of *R. v. Mannion* (1986), 28 C.C.C. (3d) 544, 53 C.R. (3d) 193, [1986] 2 S.C.R. 272, [1986] 6 W.W.R. 525 (7:0), the court held that cross-examination of the accused on his testimony at a prior trial was a violation of s. 13, the cross-examination being directed to show that the accused had left the jurisdiction out of consciousness of guilt and thus its purpose was to incriminate the accused.

Section 13 does not prevent cross-examination of an accused on testimony given in another proceeding where the purpose of the cross-examination is to impeach the accused's credibility and not to incriminate him. In such a case, however, the previous statement may not be used to establish the truth of its contents and the trial judge must so instruct the jury: *R. v. Kuldip*, *supra*.

Section 13 of the Charter is violated by testimony of a police officer that he was able to identify the accused as a result of hearing him testify in another proceeding: *R. v. Skinner* (1988), 42 C.C.C. (3d) 575 (Ont. C.A.).

## EVIDENCE OF MUTE.

**6. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible. R.S., c. E-10, s. 6.**

## EXPERT WITNESSES.

**7. Where, in any trial or other proceeding, criminal or civil, it is intended by the prosecution or the defence, or by any party, to examine as witnesses professional or other experts entitled according to the law or practice to give opinion evidence, not more than five of such witnesses may be called on either side without the leave of the court or judge or person presiding. R.S., c. E-10, s. 7.**

## ANNOTATIONS

Where the opinion evidence played a minor and insignificant part of the evidence the failure of the Crown to obtain leave to call over five experts was excused: *R. v. Vincent* (1963), 40 C.R. 365, 42 W.W.R. 638 (Man. C.A.).

Ordinarily an expert medical witness may only be asked to volunteer his opinion upon a hypothetical question based on proven facts and the only time when he may give his opinion based on all the trial evidence that he has observed is when there was no conflict in the evidence and it was made clear to the jury that that evidence was the foundation for his opinion: *Bleta v. The Queen*, [1965] 1 C.C.C. 1, 44 C.R. 193 (S.C.C.) (7:0).

The doctrine of privilege of communication does not apply to expert witnesses in a criminal case: *R. v. Potvin* (1971), 16 C.R.N.S. 233 (Que. C.A.).

It is only in unusual circumstances that expert medical evidence is admissible to attack the credibility of a witness. Such evidence would only be admissible where there is some hidden fact which affects a witness' credibility which only expert medical evidence can reveal: *R. v. French* (1977), 37 C.C.C. (2d) 201 (Ont. C.A.). (An appeal by the accused to the S.C.C. on other grounds was dismissed 47 C.C.C. (2d) 411, [1980] 1 S.C.R. 158, 98 D.L.R. (3d) 385 (7:0).)

## HANDWRITING COMPARISON.

8. Comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting those writings, may be submitted to the court and jury as proof of the genuineness or otherwise of the writing in dispute. *R.S., c. E-10, s. 8.*

## ANNOTATIONS

A witness may be competent to prove a person's handwriting through having carried on regular correspondence or having frequently seen the person's handwriting: *Pitre v. The King* (1932), 59 C.C.C. 148, [1933] 1 D.L.R. 417 (S.C.C.).

Particularly in light of the possibility of calling a witness under this section a judge ought not himself become a witness by attempting to compare signatures, in this case the signature of the accused on the appearance notice with a signature of a certificate of business name and style which the Crown relied upon to prove the accused's connection with premises alleged to have contained gaming devices: *R. v. Boudreau* (1987), 81 N.B.R. (2d) 148 (C.A.).

## ADVERSE WITNESSES / Previous statements by witness not proved adverse.

9. (1) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but if the witness, in the opinion of the court, proves adverse, the party may contradict him by other evidence, or, by leave of the court, may prove that the witness made at other times a statement inconsistent with his present testimony, but before the last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

(2) Where the party producing a witness alleges that the witness made at other times a statement in writing, reduced to writing, or recorded on audio tape or video tape or otherwise, inconsistent with the witness' present testimony, the court may, without proof that the witness is adverse, grant leave to that party to cross-examine the witness as to the statement and the court may consider the cross-examination in determining whether in the opinion of the court the witness is adverse. *R.S., c. E-10, s. 9; 1994, c. 44, s. 85.*

## ANNOTATIONS

**Proof of statement of adverse witness [subsec. (1)]** – The difficult problem of the meaning to be assigned to the word “adverse” has been considered by a number of courts. The majority of the Ontario Court of Appeal in *Wawanese Mutual Ins. Co. v. Hanes*, [1963] 1 C.C.C. 176, 28 D.L.R. (2d) 386 (Ont. C.A.) held in relation to the comparable provision of the Ontario Evidence Act, R.S.O. 1950, c. 119 that “adverse” was not limited to hostility but included a witness who, though not hostile, was unfavourable in the sense of assuming by his testimony a position opposite to that of the party calling him. This position apparently has been accepted in Ontario as representing the law with respect to this subsection. See: *R. v. Cassibo, infra*; *R. v. Gushue (No. 4)* (1975), 30 C.R.N.S. 178 (Ont. Co. Ct.). The narrower view that “adverse” means “hostile” is rep-

resented by the dissenting judgment of Roach, J.A., in *Wawanesa Mutual Ins. Co. v. Hanes*, following the judgment of the Court in *Greenough v. Eccles* (1859), 28 L.J.C.P. 160 in relation to a similar provision in the Common Law Procedure Act, 1854 (U.K.), c. 125. This narrower view has been adopted by several courts, see: *R. v. Wyman* (1958), 122 C.C.C. 65, 28 C.R. 371 (N.B.S.C. App. Div.) and *R. v. McIntyre*, [1963] 2 C.C.C. 380, 43 C.R. 262 (N.S.S.C. *in banco*). In this latter case reference was made by Ilsley, C.J., to *Wawanesa Mutual Ins. Co. v. Hanes* and to a passage in *Reference re R. v. Coffin* (1956), 114 C.C.C. 1 at p. 24, [1956] S.C.R. 191 at p. 213, where Kellock, J. appeared to equate adversity with hostility which he defined as "not giving her evidence fairly and with a desire to tell the truth because of a hostile animus towards the prosecution".

On the *voir dire* to determine adversity the trial Judge may receive evidence of both oral and written statements by the witness which are alleged to be inconsistent with his present testimony. However, the Judge after hearing evidence with respect to the making of a previous oral statement may refuse to declare the witness adverse or may refuse to grant leave to prove the statement at the trial proper because the evidence with respect to its making is too conflicting, unsatisfactory or the words allegedly spoken are ambiguous. In some circumstances a Judge may find a witness adverse solely on the basis of a previous inconsistent statement. On the *voir dire* the witness should only be examined, not cross-examined, on the prior inconsistent oral statement: *R. v. Cassibo* (1982), 70 C.C.C. (2d) 498, 39 O.R. (2d) 288 (C.A.).

In some circumstances, to preclude an accused by mechanical application of the adverse witness requirement of this subsection from cross-examining a witness whom he has called with respect to a prior confession made by the witness that he, rather than the accused, had committed the crime might deprive the accused of his constitutional right to a fair trial as guaranteed by the Canadian Charter of Rights and Freedoms, and a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to provide a safeguard does not exist. However, there should be some indication of the reliability of the alleged prior confession as a basis for holding that the refusal, without a finding that the witness is adverse, to permit cross-examination on the witness' prior confession by an accused calling a witness, will deprive the accused of his constitutional right to a fair trial: *R. v. Williams* (1985), 18 C.C.C. (3d) 356, 44 C.R. (3d) 351 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C. and C.R. *loc. cit.*

A witness may be allowed to refresh his memory by reference to his earlier deposition, such as the preliminary hearing transcript, unless the object of the examination is to discredit or contradict the party's own witness in which case the procedure under this section must be followed: *Reference re R. v. Coffin* (1956), 114 C.C.C. 1, [1956] S.C.R. 191, 23 C.R. 1.

**Cross-examination without proof of adversity [subsec. (2)]** – In *R. v. Milgaard* (1971), 2 C.C.C. (2d) 206, 14 C.R.N.S. 34 (Sask. C.A.) at the trial for non-capital murder, in the absence of the jury, the Crown in making an application under this subsection produced a statement in writing allegedly inconsistent with a witness' evidence-in-chief. The trial judge read the statement, ruled that he was satisfied that it was inconsistent, and recalled the jury and allowed Crown counsel to cross-examine her on it. She admitted signing the pages but could not remember the contents. Upon application by the Crown she was declared hostile and upon further cross-examination on that statement she admitted remembering the events referred to in it. It was held (5:0) that the trial judge's error in declaring, without hearing evidence, that the previous statement was inconsistent, and allowing her to be cross-examined on it, was in those particular circumstances not prejudicial to the appellant, and applied the present s. 686(1)(b)(iii) to dismiss the appeal. In its reasons for judgment the Court recommended the procedure for an application under this subsection where a jury is trying the case at p.221-2 C.C.C.:



“(1) Counsel should advise the Court that he desires to make an application under s. 9(2) of the *Canada Evidence Act*.

(2) When the Court is so advised, the Court should direct the jury to retire.

(3) Upon retirement of the jury, counsel should advise the learned trial Judge of the particulars of the application and produce for him the alleged statement in writing, or the writing to which the statement has been reduced.

(4) The learned trial Judge should read the statement, or writing, and determine whether, in fact, there is an inconsistency between such statement or writing and the evidence the witness has given in Court. If the learned trial Judge decides there is no inconsistency, then that ends the matter. If he finds there is an inconsistency, he should call upon counsel to prove the statement or writing.

(5) Counsel should then prove the statement, or writing. This may be done by producing the statement or writing to the witness. If the witness admits the statement, or the statement reduced to writing, such proof would be sufficient. If the witness does not so admit, counsel then could provide the necessary proof by other evidence.

(6) If the witness admits making the statement, counsel for the opposing party should have the right to cross-examine as to the circumstances under which the statement was made. A similar right to cross-examine should be granted if the statement is proved by other witnesses. It may be that he will be able to establish that there were circumstances which would render it improper for the learned trial Judge to permit the cross-examination, notwithstanding the apparent inconsistencies. The opposing counsel, too, should have the right to call evidence as to factors relevant to obtaining the statement, for the purpose of attempting to show that cross-examination should not be permitted.

(7) The learned trial Judge should then decide whether or not he will permit the cross-examination. If so, the jury should be recalled.”

This procedure was referred to with apparent approval in *McInroy and Rouse v. The Queen*, *infra*.

While it may be appropriate to attempt to refresh the memory of an honest but forgetful witness by showing him the previous statement, where the Crown witness was an accomplice whose testimony was inconsistent with the previous statement and who even Crown counsel considered was not acting honestly then the trial judge should hold a *voir dire* following the procedure set out in *R. v. Milgaard*, *supra*. The trial judge ought not to put the prior statement to the witness himself and conduct a cross-examination before the conclusion of that procedure: *R. v. Booth* (1984), 15 C.C.C. (3d) 237, 58 B.C.L.R. 63 (C.A.).

The notes of a police officer as to his interview with a witness which the witness has never confirmed prior to testifying do not constitute a statement in writing or reduced to writing within the meaning of this subsection: *R. v. Handy* (1978), 45 C.C.C. (2d) 232, 5 C.R. (3d) 97 (B.C.C.A.).

However, a conversation in the form of questions and answers recorded by the officer at the time although translated in the process from French to English is a statement reduced to writing within the meaning of this subsection: *R. v. Carpenter* (No. 2) (1982), 1 C.C.C. (3d) 149, 31 C.R. (3d) 261 (Ont. C.A.).

A trial Judge may first direct how the witness should be examined before deciding whether or not to grant leave to counsel to cross-examine: *Stewart v. The Queen* (1976), 31 C.C.C. (2d) 497, 71 D.L.R. (3d) 449, [1977] 2 S.C.R. 748 (9:0).

The trial Judge has a discretion whether or not to permit cross-examination on the prior inconsistent statement, depending on whether the ends of justice would be best attained by allowing it: *R. v. Carpenter* (No. 2), *supra*.

In *R. v. Soobrian* (1995), 96 C.C.C. (3d) 208, 21 O.R. (3d) 603, 76 O.A.C. 7 (C.A.), Crown counsel, before calling the witness, a friend of the accused, was aware that he would testify in conformity to a second statement he had given to the police and as he had testified at the preliminary inquiry, and thereby exculpate the accused. Crown coun-

sel should not have been permitted to cross-examine his own witness on an earlier statement where the admitted purpose of the cross-examination was to provide a foundation to argue that the accused were not telling the truth, because the Crown witness was not telling the truth in his testimony. Absent an evidentiary foundation to support the Crown's contention that the witness was acting in collusion with the accused, the cross-examination should not have been permitted.

There is no requirement that the witness be proved adverse before cross-examination may be permitted under this subsection. Further, even where the witness simply claims he has no recollection of the matters which are contained in the prior statement it is open to the Judge, having heard the witness, to find that he is lying about his lack of recollection and that there is therefore an inconsistency within the meaning of this section: *McInroy and Rouse v. The Queen* (1978), 42 C.C.C. (2d) 481, 89 D.L.R. (3d) 609, [1979] 1 S.C.R. 588 (7:0).

In a proper case the court may grant a party leave to cross-examine his own witness on a prior inconsistent statement even at the stage of re-examination where the witness in cross-examination has given evidence on a material matter which is contrary to the prior statement: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.) leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

**Evidentiary value of prior statement** – Where a witness is cross-examined pursuant to this subsection on a prior inconsistent statement and does not adopt the statement then it merely goes to the witness' credibility and is not admissible for the truth of its contents: *Deacon v. The King* (1947), 89 C.C.C. 1, 3 C.R. 265, [1947] S.C.R. 531 (5:0).

In certain circumstances a prior inconsistent statement will be admissible for its truth, notwithstanding the "orthodox" rule enunciated in *Deacon v. The King*, *supra*. For the statement to be admissible for its truth, the party tendering the statement must establish the following on a *voir dire*: The party must show on a balance of probabilities that there are sufficient *indicia* of reliability, namely, "(i) the statement is made under oath or solemn affirmation following a warning as to the existence of sanctions and the significance of the oath or affirmation, (ii) the statement is videotaped in its entirety, and (iii) the opposing party, whether the Crown or defence, has a full opportunity to cross-examine the witness respecting the statement . . . Alternatively, other circumstantial guarantees of reliability may suffice to render such statements substantively admissible, provided that the judge is satisfied that the circumstances provide adequate assurances of reliability". In addition, where the prior statement was made to a person in authority, the judge must be satisfied that the statement was made voluntarily and that there are no factors which would tend to bring the administration of justice into disrepute if the statement were admitted for its truth. Even if the statement is admitted as substantive evidence, the trial judge must direct the jury to consider carefully the circumstances in assessing the credibility of the prior inconsistent statement relative to the witness' testimony at trial: *R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257, 19 C.R. (4th) 1, [1993] 2 S.C.R. 740 (7:0).

In *R. v. Biscette* (1995), 99 C.C.C. (3d) 326, 97 W.A.C. 81, 169 A.R. 81 (C.A.), leave to appeal to S.C.C. granted 101 C.C.C. (3d) vi, it was held that it was open to the judge to make substantive use of the witness' preliminary hearing testimony when she recanted that testimony at the accused's trial.

Even where the requirements laid down in *R. v. B. (K.G.)*, *supra* have not been met, it would be open to the trier of fact to make substantive use of the prior inconsistent statement of the complainant where there is a striking similarity between the contents of that statement and the accused's confession. The trial judge must as well be satisfied on a balance of probabilities that there was neither reason nor opportunity for the declarants to collude and no improper influence by interrogators or other third parties. Having determined on a balance of probabilities that the statement is likely to be reliable, the trial judge must also be satisfied that the prior statement relates evidence which would be admissible as the witness' sole testimony and that the statement was not the product of coercion of any form, whether involving threats, promises, excessively leading ques-

tions by the investigator or other person in a position of authority, or other forms of investigatory misconduct: *R. v. U. (F.J.)*, [1995] 3 S.C.R. 764, 101 C.C.C. (3d) 97, 42 C.R. (4th) 133.

Exceptionally a prior inconsistent statement may be admissible for its truth in favour of the accused where there is some persuasive assurance of trustworthiness of the statement: *R. v. Ullrich* (1991), 69 C.C.C. (3d) 473 (B.C.C.A.).

### **CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS / Deposition of witness in criminal investigation.**

**10. (1) On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.**

**(2) A deposition of a witness, purporting to have been taken before a justice on the investigation of a criminal charge and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer shall be presumed, in the absence of evidence to the contrary, to have been signed by the witness. R.S., c. E-10, s. 10; 1994, c. 44, s. 86.**

### **ANNOTATIONS**

**Production of statements or notes** – Where the witness has not used his notes to refresh his memory in examination-in-chief he cannot be required to produce them on cross-examination: *R. v. Kerenko, Cohen And Stewart*, [1965] 3 C.C.C.52, 45 C.R.291 (Man.C.A.).

A preliminary inquiry is not a trial, so subsec. (1) is not applicable and the presiding judge does not have the power to order production for the defence of a Crown witness' previous written statement: *Patterson v. The Queen* (1970), 2 C.C.C. (2d) 227, 10 C.R.N.S. 55 (S.C.C., 5:2). *Contra, R. v. Harbison, Harbison And Gerz* (1972), 9 C.C.C. (2d) 259, 20 C.R.N.S.336 (B.C.Prov.Ct.).

However in *R. v. Littlejohn* (1972), 21 C.R.N.S.349, [1972] 3 W.W.R.476 (Man. Mag. Ct.) it was noted that s. 2(e) of the Canadian Bill of Rights, which gives the accused a fair hearing, was not mentioned in *Patterson v. The Queen*, *supra* and accordingly it was held that, a preliminary inquiry being a hearing, the accused was entitled to an order for production of a Crown witness' previous written statement for cross-examination.

The trial judge has a power at trial to require the production of statements made by Crown witnesses for use by the defence in order to ensure a fair trial and guarantee that an accused can make full answer and defence. The trial judge's discretion should be exercised in favour of production in the absence of any cogent reason to the contrary. There is also a power of production under this section and where it is established that a statement has been made within the meaning of this section then, generally, counsel for the accused is entitled to a copy of the statement. There is a broad right of cross-examination under this section, the exercise of which must be left in the hands of counsel for the accused. The statement given by a witness is important not only for purposes of cross-examination, but it may also disclose information which the witness has forgotten. While this section seems to imply that the trial judge may examine the statement without disclosing it to counsel, it is not appropriate that the decision should be left solely to the



trial judge to determine whether the statement is contradictory or of any use to the defence. The trial judge is not privy to information available to the defence: *R. v. Doiron* (1985), 19 C.C.C. (3d) 350 (N.S.S.C. App. Div.).

As to disclosure of statements, aside from this section, to defence, see notes under ss. 603 and 650 of the Criminal Code.

**Meaning of previous statement in writing or reduced to writing** – A report prepared by a police officer from notes of a conversation with the witness the contents of which the witness has never seen, read nor otherwise verified is not a statement within the meaning of this subsection: *R. v. Cherpak* (1978), 42 C.C.C. (2d) 166, [1978] 5 W.W.R. 315 (Alta. S.C. App. Div.).

A “will say” statement which was based on a transcript of the witness’ videotaped statements was a statement reduced to writing within the meaning of s. 10 if the document was an accurate transcript of the things said by the witness during the interviews, whether or not the witness was involved in the actual preparation of the document: *R. v. Morgan* (1993), 80 C.C.C. (3d) 16 (Ont. C.A.).

**Procedure** – As this section makes clear, at least where it is not intended to contradict the witness by proof of the statement, there is no requirement that it be shown to the witness: *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.).

The distinction between this section and s. 9 must be kept in mind. In particular, the trial Judge has no right to determine whether the previous statement is inconsistent before permitting it to be put to the witness in cross-examination: *Cormier v. The Queen* (1973), 25 C.R.N.S. 94 (5:0) (Que. C.A.); *R. v. Savion and Mizrahi* (1980), 52 C.C.C. (2d) 276, 13 C.R. (3d) 259 (Ont. C.A.).

It was held in *R. v. Peebles* (1989), 49 C.C.C. (3d) 168 (B.C.C.A.), that the accused could not be cross-examined on statements made by his counsel in the course of a show cause hearing.

On a joint trial counsel for the co-accused may cross-examine another accused on a previous statement whether or not it is shown to be voluntary. The only limitation is that the trial Judge has a very significant discretion to hold in balance fairness to the witness in his role as an accused and fairness to the accused whose counsel is cross-examining: *R. v. Ma, Ho and Lai* (1978), 44 C.C.C. (2d) 537, 6 C.R. (3d) 325 and S-45 (B.C.C.A.).

Where one accused voluntarily enters the witness box and gives evidence which incriminates his co-accused, much as a Crown witness might have done, then justice requires that he be liable to impeachment by counsel for the co-accused on a previous inconsistent statement even if that statement was to a person in authority and was not proved voluntary. Such an accused is not entitled to the same rights he would have as an accused if the Crown were adducing the statement as part of its case or was seeking to cross-examine the accused on it: *R. v. Logan* (1988), 46 C.C.C. (3d) 354, 67 O.R. (2d) 87 (C.A.).

**Evidentiary value of statement [subsec. (1)]** – The Crown is not required to produce for the accused as of right a witness previous statement. In any event such a statement is not admissible as proof of the contents but only to test the witness credibility: *R. v. Tousignant* (1962), 133 C.C.C. 270, 38 C.R. 319 (B.C.C.A.).

A prior statement by a witness, even if sworn, is, if not adopted by the witness, not evidence of the truth of its contents but rather is only admissible with respect to the credibility of the witness. Further, the fact that the trial Judge requires its production pursuant to this subsection and has it marked as an exhibit does not make the statement evidence of the truth of its contents: *R. v. Campbell*, (1977), 38 C.C.C. (2d) 6, 17 O.R. (2d) 673, 1 C.R. (3d) 309 (C.A.).

It is open to the trial Judge to mark the written statement as an exhibit. Further, while counsel has the right to contradict the witness by the statement, the witness has the right to show that the writing generally, not merely those parts referred to by counsel, does not necessarily contradict his testimony. This may be done in re-examination or by refer-

ence to the writing generally: *R. v. Smith* (1983), 35 C.R. (3d) 86, 45 B.C.L.R. 286 (B.C.C.A.); *R. v. Newall et al.* (1983), 9 C.C.C. (3d) 519, [1984] 2 W.W.R. 131 (B.C.C.A.).

A statement upon which a witness has been cross-examined under this section and re-examined is not evidence and should not be made an exhibit which goes to the jury room during the jury's deliberations: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113 (Ont. C.A.).

As indicated by the decisions in *R. v. Smith*, *R. v. Newall* and *R. v. Rowbotham*, *supra*, there is a division of opinion as to the use to be made of a prior inconsistent written statement. In *R. v. Rodney* (1988), 46 C.C.C. (3d) 322 (B.C.C.A.) the court reaffirmed its view that in a proper case the trial judge may permit the statement to go to the jury as an exhibit. However, if the cross-examination has not been extensive the proper exercise of the discretion might lead the trial judge to permit none or only edited parts of the writing to be marked as an exhibit. To a similar effect, see: *R. v. Campbell* (1990), 57 C.C.C. (3d) 200, 106 A.R. 308 (C.A.).

## CROSS-EXAMINATION AS TO PREVIOUS ORAL STATEMENTS.

**11. Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement. R.S., c. E-10, s. 11.**

## ANNOTATIONS

**Editor's Note:** The heading to this section is somewhat misleading. This section applies to both oral and written statements and provides the procedure for when any prior statement may be proved. Cross-examination on a prior written statement is governed by s. 10. Cross-examination on a prior oral statement is governed by the common law but the procedure is not unlike the procedure laid down in s. 10 with respect to written statements. See the article by A.W. Bryant, "The adversary's Witness: Cross-examination and proof of prior inconsistent statements" (1984), 62 Can. Bar Rev. 43.

Where at trial a hostile witness is confronted with previous inconsistent preliminary inquiry answers which she either refuses to acknowledge or denies the truth of, the jury must be instructed that those previous answers only are to be considered in assessing the credibility of her trial testimony and may not be accepted as being truthful unless she specifically accepts or adopts them as being true: *R. v. Hamelin* (1972), 10 C.C.C. (2d) 114 (B.C.C.A.).

It is essential that a jury be instructed that those discrepancies between a witness' previous statement and his evidence at trial may only be considered to assess the witness' credibility and not as evidence of the truth of the previous statement: *R. v. Blunden* (1976), 30 C.C.C. (2d) 122 (Ont. C.A.).

This section is confined to allowing the leading of evidence to rebut testimony shown to be inconsistent with a former statement made by the witness: *R. v. Krause* (1984), 12 C.C.C. (3d) 392 (B.C.C.A.), *revd* on other grounds 29 C.C.C. (3d) 385, 54 C.R. (3d) 294, [1986] 2 S.C.R. 466.

It was held in *R. v. Grant* (1989), 49 C.C.C. (3d) 410, 71 C.R. (3d) 231, [1989] 5 W.W.R. 762 (Man. C.A.), that counsel for the accused need not have complied with the provisions of this section in order to prove a statement by the complainant, in a sexual assault case, that she had agreed to accept and had accepted payment of money for a sexual act. This statement constituted an admission by a party and was admissible as such and not merely as a prior inconsistent statement. While not formally a party, the complainant is in the position of a party for the purposes of the admissions exception to the

hearsay rule. It was therefore sufficient that counsel complied with the common law rule that requires before contradicting a witness that, in fairness, the witness be given notice of the allegation being made against her and an opportunity to explain herself.

Where defence counsel has failed to cross-examine a witness including the complainant in a prior inconsistent statement the trial judge has a discretion to permit extrinsic evidence of the statement to be given, with the Crown being given an opportunity to call the witness in reply: *R. v. MacDonald* (1989), 48 C.C.C. (3d) 230, 90 N.S.R. (2d) 218 (C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vii.

If what the Crown witness said to another person is relevant then the jury ought to be allowed to hear the statement even if the procedure set out in this section was not followed. It would then be open to the judge to allow the Crown to call the witness in rebuttal: *R. v. Demerchant* (1991), 66 C.C.C. (3d) 49 (N.B.C.A.).

## EXAMINATION AS TO PREVIOUS CONVICTION / How conviction proved.

**12. (1) A witness may be questioned as to whether he has been convicted of any offence, and, on being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction.**

**NOTE:** Section 12(1) re-enacted by 1992, c. 47, s. 66 (to come into force by order of the Governor in Council) as subsecs. (1) and (1.1). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

*EXAMINATION AS TO PREVIOUS CONVICTIONS/Proof of previous convictions.*

*12. (1) A witness may be questioned as to whether the witness has been convicted of any offence, excluding any offence designated as a contravention under the Contraventions Act, but including such an offence where the conviction was entered after a trial on an indictment.*

*(1.1) If the witness either denies the fact or refuses to answer, the opposite party may prove the conviction.*

**(2) A conviction may be proved by producing**

- (a) a certificate containing the substance and effect only, omitting the formal part, of the indictment and conviction, if it is for an indictable offence, or a copy of the summary conviction, if it is for an offence punishable upon summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court in which the conviction, if on indictment, was had, or to which the conviction, if summary, was returned; and**
- (b) proof of identity. R.S., c. E-10, s. 12.**

## ANNOTATIONS

**Meaning of "conviction" and "any offence" [subsec. (1)]** – A "conviction" includes sentence so that a cross-examination as to credibility on a previous conviction may include the penalty imposed: *R. v. Boyce* (1975), 23 C.C.C. (2d) 16, 28 C.R.N.S. 336 (Ont. C.A.).

A witness, including the accused, may be cross-examined as to his record under the [now repealed] Juvenile Delinquents Act at least where the offence would have been punishable under the Criminal Code if the witness had been an adult at the time of its commission: *Morris v. The Queen* (1978), 43 C.C.C. (2d) 129, 6 C.R. (3d) 36, [1979] 1 S.C.R. 405 (5:4).

The words "any offence" may include conviction for offences outside of Canada. However, only the process of adjudication of guilt of a character which would constitute a conviction under Canadian law should be considered a conviction for impeachment purposes. The accused would be entitled to explain the circumstances surrounding the conviction and it may be that if the circumstances surrounding the "conviction" in another jurisdiction were so oppressive then the judge would be justified in ruling that the adjudication was not a conviction at all: *R. v. Stratton* (1978), 42 C.C.C. (2d) 449, 90 D.L.R. (3d) 420, 3 C.R. (3d) 289 (Ont. C.A.).



The term “any offence” in this section is wide enough to permit cross-examination on any offence under a federal statute and not merely offences which truly relate to the criminal law power of the federal government. Thus, the accused could be cross-examined on her previous convictions under the Unemployment Insurance Act (Can.): *R. v. Watkins* (1992), 70 C.C.C. (3d) 341 (Ont. C.A.).

In *Hewson v. The Queen* (1978), 42 C.C.C. (2d) 507, 89 D.L.R. (3d) 573, [1978] 2 S.C.R. 111 (5:4) the majority held that an accused’s previous conviction was admissible under s. 360 of the Criminal Code although that conviction was then under appeal. There would seem to be no reason why the same principle should not apply where this section is invoked and in fact the minority dealt with the problem without apparently distinguishing between s. 360 and this section, the previous conviction having been elicited during cross-examination of the accused.

**Cross-examination of accused on other misconduct** – Subject to cross-examination on previous convictions as permitted by this section an accused may not be cross-examined upon past misconduct or discreditable associations for the purpose of attacking his credibility, unless such cross-examination is relevant to prove the falsity of his own evidence: *R. v. Davison, Derosie and MacArthur* (1974), 20 C.C.C. (2d) 424, 6 O.R. (2d) 103 (Ont. C.A.).

**Procedure** – A Crown witness may disclose his previous record during his examination-in-chief: *R. v. Boyko* (1975), 28 C.C.C. (2d) 193 (B.C.C.A.).

Similarly, defence counsel may lead the accused’s criminal record during his examination-in-chief and whether the criminal record is brought out in direct or in cross-examination it goes only to the accused’s credibility: *R. v. St. Pierre* (1974), 17 C.C.C. (2d) 489, 3 O.R. (2d) 642 (C.A.).

It is permissible to simply ask the witness a general question, as in this case, whether he has ever been convicted of an offence in the United States. There is no need to specify the prior conviction in the question: *R. v. Clark* (1977), 41 C.C.C. (2d) 561, 1 C.R. (3d) 368 (B.C.C.A.).

**Instructions to jury** – The fact that a witness has been convicted of a crime is relevant to his trustworthiness as a witness, but the probative value that previous convictions have on the issue will vary not only with the type of convictions but the number and their proximity to the time when the witness gives evidence. A jury might well be justified in concluding that a conviction, even for a serious offence committed many years before was of little, if any, value in relation to credibility and the trial Judge in the exercise of his discretion ought so to instruct the jury. However, it is serious misdirection to instruct the jury that the evidence of a defence witness, with a single prior conviction for a crime of dishonesty many years before, must be carefully scrutinized before it is accepted: *R. v. Brown* (1978), 38 C.C.C. (2d) 339 (Ont. C.A.).

It is misdirection to instruct the jury that “having a criminal record brands [the accused] as an unreliable person to give evidence under oath”: *R. v. McIlvride*, [1979] 6 W.W.R. 93 (B.C.C.A.).

It constituted error for the trial judge to direct the jury that the accused’s previous convictions for dishonesty were of little or no weight on the issue of the accused’s credibility because the value of the goods stolen was less than \$200: *R. v. Turlon* (1989), 49 C.C.C. (3d) 186, 70 C.R. (3d) 376, 32 O.A.C. 396 (C.A.).

**Interpretation of provision** – It was held in *R. v. Corbett* (1988), 41 C.C.C. (3d) 385, 64 C.R. (3d) 1, [1988] 1 S.C.R. 670 (5:1) that this section does not violate the right to a fair trial as guaranteed by s. 11(d) of the Charter nor *semble* of the principles of fundamental justice under s. 7. However, a majority of the court also held that a trial judge does have a discretion to exclude evidence of previous convictions in an appropriate case where a mechanical application of this section would undermine the right to a fair trial. Factors to be considered in exercising this discretion would include the nature of the the convic-

tion, its similarity to the offence with which the accused is presently on trial, the remoteness of the previous conviction and the nature of the defence including whether it consisted of a deliberate attack upon the credibility of Crown witnesses. With respect to this latter factor it will be of importance that exclusion of the accused's criminal record not create a serious imbalance. The court also summarized some of the rules which courts have laid down in respect to treatment of evidence of a prior criminal record as follows: The accused may only be cross-examined as to the fact of the conviction itself and not concerning the conduct which led to the conviction; the accused cannot be cross-examined as to whether he testified on the prior occasion; the Crown is not entitled to go beyond prior convictions to cross-examine an accused as to discreditable conduct or association with disreputable individuals to attack his credibility, and the accused can only be cross-examined on "convictions" strictly construed and not on discharges.

**Discretion to exclude record** – In determining whether or not to exercise the discretion to preclude the Crown from cross-examining an accused on his prior criminal record, the judge should consider a number of factors including the nature of the offence of which the accused has been convicted, its similarity to the offence charged, and its remoteness in time. A test which would preclude cross-examination on the record only as a "last resort" is too narrow. In this case, where the accused was charged with sexual assault, cross-examination on 15-year-old convictions for rape should not have been permitted. On the other hand, cross-examination on prior convictions for wounding would have been proper: *R. v. P. (G.F.)* (1994), 89 C.C.C. (3d) 176, 29 C.R. (4th) 35, 18 O.R. (3d) 3 (C.A.). Also see: *R. v. T. (D.B.)* (1994), 89 C.C.C. (3d) 466, 71 O.A.C. 233 (C.A.). Similarly, in *R. v. Trudel* (1994), 90 C.C.C. (3d) 318, [1994] R.J.Q. 678, 60 Q.A.C. 138 (C.A.) it was held that the Crown should not have been permitted to cross-examine the accused, who was charged with first degree murder, on a prior conviction for threatening death.

Ordinarily, an application with respect to the admissibility of evidence concerning an accused's prior criminal record should not be dealt with until the Crown's case has concluded: *R. v. P. (G.F.)*, *supra*.

The accused is not entitled to have the admissibility of the criminal record determined in advance of an election by the accused to testify: *R. v. Underwood* (1995), 102 C.C.C. (3d) 281, 102 W.A.C. 234, 174 A.R. 234 (C.A.).

**Proof of prior conviction** – Where the accused is a witness and in cross-examination cannot recall a particular conviction the proper procedure is to prove the conviction pursuant to subsec. (2) rather than embark on a prejudicial line of cross-examination to "refresh" the memory of the accused, for example, by putting to the accused the name of the victim of the offence for which he was allegedly convicted: *R. v. Howard And Trudel* (1983), 3 C.C.C. (3d) 399 (Ont. C.A.).

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## Oaths and Solemn Affirmations

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### WHO MAY ADMINISTER OATHS.

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. R.S., c. E-10, s. 13.

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### SOLEMN AFFIRMATION BY WITNESS INSTEAD OF OATH / Effect.

14. (1) A person may, instead of taking an oath, make the following solemn affirmation:

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath. R.S., c. E-10, s. 14; 1994, c. 44, s. 87.

#### ANNOTATIONS

It was held, considering the predecessor to s. 16, that the right to affirm does not extend to a child of tender years. If the child does not understand the nature of the oath then the procedure under s. 16 must be followed: *R. v. Budin* (1981), 58 C.C.C. (2d) 352, 20 C.R. (3d) 86, 32 O.R. (2d) 1 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

However, it was held in *R. v. Conners*, [1986] 5 W.W.R. 94, 46 Alta. L.R. (2d) 65 (C.A.), that a child, in this case a 12 year old, could be affirmed pursuant to this section and s. 15 if it is found that the child of tender years although not having a belief in a deity has a sense of moral obligation to tell the truth on taking the oath and feels her conscience bound by it. The court applied the dicta of MacKinnon, A.C.J.O. in *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.), leave to appeal to S.C.C. refused 48 N.R. 319n, noted, *infra*, under s. 16. Similarly, see: *R. v. Dawson*, [1968] 4 C.C.C. 33, 4 C.R.N.S. 263, 64 W.W.R. 108 (B.C.C.A.) and *R. v. Hanna* (1993), 80 C.C.C. (3d) 289, 45 W.A.C. 42 (B.C.C.A.), leave to appeal to S.C.C. refused 91 C.C.C. (3d) vi.

Where an objection is taken to the competency of a witness, not just to take an oath, but to give evidence, the trial Judge must allow the party objecting an opportunity to call evidence on that issue and then if he dismisses that objection he must by his examination of the witness and such other evidence that he deems appropriate decide whether the witness should be sworn or affirmed: *R. v. Hawke* (1975), 22 C.C.C. (2d) 19, 29 C.R.N.S.1, 7 O.R. (2d) 145 (C.A.).

In *R. v. D.(T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.), it was held that although the mentally retarded adult did not understand the oath and therefore could not be sworn under the predecessor to s. 16 she could be affirmed if the trial judge was satisfied that she was competent to testify having regard to her capacity to observe, remember and recount and felt a duty to tell the truth.

In *R. v. Walsh* (1978), 45 C.C.C. (2d) 199 (Ont. C.A.) the Court held that the trial Judge erred in refusing to permit a "satanist" to affirm. While he was incompetent to take the oath because it would not bind his conscience due to absence of religious belief this did not render him incompetent to affirm. Moral depravity or a disposition to lie does not render a witness incompetent to testify.

A witness who objects to swearing an oath on the Bible may be given the opportunity to swear another form of religious oath and is not required to affirm: *R. v. Kalevar* (1991), 4 C.R. (4th) 114 (Ont. Ct. (Gen. Div.)).

#### SOLEMN AFFIRMATION BY DEPONENT / Effect.

15. (1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation in the words following, namely, "I,....., do solemnly affirm, etc.", and that solemn affirmation has the same force and effect as if that person had taken an oath.

(2) Any witness whose evidence is admitted or who makes a solemn affirmation under this section or section 14 is liable to indictment and punishment for perjury in all respects as if he had been sworn. R.S., c. E-10, s. 15; 1994, c. 44, s. 88.



tion, its similarity to the offence with which the accused is presently on trial, the remoteness of the previous conviction and the nature of the defence including whether it consisted of a deliberate attack upon the credibility of Crown witnesses. With respect to this latter factor it will be of importance that exclusion of the accused's criminal record not create a serious imbalance. The court also summarized some of the rules which courts have laid down in respect to treatment of evidence of a prior criminal record as follows: The accused may only be cross-examined as to the fact of the conviction itself and not concerning the conduct which led to the conviction; the accused cannot be cross-examined as to whether he testified on the prior occasion; the Crown is not entitled to go beyond prior convictions to cross-examine an accused as to discreditable conduct or association with disreputable individuals to attack his credibility, and the accused can only be cross-examined on "convictions" strictly construed and not on discharges.

**Discretion to exclude record** – In determining whether or not to exercise the discretion to preclude the Crown from cross-examining an accused on his prior criminal record, the judge should consider a number of factors including the nature of the offence of which the accused has been convicted, its similarity to the offence charged, and its remoteness in time. A test which would preclude cross-examination on the record only as a "last resort" is too narrow. In this case, where the accused was charged with sexual assault, cross-examination on 15-year-old convictions for rape should not have been permitted. On the other hand, cross-examination on prior convictions for wounding would have been proper: *R. v. P. (G.F.)* (1994), 89 C.C.C. (3d) 176, 29 C.R. (4th) 35, 18 O.R. (3d) 3 (C.A.). Also see: *R. v. T. (D.B.)* (1994), 89 C.C.C. (3d) 466, 71 O.A.C. 233 (C.A.). Similarly, in *R. v. Trudel* (1994), 90 C.C.C. (3d) 318, [1994] R.J.Q. 678, 60 Q.A.C. 138 (C.A.) it was held that the Crown should not have been permitted to cross-examine the accused, who was charged with first degree murder, on a prior conviction for threatening death.

Ordinarily, an application with respect to the admissibility of evidence concerning an accused's prior criminal record should not be dealt with until the Crown's case has concluded: *R. v. P. (G.F.)*, *supra*.

The accused is not entitled to have the admissibility of the criminal record determined in advance of an election by the accused to testify: *R. v. Underwood* (1995), 102 C.C.C. (3d) 281, 102 W.A.C. 234, 174 A.R. 234 (C.A.).

**Proof of prior conviction** – Where the accused is a witness and in cross-examination cannot recall a particular conviction the proper procedure is to prove the conviction pursuant to subsec. (2) rather than embark on a prejudicial line of cross-examination to "refresh" the memory of the accused, for example, by putting to the accused the name of the victim of the offence for which he was allegedly convicted: *R. v. Howard And Trudel* (1983), 3 C.C.C. (3d) 399 (Ont. C.A.).

## ***Oaths and Solemn Affirmations***

### **WHO MAY ADMINISTER OATHS.**

13. Every court and judge, and every person having, by law or consent of parties, authority to hear and receive evidence, has power to administer an oath to every witness who is legally called to give evidence before that court, judge or person. R.S.

I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.

(2) Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath. R.S., c. E-10, s. 14; 1994, c. 44, s. 87.

#### ANNOTATIONS

It was held, considering the predecessor to s. 16, that the right to affirm does not extend to a child of tender years. If the child does not understand the nature of the oath then the procedure under s. 16 must be followed: *R. v. Budin* (1981), 58 C.C.C. (2d) 352, 20 C.R. (3d) 86, 32 O.R. (2d) 1 (C.A.), leave to appeal to S.C.C. refused C.C.C. *loc. cit.*

However, it was held in *R. v. Conners*, [1986] 5 W.W.R. 94, 46 Alta. L.R. (2d) 65 (C.A.), that a child, in this case a 12 year old, could be affirmed pursuant to this section and s. 15 if it is found that the child of tender years although not having a belief in a deity has a sense of moral obligation to tell the truth on taking the oath and feels her conscience bound by it. The court applied the dicta of MacKinnon, A.C.J.O. in *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.), leave to appeal to S.C.C. refused 48 N.R. 319n, noted, *infra*, under s. 16. Similarly, see: *R. v. Dawson*, [1968] 4 C.C.C. 33, 4 C.R.N.S. 263, 64 W.W.R. 108 (B.C.C.A.) and *R. v. Hanna* (1993), 80 C.C.C. (3d) 289, 45 W.A.C. 42 (B.C.C.A.), leave to appeal to S.C.C. refused 91 C.C.C. (3d) vi.

Where an objection is taken to the competency of a witness, not just to take an oath, but to give evidence, the trial Judge must allow the party objecting an opportunity to call evidence on that issue and then if he dismisses that objection he must by his examination of the witness and such other evidence that he deems appropriate decide whether the witness should be sworn or affirmed: *R. v. Hawke* (1975), 22 C.C.C. (2d) 19, 29 C.R.N.S.1, 7 O.R. (2d) 145 (C.A.).

In *R. v. D.(T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.), it was held that although the mentally retarded adult did not understand the oath and therefore could not be sworn under the predecessor to s. 16 she could be affirmed if the trial judge was satisfied that she was competent to testify having regard to her capacity to observe, remember and recount and felt a duty to tell the truth.

In *R. v. Walsh* (1978), 45 C.C.C. (2d) 199 (Ont. C.A.) the Court held that the trial judge erred in refusing to permit a "satanist" to affirm. While he was incompetent to take the oath because it would not bind his conscience due to absence of religious belief his did not render him incompetent to affirm. Moral depravity or a disposition to lie does not render a witness incompetent to testify.

A witness who objects to swearing an oath on the Bible may be given the opportunity to swear another form of religious oath and is not required to affirm: *R. v. Kalevar* 991), 4 C.R. (4th) 114 (Ont. Ct. (Gen. Div.)).

#### SOLEMN AFFIRMATION BY DEPONENT / Effect.

(1) Where a person who is required or who desires to make an affidavit or deposition in a proceeding or on an occasion on which or concerning a matter respecting which an oath is required or is lawful, whether on the taking of office or otherwise, does not wish to take an oath, the court or judge, or other officer or person qualified to take affidavits or depositions, shall permit the person to make a solemn affirmation

(3d) 1, the court upheld the decision of the court of appeal. Also see: *R. v. Marquard*, *supra*.

A promise to tell the truth is a prerequisite to receiving the unsworn testimony of a child witness and where the promise was not obtained, the evidence of the child was wrongly admitted and the accused's conviction must be quashed: *R. v. S. (J.J.)* (1991), 104 N.S.R. (2d) 385 (C.A.). However, where in the course of the examination of the child, it was clear that the child understood the duty to tell the truth and undertook to tell the truth, the failure to obtain an explicit promise to tell the truth did not invalidate the conviction: *R. v. Barsoum* (1991), 13 W.C.B. (2d) 382 (N.W.T.C.A.). See also *R. v. Peterson*, *supra*.

The requirement that the witness, in this case a severely intellectually handicapped adult, promise to tell the truth includes that the witness has the capacity to make a meaningful promise. Thus, the witness should be allowed to testify only if he or she understands the duty to speak the truth in terms of everyday social conduct. An understanding of the duty to speak the truth entails an appreciation by the witness that he or she must answer all questions in accordance with the witness' recollection of what actually occurred: *R. v. Farley* (1995), 99 C.C.C. (3d) 76, 40 C.R. (4th) 190, 23 O.R. (3d) 445 (C.A.).

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## **Judicial Notice**

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### **IMPERIAL ACTS, ETC.**

17. Judicial notice shall be taken of all Acts of the Imperial Parliament, of all ordinances made by the Governor in Council, or the lieutenant governor in council of any province or colony that, or some portion of which, now forms or hereafter may form part of Canada, and of all the Acts of the legislature of any such province or colony, whether enacted before or after the passing of the *Constitution Act, 1867*. R.S., c. E-10, s. 17.

### **ANNOTATIONS**

In *R. v. Markin*, [1970] 1 C.C.C.14, 7 C.R.N.S.135 (B.C.C.A.), it was held (2:1) that "ordinances" do not include a proclamation of the Lieutenant-Governor of British Columbia.

An Order in Council amending Schedule J to the Food and Drugs Act is an ordinance within this section: *R. v. Whalen* (1971), 4 C.C.C. (2d) 560, 15 C.R.N.S.187 (N.B.S.C. App. Div.).

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### **ACTS OF CANADA.**

18. Judicial notice shall be taken of all Acts of Parliament, public or private, without being specially pleaded. R.S., c. E-10, s. 18.

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## **Documentary Evidence**

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### **COPIES BY QUEEN'S PRINTER.**

19. Every copy of any Act of Parliament, public or private, printed by the Queen's Printer, is evidence of that Act and of its contents, and every copy purporting to be printed by the Queen's Printer shall be deemed to be so printed, unless the contrary is shown. R.S., c. E-10, s. 19.



## ANNOTATIONS

Where there is a discrepancy between an Act of Parliament as certified by the Clerk of Parliament and the version as printed by the Queen's Printer, the former must govern: *R. v. Welsh and Iannuzzi* (No. 6) (1977), 32 C.C.C. (2d) 363, 74 D.L.R. (3d) 748, 15 O.R. (2d) 1 (C.A.).

## IMPERIAL PROCLAMATIONS, ETC.

20. Imperial proclamations, orders in council, treaties, orders, warrants, licences, certificates, rules, regulations, or other Imperial official records, Acts or documents may be proved

- (a) in the same manner as they may from time to time be provable in any court in England;
- (b) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of the same or a notice thereof; or
- (c) by the production of a copy thereof purporting to be printed by the Queen's Printer. R.S., c. E-10, s. 20.

## PROCLAMATIONS, ETC. OF GOVERNOR GENERAL.

21. Evidence of any proclamation, order, regulation or appointment, made or issued by the Governor General or by the Governor in Council, or by or under the authority of any minister or head of any department of the Government of Canada and evidence of a treaty to which Canada is a party, may be given in all or any of the following ways:

- (a) by the production of a copy of the *Canada Gazette*, or a volume of the Acts of Parliament purporting to contain a copy of that treaty, proclamation, order, regulation, or appointment or a notice thereof;
- (b) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be printed by the Queen's Printer;
- (c) by the production of a copy of the treaty purporting to be printed by the Queen's Printer;
- (d) by the production, in the case of any proclamation, order, regulation or appointment made or issued by the Governor General or by the Governor in Council, of a copy or extract purporting to be certified to be true by the clerk or assistant or acting clerk of the Queen's Privy Council for Canada; and
- (e) by the production, in the case of any order, regulation or appointment made or issued by or under the authority of any minister or head of a department of the Government of Canada, of a copy or extract purporting to be certified to be true by the minister, by his deputy or acting deputy, or by the secretary or acting secretary of the department over which he presides. R.S., c. E-10, s. 21; 1976-77, c. 28, s. 14.

## ANNOTATIONS

By s. 23 of the Statutory Instruments Act 1970-71-72 (Can.), c. 38, Parliament intended to obviate the necessity of a Court requiring formal proof of the publication and text of statutory instruments published in the *Canada Gazette*: *R. v. Steam Tanker "Evgenia Chandris"* (1976), 27 C.C.C. (2d) 241, 65 D.L.R. (3d) 553 (9:0) (S.C.C.).

## PROCLAMATIONS, ETC., OF LIEUTENANT GOVERNOR / In the case of the Territories.

22. (1) Evidence of any proclamation, order, regulation or appointment made or issued by a lieutenant governor or lieutenant governor in council of any province, or by or under the authority of any member of the executive council, being the head of

any department of the government of the province, may be given in all or any of the following ways:

- (a) by the production of a copy of the official gazette for the province purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof;
- (b) by the production of a copy of the proclamation, order, regulation or appointment, purporting to be printed by the government or Queen's Printer for the province, and
- (c) by the production of a copy or extract of the proclamation, order, regulation or appointment, purporting to be certified to be true by the clerk or assistant or acting clerk of the executive council, by the head of any department of the government of a province, or by his deputy or acting deputy, as the case may be.

(2) Evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to September 1, 1905, or of the Commissioner in Council of the Yukon Territory or of the Commissioner in Council of the Northwest Territories, may be given by the production of a copy of the *Canada Gazette* purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice thereof. R.S., c. E-10, s. 22.

**NOTE:** Subsec. (2) re-enacted 1993, c. 28, s. 78 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*In the case of the territories.*

*(2) Evidence of any proclamation, order, regulation or appointment made by the Lieutenant Governor or Lieutenant Governor in Council of the Northwest Territories, as constituted prior to September 1, 1905, or by the Commissioner in Council of the Yukon Territory, the Commissioner in Council of the Northwest Territories or the Legislature for Nunavut, may be given by the production of a copy of the Canada Gazette purporting to contain a copy of the proclamation, order, regulation or appointment, or a notice there.*

#### EVIDENCE OF JUDICIAL PROCEEDINGS, ETC. / Certificate where court has no seal.

23. (1) Evidence of any proceeding or record whatever of, in or before any court in Great Britain, the Supreme Court, Federal Court or Tax Court of Canada, any court in any province, any court in any British colony or possession or any court of record of the United States, of any state of the United States or of any other foreign country, or before any justice of the peace or coroner in any province, may be given in any action or proceeding by an exemplification or certified copy of the proceeding or record, purporting to be under the seal of the court or under the hand or seal of the justice or coroner, as the case may be, without any proof of the authenticity of the seal or of the signature of the justice or coroner or other proof whatever.

(2) Where any such court, justice or coroner referred to in subsection (1) has no seal, or so certifies, the evidence may be given by a copy purporting to be certified under the signature of a judge or presiding provincial court judge of the court or of the justice or coroner, without any proof of the authenticity of the signature or other proof whatever. R.S., c. E-10, s. 23; R.S., c. 10 (2nd Supp.), s. 64; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1); 1993, c. 34, s. 15.

#### ANNOTATIONS

This section may be used to prove a document but cannot be extended to authenticate a document which was not properly confirmed in accordance with the mandatory provisions of the Extradition Act: *Re Wong Shue Teen and the United States Of America* (1975), 24 C.C.C. (2d) 501, 61 D.L.R. (3d) 181 (Fed. C.A.).

A Judge who grants an authorization to intercept private communications does so as a Judge of the Court not as a *persona designata* and a certified copy of the authorization is therefore admissible under this section: *Cordes v. The Queen* (1979), 47 C.C.C. (2d) 46, [1979] 1 S.C.R. 1062, 10 C.R. (3d) 186 (7:0).

### CERTIFIED COPIES.

24. In every case in which the original record could be admitted in evidence,

- (a) a copy of any official or public document of Canada or of any province, purporting to be certified under the hand of the proper officer or person in whose custody the official or public document is placed, or
- (b) a copy of a document, by-law, rule, regulation or proceeding, or a copy of any entry in any register or other book of any municipal or other corporation, created by charter or Act of Parliament or the legislature of any province, purporting to be certified under the seal of the corporation, and the hand of the presiding officer, clerk or secretary thereof,

is admissible in evidence without proof of the seal of the corporation, or of the signature or official character of the person or persons appearing to have signed it, and without further proof thereof. R.S., c. E-10, s. 24.

### ANNOTATIONS

A certificate of incorporation of a provincial company is a public document admissible under this section. To determine whether the document was properly certified resort must be had to the relevant provincial legislation by virtue of s. 40 of this Act: *R. v. John and Murray Motors Ltd.* (1979), 47 C.C.C. (2d) 49, 8 C.R. (3d) 80 (B.C.C.A.).

Aeronautical charts prepared by a department of the Government of Canada which are in regular and everyday use for navigation purposes and are relied upon implicitly by qualified pilots and which are presumably the best evidence available of distances and directions by air are admissible in evidence, although not certified in the manner provided by this section or s. 25; *R. v. Inuvik Coastal Airways Ltd. and McKerral* (1983), 10 C.C.C. (3d) 89, 51 A.R. 353 (N.W.T.S.C.).

On the trial of a young offender on a charge of breach of probation, a copy of the original information and of the probation order certified by the clerk of the court are admissible pursuant to this section. The records of the youth court which are maintained by employees of the government are public documents, notwithstanding the privacy provisions of the Young Offenders Act. While s. 23 of this Act makes specific provision for the admissibility of court records, that provision is not the exclusive means by which court documents may be admitted in evidence: *R. v. P. (A.)* (1992), 75 C.C.C. (3d) 178 (Ont. Ct. (Gen. Div.)).

### BOOKS AND DOCUMENTS.

25. Where a book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other Act exists that renders its contents provable by means of a copy, a copy thereof or extract therefrom is admissible in evidence in any court of justice or before a person having, by law or by consent of parties, authority to hear, receive and examine evidence, if it is proved that it is a copy or extract purporting to be certified to be true by the officer to whose custody the original has been entrusted. R.S., c. E-10, s. 25.

BOOKS KEPT IN OFFICES UNDER GOVERNMENT OF CANADA / Proof of non-issue of licence or document / Proof of mailing departmental matter / Proof of official character.

26. (1) A copy of any entry in any book kept in any office or department of the Gov-



ernment of Canada, or in any commission, board or other branch of the public service of Canada, shall be admitted as evidence of that entry, and of the matters, transactions and accounts therein recorded, if it is proved by the oath or affidavit of an officer of the office or department, commission, board or other branch of the public service of Canada that the book was, at the time of the making of the entry, one of the ordinary books kept in the office, department, commission, board or other branch of the public service of Canada, that the entry was made in the usual and ordinary course of business of the office, department, commission, board or other branch of the public service of Canada and that the copy is a true copy thereof.

(2) Where by any Act of Parliament or regulation made thereunder provision is made for the issue by a department, commission, board or other branch of the public service of Canada of a licence requisite to the doing or having of any act or thing or for the issue of any other document, an affidavit of an officer of the department, commission, board or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, setting out that he has charge of the appropriate records and that after careful examination and search of those records he has been unable to find in any given case that any such licence or other document has been issued, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that in that case no licence or other document has been issued.

(3) Where by any Act of Parliament or regulation made thereunder provision is made for sending by mail any request for information, notice or demand by a department or other branch of the public service of Canada an affidavit of an officer of the department or other branch of the public service, sworn before any commissioner or other person authorized to take affidavits, setting out that he has charge of the appropriate records, that he has a knowledge of the facts in the particular case, that the request, notice or demand was sent by registered letter on a named date to the person or firm to whom it was addressed (indicating that address) and that he identifies as exhibits attached to the affidavit the post office certificate of registration of the letter and a true copy of the request, notice or demand, shall, on production and proof of the post office receipt for the delivery of the registered letter to the addressee, be admitted in evidence as proof, in the absence of evidence to the contrary, of the sending and of the request, notice or demand.

(4) Where proof is offered by affidavit pursuant to this section, it is not necessary to prove the official character of the person making the affidavit if that information is set out in the body of the affidavit. R.S., c. E-10, s. 26.

#### ANNOTATIONS

A computer is not a "book" within the meaning of this section and therefore a print-out produced by an armed forces computer is not admissible under this section: *R. v. Sunila and Solayman* (1986), 26 C.C.C. (3d) 331 (N.S.S.C.).

It was held in *Éthier v. Canada (RCMP) Commissioner*, [1992] 1 F.C. 109, 45 F.T.R. 310 (T.D.) that the word "book" does not include any kind of record and did not extend to reports consisting of opinion and interpretation. However, on appeal (1993), 63 F.T.R. 29n, 151 N.R. 374 (C.A.) it was held that the documents could be admitted as an exception to the hearsay rule pursuant to *R. v. Khan* (1990), 59 C.C.C. (3d) 92, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1, the documents meeting the requirements of reliability and necessity.

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#### NOTARIAL ACTS IN QUEBEC.

27. Any document purporting to be a copy of a notarial act or instrument made, filed or registered in the Province of Quebec, and to be certified by a notary or prothono-

tary to be a true copy of the original in his possession as such notary or prothonotary, shall be admitted in evidence in the place and stead of the original and has the same force and effect as the original would have if produced and proved, but it may be proved in rebuttal that there is no such original, that the copy is not a true copy of the original in some material particular or that the original is not an instrument of such nature as may, by the law of the Province of Quebec, be taken before a notary or be filed, enrolled or registered by a notary in that Province. R.S., c. E-10, s. 27.

#### NOTICE OF PRODUCTION OF BOOK OR DOCUMENT / Not less than 7 days.

28. (1) No copy of any book or other document shall be admitted in evidence, under the authority of section 23, 24, 25, 26 or 27, on any trial, unless the party intending to produce the copy has before the trial given to the party against whom it is intended to be produced reasonable notice of that intention.

(2) The reasonableness of the notice referred to in subsection (1) shall be determined by the court, judge or other person presiding, but the notice shall not in any case be less than seven days. R.S., c. E-10, s. 28.

#### ANNOTATIONS

Where the statute, such as the Unemployment Insurance Act, 1970-71-72 (Can.), c. 48, has its own provisions governing the admissibility of copies of documents there is no need to comply with this section: *R. v. Yerxa* (1978), 42 C.C.C. (2d) 177, 21 N.B.R. (2d) 569 (C.A.).

In determining whether there has been 7 days notice as required by subsec. (2), s. 27(1) of the Interpretation Act, R.S.C. 1985, c. I-21, applies and requires exclusion of the date of service and the date of the trial. However, none of the intervening days are to be excluded, although they are Sundays or statutory holidays: *R. v. Bourque* (1991), 66 C.C.C. (3d) 548 (N.S.C.A.).

#### COPIES OF ENTRIES / Admission in evidence / Cheques, proof of "no account" / Proof of official character / Compulsion of production or appearance / Order to inspect and copy / Warrants to search / Computation of time / Definitions / "court" / "financial institution" / "legal proceeding".

29. (1) Subject to this section, a copy of any entry in any book or record kept in any financial institution shall in all legal proceedings be admitted in evidence as proof, in the absence of evidence to the contrary, of the entry and of the matters, transactions and accounts therein recorded.

(2) A copy of an entry in the book or record described in subsection (1) shall not be admitted in evidence under this section unless it is first proved that the book or record was, at the time of the making of the entry, one of the ordinary books or records of the financial institution, that the entry was made in the usual and ordinary course of business, that the book or record is in the custody or control of the financial institution and that the copy is a true copy of it, and such proof may be given by any person employed by the financial institution who has knowledge of the book or record or the manager or accountant of the financial institution, and may be given orally or by affidavit sworn before any commissioner or other person authorized to take affidavits.

(3) Where a cheque has been drawn on any financial institution or branch thereof by any person, an affidavit of the manager or accountant of the financial institution or branch, sworn before any commissioner or other person authorized to take affidavits, setting out that he is the manager or accountant, that he has made a careful examination and search of the books and records for the purpose of ascertaining whether or not that person has an account with the financial institution or branch and that he has

been unable to find such an account, shall be admitted in evidence as proof, in the absence of evidence to the contrary, that that person has no account in the financial institution or branch.

(4) Where evidence is offered by affidavit pursuant to this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(5) A financial institution or officer of a financial institution is not in any legal proceedings to which the financial institution is not a party compellable to produce any book or record, the contents of which can be proved under this section, or to appear as a witness to prove the matters, transactions and accounts therein recorded unless by order of the court made for special cause.

(6) On the application of any party to a legal proceeding, the court may order that that party be at liberty to inspect and take copies of any entries in the books or records of a financial institution for the purposes of the legal proceeding, and the person whose account is to be inspected shall be notified of the application at least two clear days before the hearing thereof, and if it is shown to the satisfaction of the court that he cannot be notified personally, the notice may be given by addressing it to the financial institution.

(7) Nothing in this section shall be construed as prohibiting any search of the premises of a financial institution under the authority of a warrant to search issued under any other Act of Parliament, but unless the warrant is expressly endorsed by the person under whose hand it is issued as not being limited by this section, the authority conferred by any such warrant to search the premises of a financial institution and to seize and take away anything in it shall, with respect to the books or records of the institution, be construed as limited to the searching of those premises for the purpose of inspecting and taking copies of entries in those books or records, and section 490 of the *Criminal Code* does not apply in respect of the copies of those books or records obtained under a warrant referred to in this section.

(8) Holidays shall be excluded from the computation of time under this section.

(9) In this section

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“financial institution” means the Bank of Canada, the Business Development Bank of Canada and any institution incorporated in Canada that accepts deposits of money from its members or the public, and includes a branch, agency or office of any such Bank or institution;

“legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration. R.S., c. E-10, s. 29; 1974-75-76, c. 14, s. 57; 1994, c. 44, s. 90; 1995, c. 28, s. 47.

## ANNOTATIONS

The notice provisions of s. 30 do not apply to copies of records admissible under this section. Such documents are admissible without notice to the other party: *R. v. Best* (1978), 43 C.C.C. (2d) 236, [1978] 5 W.W.R. 421 (B.C.C.A.).

**Subsec. (1)** – A computer print-out of entries stored in a bank’s computer falls within the phrase “a copy of any entry in any book on record” in this subsection and therefore may be admissible under this section: *R. v. McMullen* (1978), 42 C.C.C. (2d) 67, 6 C.R. (3d) 218 (Ont. H.C.J.), affd 47 C.C.C. (2d) 499, 100 D.L.R. (3d) 671 (Ont. C.A.).

“Entry” in this subsection means an ordinary financial or bookkeeping entry and



would not cover such things as inter-office memos or written reports between branches: *M.N.R. v. Furnasman Ltd.*, [1973] F.C. 1327, [1973] C.T.C. 830 (T.D.) or memoranda of conversations or meetings between a bank employee and the bank's customers: *I.T.L. Industries Ltd. v. Winterbottom* (1980), 27 O.R. (2d) 496, 106 D.L.R. (3d) 577 (C.A.) [considering the comparable provision of the Ontario Evidence Act, s. 34].

**Subsec. (2)** – Proof of compliance with this subsection may be given by persons other than the manager or accountant, such as the bank employee in charge of the records: *R. v. McGrayne* (1979), 46 C.C.C. (2d) 63 (Ont. C.A.).

In *R. v. Bell and Bruce* (1982), 65 C.C.C. (2d) 377, 35 O.R. (2d) 164 (C.A.), the Court gave further consideration to the application of this section to computerized bank records. It was held that: a “record” may be in any, even in an illegible, form; the form in which the information is recorded may change from time to time; a “record” may be a compilation or collation of other records; and the “record” must have been produced for the bank's purposes as a reference source, or as part of its internal audit system and, at the relevant time, must be kept for that purpose. It was also possible for the bank to have more than one record at any one time, for example, the record stored in the computer and a monthly statement prepared by the computer which the bank retained for a number of years.

**Subsec. (5)** – The argument by the accused that production of certain bank records would help him present a full and complete defence is not a special cause for a Court order for production: *R. v. Palardy* (1973), 14 C.C.C. (2d) 162 (Que.Sess.Ct.).

**BUSINESS RECORDS TO BE ADMITTED IN EVIDENCE** / Inference where information not in business record / Copy of records / Where record kept in form requiring explanation / Court may order other part of record to be produced / Court may examine record and hear evidence / Notice of intention to produce record or affidavit / Not necessary to prove signature and official character / Examination on record with leave of court / Evidence inadmissible under this section / Construction of this section / Definitions / “business” / “copy” and “photographic film” / “court” / legal proceeding” / “record”.

30. (1) Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record.

(2) Where a record made in the usual and ordinary course of business does not contain information in respect of a matter the occurrence or existence of which might reasonably be expected to be recorded in that record, the court may on production of the record admit the record for the purpose of establishing that fact and may draw the inference that the matter did not occur or exist.

(3) Where it is not possible or reasonably practicable to produce any record described in subsection (1) or (2), a copy of the record accompanied by two documents, one that is made by a person who states why it is not possible or reasonably practicable to produce the record and one that sets out the source from which the copy was made, that attests to the copy's authenticity and that is made by the person who made the copy, is admissible in evidence under this section in the same manner as if it were the original of the record if each document is

(a) an affidavit of each of those persons sworn before a commissioner or other person authorized to take affidavits; or

(b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(4) Where production of any record or of a copy of any record described in subsection (1) or (2) would not convey to the court the information contained in the record by reason of its having been kept in a form that requires explanation, a transcript of the explanation of the record or copy prepared by a person qualified to make the explanation is admissible in evidence under this section in the same manner as if it were the original of the record if it is accompanied by a document that sets out the person's qualifications to make the explanation, attests to the accuracy of the explanation, and is

- (a) an affidavit of that person sworn before a commissioner or other person authorized to take affidavits; or
- (b) a certificate or other statement pertaining to the record in which the person attests that the certificate or statement is made in conformity with the laws of a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state.

(5) Where part only of a record is produced under this section by any party, the court may examine any other part of the record and direct that, together with the part of the record previously so produced, the whole or any part of the other part thereof be produced by that party as the record produced by him.

(6) For the purpose of determining whether any provision of this section applies, or for the purpose of determining the probative value, if any, to be given to information contained in any record admitted in evidence under this section, the court may, on production of any record, examine the record, admit any evidence in respect thereof given orally or by affidavit including evidence as to the circumstances in which the information contained in the record was written, recorded, stored or reproduced, and draw any reasonable inference from the form or content of the record.

(7) Unless the court orders otherwise, no record or affidavit shall be admitted in evidence under this section unless the party producing the record or affidavit has, at least seven days before its production, given notice of his intention to produce it to each other party to the legal proceeding and has, within five days after receiving any notice in that behalf given by any such party, produced it for inspection by that party.

(8) Where evidence is offered by affidavit under this section, it is not necessary to prove the signature or official character of the person making the affidavit if the official character of that person is set out in the body of the affidavit.

(9) Subject to section 4, any person who has or may reasonably be expected to have knowledge of the making or contents of any record produced or received in evidence under this section may, with leave of the court, be examined or cross-examined thereon by any party to the legal proceeding.

(10) Nothing in this section renders admissible in evidence in any legal proceeding

- (a) such part of any record as is proved to be
  - (i) a record made in the course of an investigation or inquiry,
  - (ii) a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding,
  - (iii) a record in respect of the production of which any privilege exists and is claimed, or
  - (iv) a record of or alluding to a statement made by a person who is not, or if he were living and of sound mind would not be, competent and compellable to disclose in the legal proceeding a matter disclosed in the record;
- (b) any record the production of which would be contrary to public policy; or
- (c) any transcript or recording of evidence taken in the course of another legal proceeding.

(11) The provisions of this section shall be deemed to be in addition to and not in derogation of

- (a) any other provision of this or any other Act of Parliament respecting the admissibility in evidence of any record or the proof of any matter; or
- (b) any existing rule of law under which any record is admissible in evidence or any matter may be proved.

(12) In this section,

“business” means any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government;

“copy”, in relation to any record, includes a print, whether enlarged or not, from a photographic film of the record, and “photographic film” includes a photographic plate, microphotographic film or photostatic negative;

“court” means the court, judge, arbitrator or person before whom a legal proceeding is held or taken;

“legal proceeding” means any civil or criminal proceeding or inquiry in which evidence is or may be given, and includes an arbitration;

“record” includes the whole or any part of any book, document, paper, card, tape or other thing on or in which information is written, recorded, stored or reproduced, and, except for the purposes of subsections (3) and (4), any copy or transcript admitted in evidence under this section pursuant to subsection (3) or (4). R.S., c. E-10, s. 30; 1994, c. 44, s. 91.

## ANNOTATIONS

**Subsec. (1)** – An inventory sheet made contemporaneously by employees with personal knowledge of the matters then being recorded and under a duty to make the record is admissible through the employees and *prima facie* proof of the truth of its contents at common law or in the alternative is admissible as a business record under this section: *R. v. Penno* (1977), 35 C.C.C. (2d) 266, 76 D.L.R. (3d) 529, 37 C.R.N.S. 391 (B.C.C.A.).

Fingerprint records kept by the United States Federal Bureau of Investigation are admissible under this subsection. An official of the F.B.I. who has knowledge of the contents of the records kept by the agency based on his experience, although he has no original knowledge of their contents, is competent to give evidence as to the contents of the documents: *R. v. Grimba and Wilder* (1977), 38 C.C.C. (2d) 469 (Ont.Co.Ct.).

**Subsec. (2)** – In order to prove that a certain item had not been imported by the accused the proper procedure is to produce the customs records under this section giving rise to the inference under this subsection of the non-occurrence of the importation from the fact that there was no entry of it in the records, rather than merely call an officer who had inspected the records: *R. v. Garofoli* (1988), 41 C.C.C. (3d) 97, 64 C.R. (3d) 193 (Ont. C.A.).

**Subsec. (3)** – An air way-bill is a document made in the usual and ordinary course of business a copy of which would be admissible if this subsection were complied with. In determining which parts of the way-bill are originals and which are merely copies the Court must resort to the Carriage By Air Act, R.S.C. 1970, c. C-14. That Act provides that an air way-bill consists of three originals and therefore any other part such as a delivery receipt is a copy whose admissibility is governed by the provisions of this sub-



section: *Cloutier v. The Queen* (1979), 48 C.C.C. (3d) 1, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10 (6:3).

The technical requirements laid down by provincial legislation for the swearing of an affidavit had no application to an affidavit tendered under subsec. (3) in a prosecution for violation of a federal statute: *R. v. Nickerson* (1991), 106 N.S.R. (2d) 300 (C.A.).

**Subsec. (6)** – Affidavit evidence is admissible not only to prove the matters referred to in subsecs. (3) and (4) but to prove that the record was one made in the usual and ordinary course of business: *R. v. Parker* (1984), 16 C.C.C. (3d) 478 (Ont. C.A.). *Contra: Re State of California and Meier and Hazelwood* (No. 2) (1982), 69 C.C.C. (2d) 180, 40 B.C.L.R. 297 (S.C.).

**Subsec. (7)** – The notice required by this subsection need not be written or formal thus introduction of the record at the accused's preliminary hearing is sufficient compliance with this subsection where it is sought to tender the document at the accused's trial: *R. v. Penno*, *supra*.

Similarly, the document is produced for inspection within the meaning of this subsection where it is entered as an exhibit at the preliminary inquiry and is thereafter available for inspection as provided for in the Criminal Code: *R. v. Voykin* (1986), 29 C.C.C. (3d) 280 (Alta. C.A.).

**Subsec. (10)** – Notes made by an investigator with the fire marshall's office, who is conducting an investigation into a fire at the accused's premises are inadmissible in view of para. (a)(i) of this subsection: *R. v. Lavery* (No. 2) (1979), 47 C.C.C. (2d) 60, 9 C.R. (3d) 288 (Ont. C.A.). Similarly, logs kept by police officers monitoring intercepted private communications are inadmissible: *R. v. Biasi et al.* (No. 2) (1981), 66 C.C.C. (2d) 563 (B.C.S.C.). *Contra: R. v. McLarty* (No. 3) (1978), 45 C.C.C. (2d) 184 (Ont. Co. Ct.) where a narrow interpretation was given to para. (a), the court holding that "investigation or inquiry" is the type of inquiry contemplated by the Inquiries Act, R.S.C. 1970, c. I-13. Thus records kept by the R.C.M.P. to account for the whereabouts of exhibits were admitted.

While computer print-outs made by detection equipment on board armed forces aircraft could otherwise qualify as business records within the meaning of this section, where, as in this case, the records are made in the course of surveillance operations conducted to assist law enforcement personnel in tracking alleged narcotics smugglers, then the records are not admissible by virtue of subpara. (i): *R. v. Sunila and Solayman* (1986), 26 C.C.C. (3d) 331 (N.S.S.C.). However, in this case, the court did admit these records relying on a common-law business records exception.

An authorization to intercept private communications while a "record" within this section is clearly intended to enable the obtaining of evidence upon which a prosecution may be founded and is thus a record made in contemplation of a legal proceeding and excluded by para. (a)(ii): *R. v. Baker* (1977), 35 C.C.C. (2d) 314 (B.C.C.A.).

The case of *R. v. Scheel* (1978), 42 C.C.C. (2d) 31, 3 C.R. (3d) 359 (Ont. C.A.) is of note although not directly related to this section. It was held in that case that summaries, prepared by an accountant retained by the Crown, from the accused's records are admissible in evidence at least where the summaries are based on evidence which had been properly admitted at the trial.

**Subsec. (11)** – This section is neither mandatory nor exclusive and it was open to the court to admit business records under the common law exception to the hearsay rule. Further, it was open to the court to modify the common law criteria (one of which required proof that the maker of the document was since deceased). In *R. v. Monkhouse* (1987), 61 C.R. (3d) 343, [1988] 1 W.W.R. 725, 56 Alta. L.R. (2d) 97 (C.A.), the court set down the following criteria for admissibility under the modified common law exception: a record containing (1) an original entry (2) made contemporaneously (3) in the routine (4) of business (5) by a recorder who has a duty to make the record and (6) who

had no motive to misrepresent. There is no requirement that the recorder have personal knowledge of the thing recorded if he is functioning in the usual and ordinary course of a system in effect for the preparation of business records. The court warned however that this exception should only be applied where the circumstances make the records inherently trustworthy; where there is an established system in the business which produces records which are regarded as reliable and customarily relied upon by those affected by them.

**Subsec. (12)** – A computer generated print-out produced by an employee of the telephone company showing calls to and from a particular telephone number is a “record” within the meaning of this section not merely a copy of a record: *R. v. Bicknell* (1988), 41 C.C.C. (3d) 545 (B.C.C.A.).

**DEFINITIONS / “corporation” / “government” / “photographic film” / When print admissible in evidence / Evidence of compliance with conditions / Proof by notarial copy.**

**31. (1) In this section,**

“corporation” means any bank, including the Bank of Canada and the Business Development Bank of Canada, and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company (except a company subject to Part II of the *Small Loans Act*, chapter S-11 of the Revised Statutes of Canada, 1970);

**NOTE:** Definition “corporation” re-enacted by 1992, c. 1, s. 142(1) (Sch. V, item 9(2)) (to come into force as provided by s. 142(2)). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

“corporation” means any bank, including the Bank of Canada and the Federal Business Development Bank, and each of the following carrying on business in Canada, namely, every railway, express, telegraph and telephone company (except a street railway and tramway company), insurance company or society, trust company and loan company;

“government” means the government of Canada or of any province and includes any department, commission, board or branch of any such government;

“photographic film” includes any photographic plate, microphotographic film and photostatic negative.

**(2) A print, whether enlarged or not, from any photographic film of**

- (a) an entry in any book or record kept by any government or corporation and destroyed, lost or delivered to a customer after the film was taken,
- (b) any bill of exchange, promissory note, cheque, receipt, instrument or document held by any government or corporation and destroyed, lost or delivered to a customer after the film was taken, or
- (c) any record, document, plan, book or paper belonging to or deposited with any government or corporation,

is admissible in evidence in all cases in which and for all purposes for which the object photographed would have been admitted on proof that

- (d) while the book, record, bill of exchange, promissory note, cheque, receipt, instrument or document, plan, book or paper was in the custody or control of the government or corporation, the photographic film was taken thereof in order to keep a permanent record thereof, and
- (e) the object photographed was subsequently destroyed by or in the presence of one or more of the employees of the government or corporation, or was lost or was delivered to a customer.

(3) Evidence of compliance with the conditions prescribed by this section may be given by any one or more of the employees of the government or corporation, having knowledge of the taking of the photographic film, of the destruction, loss, or delivery to a customer, or of the making of the print, as the case may be, either orally or by affidavit sworn in any part of Canada before any notary public or commissioner for oaths.

(4) Unless the court otherwise orders, a notarial copy of an affidavit under subsection (3) is admissible in evidence in lieu of the original affidavit. R.S., c. E-10, s. 31; 1974-75-76, c. 14, s. 57; 1992, c. 1, s. 142(1) (Sch. V, item 9(1)); 1995, c. 28, s. 47.

#### ANNOTATIONS

A private organization controlled and entrusted by a provincial government to administer a provincial medical care insurance scheme is included within the definition of "government": *R. v. Sanghi* (1971), 6 C.C.C. (2d) 123, 3 N.S.R. (2d) 70 (N.S.S.C. App. Div.).

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#### ORDER SIGNED BY SECRETARY OF STATE / Copies printed in *Canada Gazette*.

32. (1) An order signed by the Secretary of State of Canada and purporting to be written by command of the Governor General shall be admitted in evidence as the order of the Governor General.

(2) All copies of official and other notices, advertisements and documents printed in the *Canada Gazette* are admissible in evidence as proof, in the absence of evidence to the contrary, of the originals and of the contents thereof. R.S., c. E-10, s. 32.

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#### PROOF OF HANDWRITING OF PERSON CERTIFYING / Printed or written.

33. (1) No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, regulation, appointment, book or other document.

(2) Any copy or extract referred to in subsection (1) may be in print or in writing, or partly in print and partly in writing. R.S., c. E-10, s. 33.

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#### ATTESTING WITNESS / Instrument, how proved.

34. (1) It is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite.

(2) Any instrument referred to in subsection (1) may be proved by admission or otherwise as if there had been no attesting witness thereto. R.S., c. E-10, s. 34.

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#### IMPOUNDING OF FORGED INSTRUMENT.

35. Where any instrument that has been forged or fraudulently altered is admitted in evidence, the court or the judge or person who admits the instrument may, at the request of any person against whom it is admitted in evidence, direct that the instrument shall be impounded and be kept in the custody of an officer of the court or other proper person for such period and subject to such conditions as to the court, judge or person admitting the instrument seem meet. R.S., c. E-10, s. 35.

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#### CONSTRUCTION.

36. This Part shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing Act or existing at law. R.S., c. E-10, s. 36.



## Disclosure of Government Information

OBJECTION TO DISCLOSURE OF INFORMATION / Where objection made to superior court / Where objection not made to superior court / Limitation period / Appeal to court of appeal / Limitation period for appeal under subsection (5) / Limitation periods for appeal to Supreme Court of Canada.

37. (1) A Minister of the Crown in right of Canada or other person interested may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying orally or in writing to the court, person or body that the information should not be disclosed on the grounds of a specified public interest.

(2) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a superior court, that court may examine or hear the information and order its disclosure, subject to such restrictions or conditions as it deems appropriate, if it concludes that, in the circumstances of the case, the public interest in disclosure outweighs in importance the specified public interest.

(3) Subject to sections 38 and 39, where an objection to the disclosure of information is made under subsection (1) before a court, person or body other than a superior court, the objection may be determined, on application, in accordance with subsection (2) by

(a) the Federal Court – Trial Division, in the case of a person or body vested with power to compel production by or pursuant to an Act of Parliament if the person or body is not a court established under a law of a province; or

(b) the trial division or trial court of the superior court of the province within which the court, person or body exercises its jurisdiction, in any other case.

(4) An application pursuant to subsection (3) shall be made within ten days after the objection is made or within such further or lesser time as the court having jurisdiction to hear the application considers appropriate in the circumstances.

(5) An appeal lies from a determination under subsection (2) or (3)

(a) to the Federal Court of Appeal from a determination of the Federal Court – Trial Division; or

(b) to the court of appeal of a province from a determination of a trial division or trial court of a superior court of a province.

(6) An appeal under subsection (5) shall be brought within ten days from the date of the determination appealed from or within such further time as the court having jurisdiction to hear the appeal considers appropriate in the circumstances.

(7) Notwithstanding any other Act of Parliament,

(a) an application for leave to appeal to the Supreme Court of Canada from a judgment made pursuant to subsection (5) shall be made within ten days from the date of the judgment appealed from or within such further time as the court having jurisdiction to grant leave to appeal considers appropriate in the circumstances; and

(b) where leave to appeal is granted, the appeal shall be brought in the manner set out in subsection 60(1) of the *Supreme Court Act* but within such time as the court that grants leave specifies. 1980-81-82-83, c. 111, s. 4.

### ANNOTATIONS

The predecessor to this legislation, s. 41 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), has been held to be *intra vires* Parliament and not contrary to the Canadian

Bill of Rights: *Human Rights Com'n v. A.-G. Can. et al.* (1982), 134 D.L.R. (3d) 17, [1982] 1 S.C.R. 215 *sub nom. Com'n des Droits de la Personne v. A.-G. Can. et al.*

In this case the accused alleged that certain documents in the possession of the Parole Board would support his contention that his confession to a murder was the result of improper inducements. The court held that if there was any evidence to support the contention the documents would be disclosed, with the question of their admissibility dealt with by the trial judge. However, since the documents upon examination by the court did not contain any evidence of inducement and in view of the sensitivity of the documents, disclosure would be refused: *Re Stewart and The Queen* (1984), 13 C.C.C. (3d) 278 (B.C.S.C.).

It is a good ground for preventing disclosure that the disclosure would offend the common-law police informer privilege: *Re Regina and Jensen et al.* (1984), 15 C.C.C. (3d) 532 (Nfld. S.C.).

An objection to disclosure of the identity of a police informer referred to in an information to obtain a search warrant was properly upheld, although the accused sought the informer's identity to explore for evidence of an unreasonable seizure in violation of s. 8 of the Charter of Rights and Freedoms. The right to explore for such evidence must be exercised in accordance with the rules of evidence, including the rule prohibiting disclosure of the identity of a police informer: *R. v. Archer* (1989), 47 C.C.C. (3d) 567, 94 A.R. 323 (C.A.).

Police reports setting out the relationship between unindicted co-conspirators and the police should not be disclosed where, *inter alia*, it was shown that disclosure of the information would be injurious to the operation of the police and the accused had not demonstrated that the information sought contained evidence that was necessary to establish the innocence of the accused or would establish a fact crucial to their defence: *Bailey v. Royal Canadian Mounted Police* (1990), 43 F.T.R. 73 (T.D.).

The phrase "other person interested" contemplates an objection by a person like a minister of the Crown who is a person in authority in relation to the public interest specified. An accused who seeks to exclude from evidence information obtained by an employee of the Public Service of Canada does not have standing to raise an objection under this section. The objection would have to be raised by someone with an official status and duty in relation to the Public Service of Canada and therefore who had an official interest in preventing the disclosure: *R. v. Lines* (1986), 27 C.C.C. (3d) 377 (N.W.T.C.A.).

An objection may be made under this section to disclosure of information by certifying orally that the information should not be disclosed on the ground of a specified public interest, namely police practices. Where the objection is made, the trial judge may examine or hear the information in circumstances which he considers appropriate, including the absence of the parties, their counsel and the public. In a criminal case, if the trial judge finds that the information could not affect the outcome then the privilege claim should generally be upheld. If, however, the decision to uphold the claim might affect the outcome of the trial, the judge must consider whether upholding the claim of privilege would have the effect of preventing the accused from making full answer and defence. If the trial judge so concludes then he should consider giving the Crown the alternative of either withdrawing the claim of privilege or entering a stay of proceedings. If the Crown refuses to do either then the trial judge may permit the introduction of the evidence, imposing whatever safeguards seem appropriate. In effect, the trial judge must consider whether the public interest, in allowing the accused to make full answer and defence, can be overridden by the interest asserted by the Crown: *R. v. Meuckon* (1990), 57 C.C.C. (3d) 193, 78 C.R. (3d) 196 (B.C.C.A.).

Where objection was taken to the disclosure of communications between the police and a government lawyer, it is necessary to weigh the importance of the items of information to a defence which may properly be raised by the accused, against a public interest specified in the certificate. Before making the determination, the judge may wish to

examine or hear the evidence and will then be able to give consideration to the possibility that other issues bearing on the relevance of the information sought ought to be dealt with first: *R. v. Gray* (1993), 79 C.C.C. (3d) 332, 39 W.A.C. 208 (B.C.C.A.), leave to appeal to S.C.C. refused 83 C.C.C. (3d) vi.

On an application under this section, the trial judge may view the contents of the sealed packet without disclosing the entire contents to the accused: *R. v. Desjardins* (1990), 61 C.C.C. (3d) 376, 88 Nfld. & P.E.I.R. 143 (Nfld. S.C.).

The requirement that an objection to disclosure which is raised in the provincial court must, pursuant to subsec. (3), be determined in the superior court does not violate an accused's right to a fair trial: *Canada (Attorney-General) v. Sander* (1992), 79 C.C.C. (3d) 63, 76 B.C.L.R. (2d) 53 (S.C.), rev'd on other grounds 90 C.C.C. (3d) 41, 91 B.C.L.R. (2d) 145 (C.A.).

This section does not confer jurisdiction on a superior court judge to review an order of the judge of another court or to entertain an interlocutory appeal from such an order. The application under this section is an independent inquiry which, by statute, may require the attention of a judge other than the trial judge where the trial judge is not a judge of the superior court: *Canada (Attorney General) v. Sander* (1994), 90 C.C.C. (3d) 41, 114 D.L.R. (4th) 455, [1994] 8 W.W.R. 512 (C.A.).

A claim of public interest immunity under this section is distinct from an assertion of solicitor-client privilege. Whether a solicitor-client privilege prevails in respect to a particular communication will depend upon the nature of the relationship between the parties, and the purpose for which the communication was made. Cases involving public interest immunity, however, are concerned with a class of documents or their actual content and involve a balancing of the injuries which would be caused by a possible denial of justice as a result of non-disclosure on the one hand and the injury to the public as a result of revelation of government documents which were never intended to be made public. It may be that the proper functioning of government could include a public interest in maintaining the confidentiality of discussions between government lawyers and those government officials that they advise. Legal communications between government investigators and Department of Justice lawyers can be subject to public interest immunity, whether or not a claim at common law of solicitor-client privilege succeeds or fails: *Canada (Attorney General) v. Sander*, *supra*.

A certificate filed under this section cannot prevent a court from examining records of an R.C.M.P. investigation in determining an application under s. 41 of the Privacy Act, S.C. 1980-81-82, c. 111, (Sch. II): *Davidson v. Canada (Solicitor General)* (1990), 47 C.C.C. (3d) 104, [1989] 2 F.C. 341, 61 D.L.R. (4th) 342.

Moreover, this section would not apply where the applicant is seeking the information for his own use and there was no question of disclosure of information before a "court, person, or body with jurisdiction to compel the production of information": *Davidson v. Canada (Solicitor General)*, *supra*.

While subsec. (6) requires that an appeal be filed within 10 days, if the objection to disclosure is upheld in the course of a trial it is preferable that, except in exceptional circumstances, the appeal not be disposed of until conclusion of the trial. It is undesirable to adjourn a trial for the purpose of an interlocutory appeal which may turn out to be academic: *R. v. Archer*, *supra*.

#### OBJECTION RELATING TO INTERNATIONAL RELATIONS OR NATIONAL DEFENCE OR SECURITY / Limitation period / Appeal to Federal Court of Appeal / Subsections 37(6) and (7) apply / Special rules for hearings / *Ex parte* representations.

38. (1) Where an objection to the disclosure of information is made under subsection 37(1) on grounds that the disclosure would be injurious to international relations or national defence or security, the objection may be determined, on application, in accordance with subsection 37(2) only by the Chief Justice of the Federal Court, or



such other judge of that Court as the Chief Justice may designate to hear such applications.

(2) An application under subsection (1) shall be made within ten days after the objection is made or within such further or lesser time as the Chief Justice of the Federal Court, or such other judge of that Court as the Chief Justice may designate to hear such applications, considers appropriate.

(3) An appeal lies from a determination under subsection (1) to the Federal Court of Appeal.

(4) Subsection 37(6) applies in respect of appeals under subsection (3), and subsection 37(7) applies in respect of appeals from judgments made pursuant to subsection (3), with such modifications as the circumstances require.

(5) An application under subsection (1) or an appeal brought in respect of the application shall

(a) be heard *in camera*; and

(b) on the request of the person objecting to the disclosure of information, be heard and determined in the National Capital Region described in the schedule to the *National Capital Act*.

(6) During the hearing of an application under subsection (1) or an appeal brought in respect of the application, the person who made the objection in respect of which the application was made or the appeal was brought shall, on the request of that person, be given the opportunity to make representations *ex parte*. 1980-81-82-83, c. 111, s. 4.

#### ANNOTATIONS

**Subsec. (1)** – Where an objection is made to disclosure of information on the grounds that disclosure would be injurious to international relations or national security, the Chief Justice of the Federal Court has a discretion whether or not to inspect the documents involved and may properly conclude that they should only be inspected if it appears necessary to determine whether disclosure should be made. In determining whether to examine the information the Chief Justice may properly consider the apparent balance of the competing public interests and the likelihood that examination could alter the view of that balance and the impression as to whether disclosure should be ordered. Thus in this case the refusal to order disclosure of the documents was upheld although the Chief Justice did not inspect the documents and relied on the certificate of the Solicitor General and a secret affidavit filed to explain why disclosure would be injurious to national security and international relations and identifying the general nature of the documents: *Re Goguen and Albert and Gibson* (1984), 10 C.C.C. (3d) 492, 7 D.L.R. (4th) 144, [1983] 2 F.C. 463 (C.A.).

There is a heavy onus on an accused to justify disclosure where objection is taken on the basis of national security and may require that it be established that the evidence sought would probably establish a fact crucial to the defence. Moreover, it is unlikely that a case could ever be made out for disclosure where the evidence is sought for use on a preliminary inquiry, having regard to the function of the preliminary inquiry: *Re Kevork et al. and The Queen* (1984), 17 C.C.C. (3d) 426, [1984] 2 F.C. 753 (T.D.).

Where the Chief Justice of the Federal Court or his designate, has refused disclosure to the accused of certain evidence by reason of an objection by the Canadian Security Intelligence Service on the basis of national security, then at the subsequent trial of the accused the trial judge would be entitled to grant a stay of proceedings, in view of the breach of the accused's right to fundamental justice brought about by the unavailability of this evidence, only where it is established that the evidence is critical or essential. Such a burden is reasonable in order to avoid fishing expeditions in all cases when it is likely that C.S.I.S. had some hand in gathering information. The burden is on the

accused to persuade the trial court that there is evidence being denied that is of a critical nature without which the accused will probably not be able to make full answer and defence. Finally, it may be that where the Federal Court Judge has not even inspected the material before making his decision to refuse disclosure, the trial court may be in a position to grant a conditional stay urging inspection of the material: *R. v. Kevork, Balian and Gharakhanian* (1986), 27 C.C.C. (3d) 523 (Ont. H.C.J.).

It is not necessary for a party seeking documents, concerning which a claim of privilege has been made on the basis of the public interest in national security, to show that production is absolutely essential to the case. Nor is it an established rule that production will be refused if it is merely corroborative evidence or if the matter can otherwise be proved. The courts cannot abdicate their responsibility to balance the public interests involved merely because a claim of national security is made. On the other hand, the designated judge did not err in refusing production without examining the documents, where the information was not required as evidence at trial but merely for general discovery to determine whether any helpful evidence might in fact be available: *Gold v. The Queen In Right Of Canada* (1986), 25 D.L.R. (4th) 285, 64 N.R. 260 (F.C.A.).

**Subsec. (3)** – In *Re Goguen and Albert and Gibson* (1984), 10 C.C.C. (3d) 492, 7 D.L.R. (4th) 144, [1983] 2 F.C. 463 (C.A.) only Marceau J. considered the role of the Court of Appeal on an appeal from the decision of the Chief Justice refusing to order disclosure. His Lordship was of the view that the Court of Appeal was to proceed to an appreciation of its own without having to give special weight to the decision of the Chief Justice.

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#### **OBJECTION RELATING TO A CONFIDENCE OF THE QUEEN'S PRIVY COUNCIL / Definition / Definition of "Council" / Exception.**

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**39. (1)** Where a Minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.

**(2)** For the purpose of subsection (1), "a confidence of the Queen's Privy Council for Canada" includes, without restricting the generality thereof, information contained in

- (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
- (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) an agenda of Council or a record recording deliberations or decisions of Council;
- (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
- (f) draft legislation.

**(3)** For the purposes of subsection (2), "Council" means the Queen's Privy Council for Canada, committees of the Queen's Privy Council for Canada, Cabinet and committees of Cabinet.

**(4)** Subsection (1) does not apply in respect of

- (a) a confidence of the Queen's Privy Council for Canada that has been in existence for more than twenty years; or
- (b) a discussion paper described in paragraph (2)(b)
  - (i) if the decisions to which the discussion paper relates have been made public, or
  - (ii) where the decisions have not been made public, if four years have passed since the decisions were made. 1980-81-82-83, c. 111, s. 4.

## ANNOTATIONS

While the court is not entitled to go behind a proper certificate by the Clerk of the Privy Council, it is open to the court to see whether the certificate on its face asserts a privilege within the limitations on claims for privilege by the executive, particularly the limitation in subsec. (4). Thus where the certificate asserts that a document is a confidence on the basis of the definitions in subsec. (2) it should clearly assert that the document meets the requirements spelled out in those paragraphs, and does not fall within the proviso in subsec. (4). A letter passing between Ministers may fall within the term "record" in subsec. (2)(d) and (e): *Smith, Kline & French Laboratories Ltd. et al. v. A.-G. Can.*, [1983] 1 F.C. 917, 76 C.P.R. (2d) 192 (T.D.).

An objection to disclosure is properly taken under this section in respect of material in the possession of the body whose decision it is sought to review under s. 28 of the Federal Court Act. The determination of the validity of the objection is made pursuant to this section by the Chief Justice or a judge designated by him: *Henrie v. Canada (Security Intelligence Review Committee)* (1992), 88 D.L.R. (4th) 575, 55 F.T.R. 96n, 5 Admin. L.R. (2d) 269 (C.A.).

A memorandum to a single minister of the Crown acting under statutory authority cannot amount to a confidence of the Privy Council within the meaning of this section, since the section makes it clear that only information that concerns the Cabinet in the collegial sense can qualify for the absolute privilege. However, documents which were sent to two ministers because two ministers were responsible for making the single decision did qualify under this section: *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1992] 2 F.C. 130, 87 D.L.R. (4th) 730, 6 Admin. L.R. (2d) 191 (C.A.), leave to appeal to S.C.C. refused 96 D.L.R. (4th) vi.

In *Carey v. The Queen* (1986), 30 C.C.C. (3d) 498, [1986] 2 S.C.R. 637 (7:0), the court reviewed at length the question of state privilege at common law in relation to cabinet documents and held that there is no rule at common law that cabinet documents are absolutely immune from disclosure. While that case must be read with care when applied to the statutory provisions under this Act it may prove of assistance in interpreting those provisions.

To a similar effect see *Nova Scotia (Attorney General) v. Nova Scotia (Royal Commission Into Marshall Prosecution)* (1988), 44 C.C.C. (3d) 330, 54 D.L.R. (4th) 153 (N.S.C.A.), holding that a Royal Commission could properly require cabinet members (the present and former Attorneys-General) to testify as to the nature of cabinet discussions concerning the prosecution under investigation by the Royal Commission.

A certificate under this section cannot prevent the introduction into evidence at trial of information already produced at discovery without objection: *Best Cleaners and Contractors Ltd. v. The Queen*, [1985] 2 F.C. 293, 58 N.R. 295 (C.A.).

This section does not violate the equality rights in s. 15 of the Charter: *Canadian Assn. of Regulated Importers v. Canada (Attorney General)* (1991), 87 D.L.R. (4th) 730, [1992] 2 F.C. 130, 6 Admin. L.R. (2d) 191 (C.A.), leave to appeal to S.C.C. refused 96 D.L.R. (4th) vi.



## Provincial Laws of Evidence

### HOW APPLICABLE.

40. In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings. R.S., c. E-10, s. 37.

### ANNOTATIONS

Provincial procedural enactments, such as one providing for use of another language at trial, are not "laws of evidence" within this section: *R. v. Murphy, ex p. Belisle and Moreau*, [1968] 4 C.C.C. 229, 5 C.R.N.S. 68 (N.B.C.A.).

It was held in *Marshall v. The Queen* (1960), 129 C.C.C. 232, 26 D.L.R. (2d) 459, [1961] S.C.R. 123, 34 C.R. 216 (5:0) (S.C.C.) that provincial legislation, rendering inadmissible an accident report made by a motorist at "any trial", when properly construed applied only to trials of offences within provincial jurisdiction and not for criminal offences. Nor could such legislation apply to the trial of criminal offences by virtue of this section. The words "subject to this and other Acts of the Parliament of Canada" include s. 8 of the Criminal Code which preserves the common law relating to the admissibility of confessions. If the statement is proved voluntary then it is admissible even though made under compulsion of statute.

Similarly, it was held that the combined effect of this section and s. 8(2) of the Criminal Code is to incorporate in the criminal law by legislation the common law in effect in a province immediately before April 1, 1955, including for example the rule respecting secrecy of the identities of police informers. Thus, provincial legislation which sought to abrogate that rule would be either *ultra vires* or inoperative: *Bisaillon v. Keable et al.* (1983), 7 C.C.C. (3d) 385, 2 D.L.R. (4th) 193 (S.C.C.) (7:0).

This section must be given a narrow scope so as to avoid unacceptable differences from province to province on fundamental matters of criminal evidence and thus, for example, should be restricted to the proof of matters within provincial competence: *R. v. Albright* (1987), 37 C.C.C. (3d) 105, 60 C.R. (3d) 97, [1987] 2 S.C.R. 383 (5:0).

Provincial legislation making admissible at trial an accident report made by a motorist to prove identity of the driver cannot alter the common law which requires proof of voluntariness before any statement by an accused is admissible at his trial for an offence under the Criminal Code: *R. v. Ward* (1977), 38 C.C.C. (2d) 353, [1978] 1 W.W.R. 514 (Alta. S.C. App.Div.). This point was not argued on appeal to the S.C.C. (1979), 44 C.C.C. (2d) 498.

Provincial legislation making admissible a certificate of the Deputy Registrar of Motor Vehicles demonstrating ownership of a motor vehicle is not applicable to trial of federal offences. Such legislation is inconsistent with s. 8(2) of the Criminal Code which preserves the common law and the certificate would be inadmissible hearsay at common law: *R. v. Richardson* (1980), 57 C.C.C. (2d) 403, [1981] 2 W.W.R. 755 (Alta. C.A.).

This section is to be given a narrow scope and restricted to matters within provincial competency so as to avoid unacceptable differences between provinces respecting the admissibility of relevant evidence tendered by affidavit under s. 30 in a prosecution under federal legislation: *R. v. Nickerson* (1991), 106 N.S.R. (2d) 300 (C.A.).

A medical report prepared for the defence which may have been admissible in civil proceedings by virtue of provincial legislation was not admissible in criminal proceedings. The admissibility of such evidence was a matter completely within federal jurisdiction and this section did not make the provincial legislation applicable: *R. v. Driver* (1992), 16 W.C.B. (2d) 127 (Ont. Ct. (Prov. Div.)).

## ***Statutory Declarations***

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### **SOLEMN DECLARATION.**

41. Any judge, notary public, justice of the peace, police or provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

I,....., solemnly declare that (*state the fact or facts declared to*),  
and I make this solemn declaration conscientiously believing it to be true,  
and knowing that it is of the same force and effect as if made under oath.

Declared before me..... at..... this  
..... day of..... 19.....

R.S., c. E-10, s. 38; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1).

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## ***Insurance Proofs***

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### **AFFIDAVITS, ETC.**

42. Any affidavit, solemn affirmation or declaration required by any insurance company authorized by law to do business in Canada, in regard to any loss of or injury to person, property or life insured or assured therein, may be taken before any commissioner or other person authorized to take affidavits, before any justice of the peace or before any notary public for any province, and the commissioner, person, justice of the peace or notary public is required to take the affidavit, solemn affirmation or declaration. R.S., c. E-10, s. 39.

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## **Part II**

### ***Application***

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#### **FOREIGN COURTS.**

43. This Part applies to the taking of evidence relating to proceedings in courts out of Canada. R.S., c. E-10, s. 40.

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## ***Interpretation***

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### **DEFINITIONS / "cause" / "court" / "judge" / "oath".**

44. In this Part,

"cause" includes a proceeding against a criminal;

"court" means any superior court in any province;

"judge" means any judge of any superior court in any province;

"oath" includes a solemn affirmation in cases in which, by the law of Canada, or of a

province, as the case may be, a solemn affirmation is allowed instead of an oath. R.S., c. E-10, s. 41; 1984, c. 40, s. 27.

## CONSTRUCTION.

45. This Part shall not be so construed as to interfere with the right of legislation of the legislature of any province requisite or desirable for the carrying out of the objects hereof. R.S., c. E-10, s. 42.

## Procedure

### ORDER FOR EXAMINATION OF WITNESS IN CANADA.

46. Where, on an application for that purpose, it is made to appear to any court or judge that any court or tribunal of competent jurisdiction in the Commonwealth and Dependent Territories or in any foreign country, before which any civil, commercial or criminal matter is pending, is desirous of obtaining the testimony in relation to that matter of a party or witness within the jurisdiction of the first mentioned court, of the court to which the judge belongs or of the judge, the court or judge may, in its or his discretion, order the examination on oath on interrogatories, or otherwise, before any person or persons named in the order, of that party or witness accordingly, and by the same or any subsequent order may command the attendance of that party or witness for the purpose of being examined, and for the production of any writings or other documents mentioned in the order and of any other writings or documents relating to the matter in question that are in the possession or power of that party or witness. R.S., c. E-10, s. 43.

### ANNOTATIONS

Letters rogatory may be enforced by the Court of one province with respect to documents then held by an employee of a federal department in another province: *Re Request For International Judicial Assistance* (1979), 49 C.C.C. (2d) 276, 102 D.L.R. (3d) 18 (Alta. Q.B.), rev'd on other grounds 58 C.C.C. (2d) 274, 120 D.L.R. (3d) 732, [1981] 4 W.W.R. 148 (Alta. C.A.), judgment restored, the court not dealing with this point 66 C.C.C. (2d) 125, 27 C.R. (3d) 1, 134 D.L.R. (3d) 32, [1982] 1 S.C.R. 414, *sub nom. District Court of the United States, Middle District of Florida v. Royal American Shows Inc. et al.*; *United States v. Royal American Shows Inc. et al.*

In an unusual case, *Gulf Oil Corp. v. Gulf Canada Ltd. et al.* (1980), 111 D.L.R. (3d) 74, [1980] 2 S.C.R. 39, the Supreme Court of Canada took jurisdiction under this section but refused to exercise its discretion to enforce letters rogatory from United States Courts in view of federal government policy which was contrary to disclosure of the documents sought by the United States Courts.

A Canadian Court may grant a request for production of documents only. The order for production need not be ancillary to an order for examination of a specific witness: *District Court of the United States, Middle District of Florida v. Royal American Shows Inc. et al.*; *United States of America v. Royal American Shows Inc. et al.* (1982), 66 C.C.C. (2d) 125, 27 C.R. (3d) 1, [1982] 1 S.C.R. 414 (5:0).

The Court's power under this section will not be exercised where the person whose attendance for examination is sought is an accused in pending criminal proceedings in the requesting Court and the testimony sought is for the purpose of such proceedings. While Canadian Courts in the interest of comity will give judicial assistance whenever possible, comity recognizes that judicial assistance may be denied where its exercise would violate the public policy of the state to which the appeal is made or conflicts with local notions of justice, such as in Canada the right of an accused not to be compelled to



testify against himself: *Re Uzsinska and Republic of France* (1980), 52 C.C.C. (2d) 39, 27 O.R. (2d) 604 (H.C.J.).

Courts will not generally exercise their discretion in favour of enforcing letters rogatory merely to provide a basis for corroboration of available evidence. Further, the court will not enforce a request for production of documents which is too wide, too vague and too general to call for production by persons who are strangers to the litigation: *Seminole Electric Co-operative, Inc. v. BBC Brown Boveri, Inc.* (1987), 35 D.L.R. (4th) 102, 80 N.B.R. (2d) 91 (Q.B.).

The court has no power to limit a specific request for production of documents from a foreign court and where the request is too general to be enforced then the request must be refused: *Re Scholnick and Bank of Nova Scotia* (1987), 59 O.R. (2d) 538 (H.C.J.); *Seminole Electric Cooperative Inc. v. BBC Brown Boveri, Inc.*, *supra*.

An order for examination of witnesses may be made under this section even where the proceedings are at a pre-trial stage. Thus an order was made at the request of Swiss authorities where the provisions of this section had been complied with, and the request for assistance had come through the proper diplomatic channels, and if the order were refused the purpose of the Treaty under which Switzerland would conduct a surrogate criminal prosecution in respect of Canadian charges against Swiss citizens would be frustrated: *Zingre, Wuest and Reiser v. The Queen* (1981), 61 C.C.C. (2d) 465, 127 D.L.R. (3d) 223, [1981] 2 S.C.R. 392 (9:0).

An order will be made under this Part to examine a witness, merely for investigation purposes to determine whether charges should be laid, only in exceptional circumstances. The potential accused has standing to challenge the validity of an order made under this Part: *France (Republic) v. De Havilland Aircraft of Canada Ltd.* (1989), 50 C.C.C. (3d) 167 (Ont. H.C.J.).

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## ENFORCEMENT OF THE ORDER.

47. On the service on the party or witness of an order referred to in section 46, and of an appointment of a time and place for the examination of the party or witness signed by the person named in the order for taking the examination, or, if more than one person is named, by one of the persons named, and on payment or tender of the like conduct money as is properly payable on attendance at a trial, the order may be enforced in like manner as an order made by the court or judge in a cause pending in that court or before that judge. R.S., c. E-10, s. 44.

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## EXPENSES AND CONDUCT MONEY.

48. Every person whose attendance is required in the manner described is entitled to the like conduct money and payment for expenses and loss of time as on attendance at a trial. R.S., c. E-10, s. 45.

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## ADMINISTERING OATH.

49. On any examination of parties or witnesses, under the authority of any order made in pursuance of this Part, the oath shall be administered by the person authorized to take the examination, or, if more than one person is authorized, by one of those persons. R.S., c. E-10, s. 46.

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## RIGHT OF REFUSAL TO ANSWER OR PRODUCE DOCUMENT / Nature of right.

50. (1) Any person examined under any order made under this Part has the like right to refuse to answer questions tending to criminate himself, or other questions, as a party or witness, as the case may be, would have in any cause pending in the court by which, or by a judge whereof, the order is made.

(2) No person shall be compelled to produce, under any order referred to in subsec-

tion (1), any writing or other document that he could not be compelled to produce at a trial of such a cause. R.S., c. E-10, s. 47.

## RULES OF COURT / Letters rogatory.

51. (1) The court may frame rules and orders in relation to procedure and to the evidence to be produced in support of the application for an order for examination of parties and witnesses under this Part, and generally for carrying this Part into effect.

(2) In the absence of any order in relation to the evidence to be produced in support of the application referred to in subsection (1), letters rogatory from any court of justice in the Commonwealth and Dependent Territories, or from any foreign tribunal, in which the civil, commercial or criminal matter is pending, shall be deemed and taken to be sufficient evidence in support of the application. R.S., c. E-10, s. 48.

### Part III

## Application

### APPLICATION OF THIS PART.

**52. This Part extends to the following classes of persons:**

- (a) officers of any of Her Majesty's diplomatic or consular services while performing their functions in any foreign country, including ambassadors, envoys, ministers, charges d'affaires, counsellors, secretaries, attaches, consuls general, consuls, vice-consuls, pro-consuls, consular agents, acting consuls general, acting consuls, acting vice-consuls and acting consular agents;
- (b) officers of the Canadian diplomatic, consular and representative services while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada, including, in addition to the diplomatic and consular officers mentioned in paragraph (a), high commissioners, permanent delegates, acting high commissioners, acting permanent delegates, counsellors and secretaries;
- (c) Canadian Government Trade Commissioners and Assistant Canadian Government Trade Commissioners while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada;
- (d) honorary consular officers of Canada while performing their functions in any foreign country or in any part of the Commonwealth and Dependent Territories other than Canada; and
- (e) judicial officials in a foreign country in respect of oaths, affidavits, solemn affirmations, declarations or similar documents that the official is authorized to administer, take or receive. R.S., c. E-10, s. 49; 1984, c. 40, s. 27(3); 1994, c. 44, s. 92.

## Oaths and Solemn Affirmations

## OATHS TAKEN ABROAD.

53. Oaths, affidavits, solemn affirmations or declarations administered, taken or received outside Canada by any person mentioned in section 52 are as valid and effectual and are of the like force and effect to all intents and purposes as if they had been administered, taken or received in Canada by a person authorized to adminis-

ter, take or receive oaths, affidavits, solemn affirmations or declarations therein that are valid and effectual under this Act. R.S., c. E-10, s. 50.

#### ANNOTATIONS

While it is not clear that this section when taken with s. 40 of this Act was intended to be exclusive and to limit the admissibility of affidavits to those sworn abroad before persons mentioned in s. 52, where the trial is in the Federal Court, s. 53 of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.) makes the law of evidence of the province applicable notwithstanding s. 40 of this Act. Thus if the trial is in Ontario an affidavit sworn before a notary public as permitted by the Ontario Evidence Act was admissible: *Kemanord AB v. PPG Industries, Inc. et al.* (1980), 49 C.P.R. (2d) 29, [1981] 1 F.C. 567 (T.D.); *Cooper & Beatty Ltd. v. Alpha Graphics Ltd. et al.* (1980), 49 C.P.R. (2d) 145 (Fed. Ct. T.D.).

### *Documentary Evidence*

#### DOCUMENTS TO BE ADMITTED IN EVIDENCE / Status of statements.

54. (1) Any document that purports to have affixed, impressed or subscribed on it or to it the signature of any person authorized by any of paragraphs 52(a) to (d) to administer, take or receive oaths, affidavits, solemn affirmations or declarations, together with their seal or with the seal or stamp of their office, or the office to which the person is attached, in testimony of any oath, affidavit, solemn affirmation or declaration being administered, taken or received by the person, shall be admitted in evidence, without proof of the seal or stamp or of the person's signature or official character.

(2) An affidavit, solemn affirmation, declaration or other similar statement taken or received in a foreign country by an official referred to in paragraph 52(e) shall be admitted in evidence without proof of the signature or official character of the official appearing to have signed the affidavit, solemn affirmation, declaration or other statement. R.S., c. E-10, s. 51; 1994, c. 44, s. 93.



# FOOD AND DRUGS ACT

R.S.C. 1985, Chap. F-27

Amended R.S.C. 1985, c. 27 (1st Supp.), ss. 191 to 195, 203(1), 208

Amended R.S.C. 1985, c. 31 (1st Supp.), c. 11

Amended R.S.C. 1985, c. 27 (3rd Supp.)

Amended R.S.C. 1985, c. 42 (4th Supp.), ss. 9 to 12; originally proclaimed in force January 1, 1989

Amended 1993, c. 34, ss. 71(1), (3), (4) and 73; in force June 23, 1993

Amended 1993, c. 37, ss. 22 to 24; brought into force September 1, 1993.

Amended 1993, c. 44, s. 158; brought into force January 1, 1994 (but see s. 242)

Amended 1994, c. 38, ss. 18 and 19; brought into force January 12, 1995

Amended 1994, c. 47, s. 117; brought into force January 1, 1996

Amended 1995, c. 1, s. 62(1)(l); brought into force March 29, 1995.

Amended 1996, Bill C-8, ss. 77 to 82; to come into force by order of the Governor in Council (but see ss. 61 to 63), however, Bill C-8 has not yet received Royal Assent

## An Act respecting food, drugs, cosmetics and therapeutic devices

### SHORT TITLE

1. This Act may be cited as the *Food and Drugs Act*. R.S., c. F-27, s. 1.

### INTERPRETATION

**DEFINITIONS** / "advertisement" / "analyst" / "contraceptive device" / "cosmetic" / "department" / "device" / "drug" / "food" / "inspector" / "label" / "minister" / "package" / "prescribed" / "sell" / "unsanitary conditions".

2. In this Act,

"advertisement" includes any representation by any means whatever for the purpose of promoting directly or indirectly the sale or disposal of any food, drug, cosmetic or device;

"analyst" means any person designated as an analyst under section 28;

"contraceptive device" means any instrument, apparatus, contrivance or substance other than a drug, that is manufactured, sold or represented for use in the prevention of conception;

"cosmetic" includes any substance or mixture of substances manufactured, sold or represented for use in cleansing, improving or altering the complexion, skin, hair or teeth, and includes deodorants and perfumes;

"Department" means the Department of National Health and Welfare;

"device" means any article, instrument, apparatus or contrivance, including any component, part or accessory thereof, manufactured, sold or represented for use in

- (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals,
- (b) restoring, correcting or modifying a body function or the body structure of human beings or animals,
- (c) the diagnosis of pregnancy in human beings or animals, or
- (d) the care of human beings or animals during pregnancy and at and after birth of the offspring, including care of the offspring,

and includes a contraceptive device but does not include a drug;

"drug" includes any substance or mixture of substances manufactured, sold or represented for use in

- (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals,
- (b) restoring, correcting or modifying organic functions in human beings or animals, or
- (c) disinfection in premises in which food is manufactured, prepared or kept;

"food" includes any article manufactured, sold or represented for use as food or drink for human beings, chewing gum, and any ingredient that may be mixed with food for any purpose whatever;

"inspector" means any person designated as an inspector for the purpose of the enforcement of this Act under

- (a) subsection 22(1) of this Act,
- (b) *The Department of Agriculture and Agri-Food Act*, or
- (c) *the Department of Industry Act*;

"label" includes any legend, word or mark attached to, included in, belonging to or accompanying any food, drug, cosmetic, device or package;

"Minister" means the Minister of National Health and Welfare;

"package" includes any thing in which any food, drug, cosmetic or device is wholly or partly contained, placed or packed;

"prescribed" means prescribed by the regulations;

"sell" includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration;

"unsanitary conditions" means such conditions or circumstances as might contaminate with dirt or filth, or render injurious to health, a food, drug or cosmetic. R.S., c. F-27, s. 2; 1980-81-82-83, c. 47, s. 19; R.S.C. 1985, c. 27 (1st Supp.), s. 191; 1993, c. 34, s. 71; 1994, c. 38, s. 18; 1995, c. 1, s. 62(1)(I).

## ANNOTATIONS

"Sell" – The definition of this word is carried through to interpret the word "sell" in the regulations under this Act: *R. v. Hancock* (1978), 39 C.C.C. (2d) 275, [1978] 2 W.W.R. 197 (B.C.C.A.). In this case it was held that an "offer to sell" is not equivalent to "offer for sale" within the meaning of this section. The definition of "sell" in this section contemplates that all the acts included in the definition must be in relation to a specific substance. Thus on a charge of offering mescaline for sale the accused must be acquitted where he held out as mescaline a substance which was not in fact mescaline.

It was held, prior to the amendment to this section which added the phrase "whether or not the distribution is made for consideration", that the mere giving of a drug does not come within the meaning of the word "distribute" even if there is no requirement of proof of commerciality: *R. v. Cole* (1981), 64 C.C.C. (2d) 119, 34 O.R. (2d) 416 (C.A.).

In *R. v. Davidson* (1984), 11 C.C.C. (3d) 460, 52 N.B.R. (2d) 338 (C.A.) the accused, a physician, was convicted of unlawful sale of a Sch. F. drug. Although the accused did not charge for the drugs his conduct came within the definition of "distribute". The accused had a large quantity of diazepam on hand and had been prohibited by the medical council from dispensing drugs from his office. The accused collected medicare payments for the patients' visits, which provided the element of commerciality, and in the guise of treating the patients he was really distributing drugs.

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## Part I / FOODS, DRUGS, COSMETICS AND DEVICES

### General

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**PROHIBITED ADVERTISING / Prohibited label or advertisement where sale made / Unauthorized advertising of contraceptive device prohibited.**

3. (1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.

(2) No person shall sell any food, drug, cosmetic or device

(a) that is represented by label, or

(b) that the person advertises to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.

(3) Except as authorized by regulation, no person shall advertise to the general public any contraceptive device or any drug manufactured, sold or represented for use in the prevention of conception. R.S., c. F-27, s. 3.

### ANNOTATIONS

This section constitutes a reasonable limit on freedom of expression as guaranteed by the Charter of Rights and Freedoms and is therefore not unconstitutional: *R. v. Thomas Lipton Inc.* (1989), 51 C.C.C. (3d) 104, 26 C.P.R. (3d) 385 (Ont. Prov. Ct.).

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### Food

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#### PROHIBITED SALES OF FOOD.

4. No person shall sell an article of food that

(a) has in or on it any poisonous or harmful substance;

(b) is unfit for human consumption;

(c) consists in whole or in part of any filthy, putrid, disgusting, rotten, decomposed or diseased animal or vegetable substance;

(d) is adulterated; or

(e) was manufactured, prepared, preserved, packaged or stored under unsanitary conditions. R.S., c. F-27, s. 4.

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**DECEPTION, ETC., REGARDING FOOD / Food labelled or packaged in contravention of regulations.**

5. (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.



**(2) An article of food that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1). R.S., c. F-27, s. 5.**

#### ANNOTATIONS

On a charge that the accused did "sell" a side of beef in a manner likely to create an erroneous impression as to its "composition" the word "sell" may properly describe the whole continuum of events from the advertisement through the processing of the meat to its delivery and payment and the word "composition" properly describes the various cuts from the side of the beef sold. The charge is therefore made out where the meat as delivered to the customer did not include all the parts of the side of beef and included extraneous parts: *R. v. Grotoli* (1978), 43 C.C.C. (2d) 158 (Ont. C.A.).

In light of the Charter this provision must now be interpreted as creating a strict liability offence only, where the accused can avoid liability by proof of due diligence: *R. v. Rube* (1991), 63 C.C.C. (3d) 47, 54 B.C.L.R. (2d) 106 (C.A.), affd 75 C.C.C. (3d) 575n, [1993] 1 W.W.R. 365, 74 B.C.L.R. (2d) 1n (S.C.C.) (7:0).

#### IMPORTATION AND INTERPROVINCIAL MOVEMENT OF FOOD / Not applicable to carriers / Labelling, etc., of food that is imported or moved interprovincially.

- 6. (1) Where a standard for a food has been prescribed, no person shall**
- (a) import into Canada,**
  - (b) send, convey or receive for conveyance from one province to another, or**
  - (c) have in possession for the purpose of sending or conveying from one province to another**

**any article that is intended for sale and that is likely to be mistaken for that food unless the article complies with the prescribed standard.**

**(2) Paragraphs (1)(b) and (c) do not apply to an operator of a conveyance that is used to carry an article or to a carrier of an article whose sole concern, in respect of the article, is the conveyance of the article unless the operator or carrier could, with reasonable diligence, have ascertained that the conveying or receiving for conveyance of the article or the possession of the article for the purpose of conveyance would be in violation of subsection (1).**

**(3) Where a standard for a food has been prescribed, no person shall label, package, sell or advertise any article that**

- (a) has been imported into Canada,**
- (b) has been sent or conveyed from one province to another, or**
- (c) is intended to be sent or conveyed from one province to another**

**in such a manner that it is likely to be mistaken for that food unless the article complies with the prescribed standard. R.S., c. F-27, s. 6; R.S.C. 1985, c. 27 (3rd Supp.), s. 1.**

#### GOVERNOR IN COUNCIL MAY IDENTIFY STANDARD OR PORTION THEREOF / Where standard or portion thereof is identified.

**6.1. (1) The Governor in Council may, by regulation, identify a standard prescribed for a food, or any portion of the standard, as being necessary to prevent injury to the health of the consumer or purchaser of the food.**

**(2) Where a standard or any portion of a standard prescribed for a food is identified by the Governor in Council pursuant to subsection (1), no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that food unless the article complies with the standard or portion of a standard so identified. R.S.C. 1985, c. 27 (3rd Supp.), s. 1.**

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**UNSANITARY MANUFACTURE, ETC., OF FOOD.**

7. No person shall manufacture, prepare, preserve, package or store for sale any food under unsanitary conditions. R.S., c. F-27, s. 7.

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**Drugs**

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**PROHIBITED SALES OF DRUGS.**

8. No person shall sell any drug that

- (a) was manufactured, prepared, preserved, packed or stored under unsanitary conditions; or
  - (b) is adulterated. R.S., c. F-27, s. 8.
- 

**DECEPTION, ETC., REGARDING DRUGS / Drugs labelled or packaged in contravention of regulations.**

9. (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

(2) A drug that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1). R.S., c. F-27, s. 9.

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**WHERE STANDARD PRESCRIBED FOR DRUG / Trade standards / Where no prescribed or trade standard.**

10. (1) Where a standard has been prescribed for a drug, no person shall label, package, sell or advertise any substance in such a manner that it is likely to be mistaken for that drug, unless the substance complies with the prescribed standard.

(2) Where a standard has not been prescribed for a drug, but a standard for the drug is contained in any publication referred to in Schedule B, no person shall label, package, sell or advertise any substance in such a manner that it is likely to be mistaken for that drug, unless the substance complies with the standard.

(3) Where a standard for a drug has not been prescribed and no standard for the drug is contained in any publication referred to in Schedule B, no person shall sell the drug unless

- (a) it is in accordance with the professed standard under which it is sold; and
  - (b) it does not resemble, in a manner likely to deceive, any drug for which a standard has been prescribed or is contained in any publication referred to in Schedule B. R.S., c. F-27, s. 10.
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**UNSANITARY MANUFACTURE, ETC., OF DRUG.**

11. No person shall manufacture, prepare, preserve, package or store for sale any drug under unsanitary conditions. R.S., c. F-27, s. 11.

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**DRUGS NOT TO BE SOLD UNLESS SAFE MANUFACTURE INDICATED.**

12. No person shall sell any drug described in Schedule C or D unless the Minister has, in prescribed form and manner, indicated that the premises in which the drug was manufactured and the process and conditions of manufacture therein are suitable to ensure that the drug will not be unsafe for use. R.S., c. F-27, s. 12.

**DRUGS NOT TO BE SOLD UNLESS SAFE BATCH INDICATED.**

13. No person shall sell any drug described in Schedule E unless the Minister has, in prescribed form and manner, indicated that the batch from which the drug was taken is not unsafe for use. R.S., c. F-27, s. 13.

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**SAMPLES / Exception.**

14. (1) No person shall distribute or cause to be distributed any drug as a sample.

(2) Subsection (1) does not apply to the distribution, under prescribed conditions, of samples of drugs to physicians, dentists, veterinary surgeons or pharmacists. R.S., c. F-27, s. 14.

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**SCHEDULE F DRUGS NOT TO BE SOLD.**

15. No person shall sell any drug described in Schedule F. R.S., c. F-27, s. 15.

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***Cosmetics***

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**PROHIBITED SALES OF COSMETICS.**

16. No person shall sell any cosmetic that

- (a) has in or on it any substance that may cause injury to the health of the user when the cosmetic is used,
    - (i) according to the directions on the label or accompanying the cosmetic, or
    - (ii) for such purposes and by such methods of use as are customary or usual therefor;
  - (b) consists in whole or in part of any filthy or decomposed substance or of any foreign matter; or
  - (c) was manufactured, prepared, preserved, packaged or stored under unsanitary conditions. R.S., c. F-27, s. 16.
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**WHERE STANDARD PRESCRIBED FOR COSMETIC.**

17. Where a standard has been prescribed for a cosmetic, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that cosmetic, unless the article complies with the prescribed standard. R.S., c. F-27, s. 17.

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**UNSANITARY CONDITIONS.**

18. No person shall manufacture, prepare, preserve, package or store for sale any cosmetic under unsanitary conditions. R.S., c. F-27, s. 18.

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***Devices***

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**PROHIBITED SALES OF DEVICES.**

19. No person shall sell any device that, when used according to directions or under such conditions as are customary or usual, may cause injury to the health of the purchaser or user thereof. R.S., c. F-27, s. 19.

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**DECEPTION, ETC., REGARDING DEVICES / Devices labelled or packaged in contravention of regulations.**

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20. (1) No person shall label, package, treat, process, sell or advertise any device in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its design, construction, performance, intended use, quantity, character, value, composition, merit or safety.

(2) A device that is not labelled or packaged as required by, or is labelled or packaged contrary to, the regulations shall be deemed to be labelled or packaged contrary to subsection (1). R.S., c. F-27, s. 20; 1976-77, c. 28, s. 16.

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#### WHERE STANDARD PRESCRIBED FOR DEVICE.

21. Where a standard has been prescribed for a device, no person shall label, package, sell or advertise any article in such a manner that it is likely to be mistaken for that device, unless the article complies with the prescribed standard. R.S., c. F-27, s. 21.

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## Part II / ADMINISTRATION AND ENFORCEMENT

### *Inspection, Seizure and Forfeiture*

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#### INSPECTORS / Certificate to be produced.

22. (1) The Minister may designate any person as an inspector for the purpose of the enforcement of this Act.

(2) An inspector shall be furnished with a prescribed certificate of his designation as an inspector and on entering any place pursuant to subsection 23(1) an inspector shall, if so required, produce the certificate to the person in charge of that place. R.S., c. F-27, s. 22; 1980-81-82-83, c. 47, s. 19.

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#### POWERS OF INSPECTORS / Warrant required to enter dwelling-house / Authority to issue warrant / Use of force / Definition of "article to which this Act or the regulations apply" / Assistance and information to be given inspector.

23. (1) Subject to subsection (1.1), an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured, prepared, preserved, packaged or stored, and may

- (a) examine any such article and take samples thereof, and examine anything that the inspector believes on reasonable grounds is used or capable of being used for that manufacture, preparation, preservation, packaging or storing;
- (a.1) enter any conveyance that the inspector believes on reasonable grounds is used to carry any article to which section 6 or 6.1 applies and examine any such article found therein and take samples thereof;
- (b) open and examine any receptacle or package that the inspector believes on reasonable grounds contains any article to which this Act or the regulations apply;
- (c) examine and make copies of, or extracts from, any books, documents or other records found in any place referred to in this subsection that the inspector believes on reasonable grounds contain any information relevant to the enforcement of this Act with respect to any article to which this Act or the regulations apply; and
- (d) seize and detain for such time as may be necessary any article by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or the regulations has been contravened.

(1.1) Where any place mentioned in subsection (1) is a dwelling-house, an inspector

may not enter that dwelling-house without the consent of the occupant except under the authority of a warrant issued under subsection (1.2).

(1.2) Where on *ex parte* application a justice of the peace is satisfied by information on oath

- (a) that the conditions for entry described in subsection (1) exist in relation to a dwelling-house,
- (b) that entry to the dwelling-house is necessary for any purpose relating to the administration or enforcement of this Act, and
- (c) that entry to the dwelling-house has been refused or that there are reasonable grounds for believing that entry thereto will be refused,

the justice of the peace may issue a warrant under his hand authorizing the inspector named therein to enter that dwelling-house subject to such conditions as may be specified in the warrant.

(1.3) In executing a warrant issued under subsection (1.2), the inspector named therein shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

(2) In subsection (1), "article to which this Act or the regulations apply" includes

- (a) any food, drug, cosmetic or device;
- (b) anything used for the manufacture, preparation, preservation, packaging or storing thereof; and
- (c) any labelling or advertising material.

(3) The owner or person in charge of a place entered by an inspector pursuant to subsection (1) and every person found therein shall give the inspector all reasonable assistance and furnish the inspector with any information he may reasonably require. R.S., c. F-27, s. 22; R.S.C. 1985, c. 31 (1st Supp.), s. 11; c. 27 (3rd Supp.), s. 2.

## ANNOTATIONS

This section constitutes a code of search and seizure for Parts I and II of this Act and thus there is no requirement that the inspector also have a search warrant issued under s. 443 [now s. 487] of the Criminal Code notwithstanding the reason for the inspector's entry onto the premises is a suspected violation of this Act or the Regulations: *Re Vienna Clinic Ltd. and Skaken and The Queen* (1980), 53 C.C.C. (2d) 556 (Alta. Q.B.).

It was held in *C.E. Jamieson & Co. (Dominion) Ltd. v. Attorney-General of Canada* (1987), 37 C.C.C. (3d) 193, 46 D.L.R. (4th) 582, [1988] 1 F.C. 590 (T.D.), however, considering the predecessor to this section that, to the extent that subsec. (1)(d) authorizes a warrantless seizure from an office or warehouse in the context of a criminal investigation, it violates s. 8 of the Charter and is of no force and effect. In the case of exigent circumstances, a "peace officer" could obtain a telewarrant under s. 487.1 of the Criminal Code.

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## OBSTRUCTION AND FALSE STATEMENTS / Interference.

24. (1) No person shall obstruct or hinder, or knowingly make any false or misleading statement either orally or in writing to, an inspector while the inspector is engaged in carrying out his duties or functions under this Act or the regulations.

(2) Except with the authority of an inspector, no person shall remove, alter or interfere in any way with anything seized under this Part. R.S., c. F-27, ss. 22, 37.

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## STORAGE AND REMOVAL.

25. Any article seized under this Part may, at the option of an inspector, be kept or stored in the building or place where it was seized or, at the direction of an inspector, the article may be removed to any other proper place. R.S., c. F-27, ss. 22, 37.

**RELEASE OF SEIZED ARTICLES.**

26. An inspector who has seized any article under this Part shall release it when he is satisfied that all the provisions of this Act and the regulations with respect thereto have been complied with. R.S., c. F-27, ss. 23, 37.

**DESTRUCTION WITH CONSENT / Forfeiture on conviction / Order for forfeiture on application of inspector.**

27. (1) Where an inspector has seized an article under this Part and its owner or the person in whose possession the article was at the time of seizure consents to its destruction, the article is thereupon forfeited to Her Majesty and may be destroyed or otherwise disposed of as the Minister, the Minister of Agriculture and Agri-Food or the Minister of Industry may direct.

(2) Where a person has been convicted of a contravention of this Act or the regulations, the court or judge may order that any article by means of or in relation to which the offence was committed, and any thing of a similar nature belonging to or in the possession of the accused or found with the article, be forfeited and, on the making of the order, the article and thing are forfeited to Her Majesty and may be disposed of as the Minister, the Minister of Agriculture and Agri-Food or the Minister of Industry may direct.

(3) Without prejudice to subsection (2), a judge of a superior court of the province in which any article is seized under this Part may, on the application of an inspector and on such notice to such persons as the judge directs, order that the article and any thing of a similar nature found therewith be forfeited to Her Majesty, to be disposed of as the Minister, the Minister of Agriculture and Agri-Food or the Minister of Industry may direct, if the judge finds, after making such inquiry as the judge considers necessary, that the article is one by means of or in relation to which any of the provisions of this Act or the regulations have been contravened. R.S., c. F-27, ss. 23, 37; 1994, c. 38, s. 19; 1995, c. 1, s. 62(1)(l).

**Analysis****ANALYSTS.**

28. The Minister may designate any person as an analyst for the purpose of the enforcement of this Act. 1980-81-82-83, c. 47, s. 19.

**ANALYSIS AND EXAMINATION / Certificate or report.**

29. (1) An inspector may submit to an analyst, for analysis or examination, any article seized by the inspector, any sample therefrom or any sample taken by the inspector.

(2) An analyst who has made an analysis or examination may issue a certificate or report setting out the results of the analysis or examination. R.S., c. F-27, s. 24.

**Regulations**

**REGULATIONS / Regulations respecting drugs manufactured outside Canada / Regulations re the North American Free Trade Agreement and WTO Agreement / Definitions / "North American Free Trade Agreement" / "WTO Agreement".**



30. (1) The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, and, in particular, but without restricting the generality of the foregoing, may make regulations

- (a) declaring that any food or drug or class of food or drugs is adulterated if any prescribed substance or class of substances is present therein or has been added thereto or extracted or omitted therefrom;
- (b) respecting
  - (i) the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices,
  - (ii) the size, dimensions, fill and other specifications of packages of food, drugs, cosmetics and devices,
  - (iii) the sale or the conditions of sale of any food, drug, cosmetic or device, and
  - (iv) the use of any substance as an ingredient in any food, drug, cosmetic or device,

to prevent the purchaser or consumer thereof from being deceived or misled in respect of the design, construction, performance, intended use, quantity, character, value, composition, merit or safety thereof, or to prevent injury to the health of the purchaser or consumer;

- (c) prescribing standards of composition, strength, potency, purity, quality or other property of any article of food, drug, cosmetic or device;
- (d) respecting the importation of foods, drugs, cosmetics and devices in order to ensure compliance with this Act and the regulations;
- (e) respecting the method of manufacture, preparation, preserving, packing, storing and testing of any food, drug, cosmetic or device in the interest of, or for the prevention of injury to, the health of the purchaser or consumer;
- (f) requiring persons who sell food, drugs, cosmetics or devices to maintain such books and records as the Governor in Council considers necessary for the proper enforcement and administration of this Act and the regulations;
- (g) respecting the form and manner of the Minister's indication under section 12, including the fees payable therefor, and prescribing what premises or what processes or conditions of manufacture, including qualifications of technical staff, shall or shall not be deemed to be suitable for the purposes of that section;
- (h) requiring manufacturers of any drugs described in Schedule E to submit test portions of any batch of those drugs and respecting the form and manner of the Minister's indication under section 13, including the fees payable therefor;
- (i) respecting the powers and duties of inspectors and analysts and the taking of samples and the seizure, detention, forfeiture and disposition of articles;
- (j) exempting any food, drug, cosmetic or device from all or any of the provisions of this Act and prescribing the conditions of the exemption;
- (k) prescribing forms for the purposes of this Act and the regulations;
- (l) providing for the analysis of food, drugs or cosmetics other than for the purposes of this Act and prescribing a tariff of fees to be paid for that analysis;
- (m) adding anything to any of the schedules, in the interest of, or for the prevention of injury to, the health of the purchaser or consumer, or deleting anything therefrom;
- (n) respecting the distribution or the conditions of distribution of samples of any drug;
- (o) respecting
  - (i) the method of manufacture, preparation, preserving, packing, labelling, storing and testing of any new drug, and
  - (ii) the sale or the conditions of sale of any new drug, and defining for the purposes of this Act the expression "new drug"; and
- (p) authorizing the advertising to the general public of contraceptive devices and drugs manufactured, sold or represented for use in the prevention of concep-

tion and prescribing the circumstances and conditions under which, and the persons by whom, those devices and drugs may be so advertised.

(2) Without limiting or restricting the authority conferred by any other provisions of this Act or any Part thereof for carrying into effect the purposes and provisions of this Act or any Part thereof, the Governor in Council may make such regulations governing, regulating or prohibiting

- (a) the importation into Canada of any drug or class of drugs manufactured outside Canada, or
- (b) the distribution or sale in Canada, or the offering, exposing or having in possession for sale in Canada, of any drug or class of drugs manufactured outside Canada,

as the Governor in Council deems necessary for the protection of the public in relation to the safety and quality of any such drug or class of drugs.

(3) Without limiting or restricting the authority conferred by any other provisions of this Act or any Part thereof for carrying into effect the purposes and provisions of this Act or any Part thereof, the Governor in Council may make such regulations as the Governor in Council deems necessary for the purpose of implementing, in relation to drugs, Article 1711 of the North American Free Trade Agreement or paragraph 3 of Article 39 of the Agreement on Trade-related Aspects of Intellectual Property Rights set out in Annex 1C to the WTO Agreement.

(4) In subsection (3),

“North American Free Trade Agreement” has the meaning given to the word “Agreement” by subsection 2(1) of the *North American Free Trade Agreement Implementation Act*;

“WTO Agreement” has the meaning given to the word “Agreement” by subsection 2(1) of the *World Trade Organization Agreement Implementation Act*. R.S., c. F-27, s. 25; 1976-77, c. 28, s. 16; 1980-81-82-83, c. 47, s. 19; 1993, c. 44, s. 158; 1994, c. 47, s. 117.

## ANNOTATIONS

Subsection (1)(e) authorizes the making of regulations respecting the prohibition of sale except by prescription of certain drugs: *R. v. Davidson* (1984), 11 C.C.C. (3d) 460, 52 N.B.R. (3d) 338 (C.A.).

Subsection 1(o) permitting the making of regulations with respect to new drugs is *intra vires* Parliament: *C.E. Jamieson & Co. (Dominion) Ltd. v. Attorney-General Of Canada* (1987), 37 C.C.C. (3d) 193, 46 D.L.R. (4th) 582, [1988] 1 F.C. 590 (T.D.).

## Offences and Punishment

### CONTRAVENTION OF ACT, EXCEPT PARTS III AND IV, OR REGULATIONS.

31. Every person who contravenes any of the provisions of this Act, except Parts III and IV, or of the regulations made under this Part is guilty of an offence and liable

- (a) on summary conviction for a first offence to a fine not exceeding five hundred dollars or to imprisonment for a term not exceeding three months or to both and, for a subsequent offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both; and
- (b) on conviction on indictment to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both. R.S., c. F-27, ss. 26, 39, 46.

**NOTE:** The portion preceding para. (a) replaced 1996, Bill C-8, s. 77 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

**CONTRAVENTION OF ACT AND REGULATIONS.**

31. *Every person who contravenes any of the provisions of this Act or of the regulations made under this Part is guilty of an offence and liable*

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**LIMITATION PERIOD.**

32. A prosecution under paragraph 31(a) may be instituted at any time within but not later than twelve months from the time the subject-matter of the prosecution arose. R.S., c. F-27, s. 27.

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**VENUE.**

33. A prosecution for a contravention of this Act or the regulations may be instituted, heard, tried or determined in the place in which the offence was committed or the subject-matter of the prosecution arose or in any place in which the accused is apprehended or happens to be. R.S., c. F-27, s. 28.

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**WANT OF KNOWLEDGE / Notice of reliance on want of knowledge.**

34. (1) Subject to subsection (2), in a prosecution for the sale of any article in contravention of this Act, except Parts III and IV, or of the regulations made under this Part, if the accused proves to the satisfaction of the court or judge that

(a) the accused purchased the article from another person in packaged form and sold it in the same package and in the same condition the article was in at the time it was so purchased, and

(b) that the accused could not with reasonable diligence have ascertained that the sale of the article would be in contravention of this Act or the regulations,

the accused shall be acquitted.

(2) Subsection (1) does not apply in any prosecution unless the accused, at least ten days before the day fixed for the trial, has given to the prosecutor notice in writing that the accused intends to avail himself of the provisions of subsection (1) and has disclosed to the prosecutor the name and address of the person from whom the accused purchased the article and the date of purchase. R.S., c. F-27, ss. 29, 39, 46.

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**CERTIFICATE OF ANALYST / Requiring attendance of analyst / Notice of intention to produce certificate / Proof of service / Attendance for examination.**

35. (1) Subject to this section, in any prosecution for an offence under section 31 or an offence referred to in subsection 41(1) or 50(1), a certificate purporting to be signed by an analyst and stating that an article, sample or substance has been submitted to, and analyzed or examined by, the analyst and stating the results of the analysis or examination is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

**NOTE:** Subsection (1) replaced 1996, Bill C-8, s. 78 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and also may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

**CERTIFICATE OF ANALYST.**



35. (1) Subject to this section, in any prosecution for an offence under section 31, a certificate purporting to be signed by an analyst and stating that an article, sample or substance has been submitted to, and analysed or examined by, the analyst and stating the results of the analysis or examination is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed it.

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(3) No certificate shall be admitted in evidence pursuant to subsection (1) unless, before the trial, the party intending to produce the certificate has given reasonable notice of that intention, together with a copy of the certificate, to the party against whom it is intended to be produced.

(4) For the purposes of this Act, service of any certificate referred to in subsection (1) may be proved by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served it.

(5) Notwithstanding subsection (4), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service. R.S., c. F-27, s. 30; R.S.C. 1985, c. 27 (1st Supp.), s. 192.

#### ANNOTATIONS

A notice which incorrectly referred to the wrong statute in a way that could not have caused confusion to the accused is reasonable: *R. v. Hillis* (1975), 24 C.C.C. (2d) 318, [1975] 5 W.W.R. 684 (B.C.C.A.).

See also cases noted under s. 9 of the Narcotic Control Act, *infra*.

#### PROOF AS TO MANUFACTURER OR PACKAGER / Offence by employee or agent / Certified copies and extracts / Where accused had adulterating substances.

36. (1) In a prosecution for a contravention of this Act, except Parts III and IV, or of the regulations made under this Part, proof that a package containing any article to which this Act or the regulations apply bore a name or address purporting to be the name or address of the person by whom it was manufactured or packaged is, in the absence of evidence to the contrary, proof that the article was manufactured or packaged, as the case may be, by the person whose name or address appeared on the package.

**NOTE:** Subsection (1) replaced 1996, Bill C-8, s. 79 (to come into force by order of the Governor in Council). The text, which is not yet in force as of May 15, 1996 and may change before receiving Royal Assent, is therefor printed in *lightface italics* and reads as follows:

#### PROOF AS TO MANUFACTURER OR PACKAGER.

36. (1) In a prosecution for a contravention of this Act or of the regulations made under this Part, proof that a package containing any article to which this Act or the regulations apply bore a name or address purporting to be the name or address of the person by whom it was manufactured or packaged is, in the absence of evidence to the contrary, proof that the article was manufactured or packaged, as the case may be, by the person whose name or address appeared on the package.

(2) In a prosecution for a contravention described in subsection (1), it is sufficient proof of the offence to establish that it was committed by an employee or agent of the

accused whether or not the employee or agent is identified or has been prosecuted for the offence.

(3) In a prosecution for a contravention described in subsection (1), a copy of a record or an extract therefrom certified to be a true copy by the inspector who made it pursuant to paragraph 23(1)(c) is admissible in evidence and is, in the absence of evidence to the contrary, proof of its contents.

(4) Where a person is prosecuted under this Part for having manufactured an adulterated food or drug for sale, and it is established that the person had in his possession or on his premises any substance the addition of which to that food or drug has been declared by regulation to cause the adulteration of the food or drug, the onus of proving that the food or drug was not adulterated by the addition of that substance lies on the accused. R.S., c. F-27, ss. 31, 39, 46.

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## **Exports**

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### **CONDITIONS UNDER WHICH EXPORTS EXEMPT / Definition of "drug".**

37. (1) This Act does not apply to any packaged food, drug, cosmetic or device, not manufactured for consumption in Canada and not sold for consumption in Canada, if the package is marked in distinct overprinting with the word "Export" or "Exportation" and a certificate that the package and its contents do not contravene any known requirement of the law of the country to which it is or is about to be consigned has been issued in respect of the package and its contents in prescribed form and manner.

(2) In subsection (1), "drug" does not include a drug or other substance defined as a controlled drug by Part III or as a restricted drug by Part IV. R.S., c. F-27, s. 32; 1993, c. 34, 73.

**NOTE:** Subsection (2) repealed 1996, Bill C-8, s. 80 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 Bill C-8 has not yet received Royal Assent and not in force as of May 15, 1996).

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## **Part III / CONTROLLED DRUGS**

**NOTE:** Part III (ss. 38 to 45) repealed 1996, Bill C-8, s. 81 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and Bill C-8 has not yet received Royal Assent).

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### **DEFINITIONS / "controlled drug" / "possession" / "practitioner" / "prescription" / "traffic".**

38. In this Part,

"controlled drug" means any drug or other substance included in Schedule G;

"possession" means possession within the meaning of subsection 4(3) of the *Criminal Code*;

"practitioner" means a person who is registered and entitled under the laws of a province to practise in that province the profession of medicine, dentistry or veterinary medicine;

"prescription" means, in respect of a controlled drug, an authorization given by a

practitioner that a stated amount of the controlled drug be dispensed for the person named therein;

“traffic” means to manufacture, sell, export from or import into Canada, transport or deliver, otherwise than under the authority of this Part or the regulations. R.S., c. F-27, s. 33; R.S.C. 1985, c. 27 (1st Supp.), s. 193.

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**FAILURE TO DISCLOSE PREVIOUS PRESCRIPTIONS / Offence and punishment / Limitation period.**

38.1 (1) No person shall, at any time, seek or obtain a controlled drug or a prescription for a controlled drug from a practitioner unless that person discloses to the practitioner particulars of every controlled drug or prescription for a controlled drug issued to that person by a different practitioner within the preceding thirty days.

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years; or
- (b) is guilty of an offence punishable on summary conviction and liable
  - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, and
  - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year.

(3) Summary conviction proceedings in respect of an offence under this section may be instituted at any time within but not later than one year from the time when the subject-matter of the proceedings arose. R.S.C. 1985, c. 27 (1st Supp.), s. 194.

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**TRAFFICKING IN CONTROLLED DRUG / Possession for trafficking / Offence and punishment.**

39. (1) No person shall traffic in a controlled drug or any substance represented or held out by the person to be a controlled drug.

(2) No person shall have in possession any controlled drug for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence and liable

- (a) on summary conviction, to imprisonment for a term not exceeding eighteen months; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding ten years. R.S., c. F-27, s. 34.

**ANNOTATIONS**

On a charge of conspiracy to traffic in a controlled drug it is not necessary that the Crown prove an agreement between the parties to “jointly” sell, transport or deliver a controlled drug. Where the evidence establishes that the accused D agreed with the accused S to obtain and transport and deliver at S’s request a substantial quantity of drugs and that S agreed to pay D for his services the conspiracy charge is made out: *R. v. Davis and Sokoloski* (1973), 14 C.C.C. (2d) 517 (Ont. C.A.), affd 33 C.C.C. (2d) 496, 74 D.L.R. (3d) 126, [1977] 2 S.C.R. 523, *sub nom. Sokoloski v. The Queen* (5:4).

A genuine though mistaken belief on the part of the accused that the laboratory in which they were employed was authorized to manufacture the controlled drug is a defence to the charge: *R. v. Darquea and Martyn* (1979), 47 C.C.C. (2d) 567 (Ont. C.A.).

It was held in *R. v. Dumais* (1979), 51 C.C.C. (2d) 106 (Ont. C.A.) that the words “jointly traffic” in the indictment did not preclude the conviction of only one of two



accused. The Court distinguished *R. v. Maxwell, Watson and Shaw* (1978), 39 C.C.C. (2d) 439 (B.C.C.A.) noted under s. 4 of the Narcotic Control Act, *infra*.

To constitute the offence under this section there must be trafficking in controlled drugs. Merely providing a drug purchaser with a means to acquire drugs by improperly providing the person with a prescription is not an offence under this section: *R. v. Burke* (1989), 50 C.C.C. (3d) 286 (P.E.I.C.A.).

Also see cases noted under s. 48, *infra*.

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**PROCEDURE IN PROSECUTION FOR POSSESSION FOR TRAFFICKING / Procedure on finding in respect of possession / Acquittal on conviction.**

40. (1) In any prosecution for a contravention of subsection 39(2), if the accused does not plead guilty, the trial shall proceed as if the issue to be tried is whether the accused was in possession of a controlled drug.

(2) If, pursuant to subsection (1), the court finds that the accused was not in possession of a controlled drug, the accused shall be acquitted but, if the court finds that the accused was in possession of a controlled drug, the accused shall be given an opportunity of establishing that he was not in possession of the controlled drug for the purpose of trafficking and, thereafter, the prosecutor shall be given an opportunity of adducing evidence to the contrary.

(3) If the accused establishes, pursuant to subsection (2), that he was not in possession of the controlled drug for the purpose of trafficking, the accused shall be acquitted of the offence as charged and, if the accused fails to so establish, the accused shall be convicted of the offence as charged and sentenced accordingly. R.S., c. F-27, s. 35.

**ANNOTATIONS**

In light of the decision of the Supreme Court of Canada in *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1 (7:0) in relation to s. 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1, it must be considered that this section as well is of no force and effect.

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**SETTING OUT OR NEGATING EXCEPTION, ETC., NOT REQUIRED / Burden of proving exception, etc.**

41. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under section 39 or under section 463, 464 or 465 of the *Criminal Code* in respect of an offence under section 39.

(2) In any prosecution under this Part, the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment. R.S., c. F-27, s. 36.

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**ENTRY AND SEARCH / Search of person and seizure / Warrant to search dwelling-house / Powers of peace officer.**

42. (1) A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under subsection (3), enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a controlled drug by means of or in respect of which an offence under this Part has been committed.

**Transitional provision**

**Note:** Section 208 of the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.) provides as follows:

"208. Nothing in sections 190, 195, 199 and 200 of this Act shall be construed as rendering invalid or inadmissible in any proceedings any evidence obtained by the exercise of a writ of assistance prior to the coming into force of those sections."

(2) A peace officer may search any person found in a place entered pursuant to subsection (1) and may seize and, from a place so entered, take away any controlled drug found in that place and any other thing that may be evidence that an offence under this Part has been committed.

(3) A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a controlled drug, by means of or in respect of which an offence under this Part has been committed, in any dwelling-house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling-house and search for controlled drugs.

(4) [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 195(2).]

**Transitional provision**

**Note:** Section 208 of the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.) provides as follows:

"208. Nothing in sections 190, 195, 199 and 200 of this Act shall be construed as rendering invalid or inadmissible in any proceedings any evidence obtained by the exercise of a writ of assistance prior to the coming into force of those sections."

(5) For the purpose of exercising authority under this section, a peace officer may, with such assistance as that officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing. R.S., c. F-27, s. 37; R.S., c. 10 (2nd Supp.), s. 64; R.S.C. 1985, c. 27 (1st Supp.), s. 195.

**ANNOTATIONS**

By reason of s. 8 of the Charter of Rights and Freedoms this section is of no force and effect to the extent that it authorizes the warrantless search of a place other than a dwelling house, such as an office, business or shop: *R. v. La Plante* (1987), 40 C.C.C. (3d) 63, 48 D.L.R. (4th) 615, 59 Sask. R. 251 (C.A.).

The police officer who must have reasonable and probable grounds for believing that a suspect is in possession of a controlled drug is the officer who decides that the suspect should be searched. That officer may or may not perform the actual search and if another officer conducts the search he is entitled to assume that the officer who ordered the search had the requisite grounds for doing so: *R. v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.) (5:0). [Also see the note of this case under s. 11 of the Narcotic Control Act, *infra*.]

The stopping of the accused's vehicle and the search of the accused and the vehicle, upon mere suspicion that the accused is in possession of drugs, infringes ss. 8 and 9 of the Charter of Rights: *R. v. Ironeagle* (1989), 49 C.C.C. (3d) 339, 70 C.R. (3d) 164, 40 C.R.R. 161, 76 Sask. R. 253 (C.A.).

**APPLICATION FOR RESTORATION / Order of immediate restoration / Order of restoration at later time / Where application not made or order refused.**

43. (1) Where a controlled drug or other thing has been seized under subsection 42(2), any person may, within two months after the date of the seizure, on prior notification being given to the Crown in the manner prescribed by the regulations, apply

to a provincial court judge within whose territorial jurisdiction the seizure was made for an order of restoration under this section.

(2) Subject to section 44, where on the hearing of an application made under subsection (1) the provincial court judge is satisfied that the applicant is entitled to possession of the controlled drug or other thing seized, and that the thing seized is not or will not be required as evidence in any proceedings in respect of an offence under this Part, the provincial court judge shall order that the thing seized be restored forthwith to the applicant.

(3) Where on the hearing of an application made under subsection (1) the provincial court judge is satisfied that the applicant is entitled to possession of the thing seized but is not satisfied that the thing is not or will not be required as evidence in any proceedings in respect of an offence under this Part, the provincial court judge shall order that the thing seized be restored to the applicant

(a) on the expiration of four months after the date of seizure, if no proceedings in respect of an offence under this Part have been commenced before that time;  
or

(b) on the final conclusion of any such proceedings, in any other case.

(4) Where no application has been made for the return of any controlled drug or other thing seized pursuant to subsection 42(2) within two months after the date of the seizure, or an application therefor has been made but, on the hearing of the application, no order of restoration is made, the thing seized shall be delivered

(a) in the case of a controlled drug, to the Minister, who may make such disposition thereof as the Minister thinks fit; and

(b) in the case of any other thing,

(i) where the prosecution of the offence in respect of which the thing was seized was commenced at the instance of the government of a province and conducted by or on behalf of that government, to the Attorney General or Solicitor General of that province, and

(ii) in any other case, to the Minister of Supply and Services,

who may dispose of the thing in accordance with the law. R.S., c. F-27, s. 37; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1); 1993, c. 37, s. 22.

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#### FORFEITURE ON CONVICTION.

44. Where a person has been convicted of an offence under this Part,

(a) any controlled drug seized pursuant to subsection 42(2) by means of or in respect of which the offence was committed is forfeited to Her Majesty in right of Canada and shall be disposed of by the Minister as the Minister thinks fit; and

(b) any money so seized that was used for the purchase of that controlled drug is,

(i) where the prosecution of the offence in respect of which the money was seized was commenced at the instance of the government of a province and conducted by or on behalf of that government, forfeited to Her Majesty in right of that province and shall be disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and

(ii) in any other case, forfeited to Her Majesty in right of Canada and shall be disposed of by the Minister of Supply and Services in accordance with the law. R.S., c. F-27, s. 37; 1993, c. 37, s. 23.

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#### INTERPRETATION.

44.1 For the purposes of sections 44.2 to 44.4, a reference therein to an offence under section 39, 44.2 or 44.3 shall be deemed to include a reference to a conspiracy



or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, such an offence. R.S., c. 42 (4th Supp.), s. 9.

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**POSSESSION OF PROPERTY OBTAINED BY TRAFFICKING IN CONTROLLED DRUGS / Punishment.**

44.2 (1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under section 39; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 39.

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the subject-matter of the offence exceeds one thousand dollars; or
- (b) is guilty
  - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
  - (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed one thousand dollars. R.S., c. 42 (4th Supp.), s. 9.

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**LAUNDERING PROCEEDS OF TRAFFICKING IN CONTROLLED DRUGS / Punishment.**

44.3 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner or by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under section 39; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 39.

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction. R.S., c. 42 (4th Supp.), s. 9.

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**PART XII.2 OF THE CRIMINAL CODE APPLICABLE / Idem.**

44.4 (1) Sections 462.3 and 462.32 to 462.5 of the *Criminal Code* apply, with such modifications as the circumstances require, in respect of proceedings for an offence under section 39, 44.2 or 44.3

(2) For the purposes of subsection (1),

- (a) a reference in section 462.37 or 462.38 or subsection 462.41(2) of the *Criminal Code* to an enterprise crime offence shall be deemed to be a reference to an offence under section 39, 44.2 or 44.3; and
- (b) a reference, in relation to the manner in which forfeited property is to be disposed of, in subsection 462.37(1) or 462.38(2), paragraph 462.43(c) or section 462.5 of the *Criminal Code*, to the Attorney General shall be deemed to be a reference to

- (i) where the prosecution of the offence in respect of which the thing was forfeited was commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General or Solicitor General of that province, and
- (ii) in any other case, the Minister of Supply and Services. R.S.C. 1985, c. 42 (4th Supp.), s. 9; 1993, c. 37, s. 24.

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**REGULATIONS RESPECTING CONTROLLED DRUGS / Amendment of Schedule G.**

45. (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Part, and, in particular, but without restricting the generality of the foregoing, may make regulations

- (a) authorizing the manufacture, sale, importation, transportation, delivery or other dealing in controlled drugs and prescribing the circumstances and conditions under which, and the persons by whom, controlled drugs may be manufactured, sold, imported, transported, delivered or otherwise dealt in;
- (b) providing for the issue of licences for the importation, manufacture or sale of controlled drugs;
- (c) prescribing the form, duration and terms and conditions of any licence described in paragraph (b) and the fees payable therefor, and providing for the cancellation and suspension of those licences;
- (d) requiring persons who import, manufacture, sell, administer or deal in controlled drugs to maintain such books and records as the Governor in Council considers necessary for the proper administration and enforcement of this Part and the regulations made under this Part and to make such returns and furnish such information relating to the said controlled drugs as the Governor in Council may require;
- (e) authorizing the communication of any information obtained under this Part or the regulations to provincial professional licensing authorities; and
- (f) prescribing a fine not exceeding five hundred dollars or a term of imprisonment not exceeding six months, or both, to be imposed on summary conviction as punishment for the contravention of any regulation.

(2) The Governor in Council may amend Schedule G by adding thereto or deleting therefrom any substance, the inclusion or exclusion of which, as the case may be, is deemed necessary by the Governor in Council in the public interest. R.S., c. F-27, s. 38.

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**Part IV / RESTRICTED DRUGS**

**NOTE:** Part IV (ss. 46 to 51) repealed 1996, Bill C-8, s. 81 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and Bill C-8 has not yet received Royal Assent).

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**DEFINITIONS / "possession" / "regulations" / "restricted drug" / "traffic".**

**46. In this Part,**

"possession" means possession within the meaning of subsection 4(3) of the *Criminal Code*;

"regulations" means regulations made as provided for by or under section 51;

"restricted drug" means any drug or other substance included in Schedule H;

"traffic" means to manufacture, sell, export from or import into Canada, transport or

deliver, otherwise than under the authority of this Part or the regulations. R.S., c. F-27, s. 40.

#### ANNOTATIONS

**“Restricted drug”** – The drug “Psilocybin” as described in Sch. H includes the drug as found in its natural form in a mushroom. Thus an accused may be convicted of the trafficking or possession offence although he only has possession of mushrooms containing psilocybin: *R. v. Dunn* (1982), 1 C.C.C. (3d) 1, 30 C.R. (3d) 339, [1982] 2 S.C.R. 677 (7:0).

Ignorance that a drug has been added to Sch. H by Regulation published in the *Canada Gazette* is no defence to a charge contrary to s. 48(1): *Molis v. The Queen* (1980), 55 C.C.C. (2d) 558, [1980] 2 S.C.R. 356 (7:0).

The process, known as “fast-tracking” whereby a drug can be added to Sch. H within a very short time, did not infringe the rights of the accused under s. 7 of the Charter, even though the process was resorted to specifically to deal with the conduct of the accused who was manufacturing a “designer drug” which resembled a drug already on the Schedule. Once the drug was added to Sch. H, it was duly gazetted and it was only then that the accused was arrested: *R. v. Unger* (1990), 518 C.C.C. (3d) 518 (Ont. Dist. Ct.).

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#### POSSESSION OF RESTRICTED DRUG / Offence.

47. (1) Except as authorized by this Part or the regulations, no person shall have a restricted drug in his possession.

(2) Every person who contravenes subsection (1) is guilty of an offence and liable

- (a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or
- (b) on conviction on indictment, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years or to both. R.S., c. F-27, s. 41.

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#### TRAFFICKING IN RESTRICTED DRUG / Possession for trafficking / Offence.

48. (1) No person shall traffic in a restricted drug or any substance represented or held out by the person to be a restricted drug.

(2) No person shall have in possession any restricted drug for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an offence and liable

- (a) on summary conviction, to imprisonment for a term not exceeding eighteen months; or
- (b) on conviction on indictment, to imprisonment for a term not exceeding ten years. R.S., c. F-27, s. 42.

#### ANNOTATIONS

**Editor's Note:** Reference may also be made to cases noted under s. 4 of the Narcotic Control Act but bearing in mind the different definition of “traffic” in s. 46 of this Act and in s. 2 of the Narcotic Control Act.

**Meaning of trafficking generally** – An accused, in possession of a restricted drug and a narcotic who testifies that he had them for his own use but would have offered to share with others present at the time, while properly convicted of possession of the narcotic for



the purpose of trafficking in view of the wide definition of "traffic" in the Narcotic Control Act including to "give", is properly convicted only of simple possession of the restricted drug in view of the much narrower definition of the word in s. 46 of this Act. In particular the word "deliver" is not apt to describe an intention merely to share or to offer to share the restricted drug: *R. v. Rogalsky* (1975), 23 C.C.C. (2d) 399, [1975] 4 W.W.R. 418 (Sask. C.A.).

But compare *R. v. Weselak* (1972), 9 C.C.C. (2d) 193 (Ct. Mart. App. Ct.) where it was held that the accused's act of sharing the drugs with some friends fell within the meaning of "deliver" so as to constitute trafficking under this subsection.

The words "transport" and "deliver" are to be given their ordinary literal meaning and would include the conduct of an accused in merely delivering the drug back to the original owner: *R. v. Pottie* (1979), 46 C.C.C. (2d) 321, 31 N.S.R. (2d) 569 (C.A.).

Holding out is not limited to words and may be found in the accused's actions alone without any express words: *R. v. Garfield* (1974), 21 C.C.C. (2d) 449 (Ct. Mart. App. Ct.).

**Use of joint funds to purchase drugs [subsec. (1)]** – The purchasing with joint funds of another and the giving to the joint purchaser some of the restricted drugs does not constitute trafficking under this Act: *R. v. Jimmo* (1974), 16 C.C.C. (2d) 396 (2:1) (Que. C.A.). *Contra*: *R. v. Kopach* (1980), 53 C.C.C. (2d) 300, 20 A.R. 497 (C.A.) where it was held that the word "deliver" in the definition of "traffic" in s. 46 is to be given its ordinary meaning of "to hand over to another's possession or keeping; to give or distribute to the proper person" and does not require proof of some commercial activity. An accused who has purchased a large quantity of drugs with the joint funds of himself and others with the intention of splitting up the drugs amongst the contributors is in possession of the drug for the "purpose of trafficking".

On a charge of possession for the purpose of trafficking it is no defence that the accused was merely transporting drugs to his home for the use of his wife and himself drugs which had been purchased out of their joint funds in view of the inclusion of the word "transport" in the definition of "traffic" in s. 46. Although a person is not trafficking if he transports the drugs merely for his own use, the transporting to a second person – his wife – renders the accused guilty: *R. v. O'Connor* (1975), 23 C.C.C. (2d) 110, 29 C.R.N.S. 100 (B.C.C.A.).

**Mens rea** – In *R. v. Kundeus*, the trial Judge found that the accused, who did not testify, sold an undercover police officer a controlled drug, which upon analysis turned out to be a restricted drug. In setting aside the conviction for trafficking it was held that where the trial Judge found that the accused thought he was selling and intended to sell a controlled drug he cannot be said to have had the *mens rea* to traffic in a restricted drug (1974), 17 C.C.C. (2d) 345, [1974] 4 W.W.R. 228 (B.C.C.A.). On further appeal the conviction was restored, the Court holding (7:2) that proof of the sale of a restricted drug raises a rebuttable presumption of guilt and no evidence having been offered by the accused it would not be possible to find that the accused had an honest belief amounting to a non-existence of *mens rea* of the offence charged (1975), 24 C.C.C. (2d) 276, 32 C.R.N.S. 129 (S.C.C.).

**Liability of party** – Where an accused's liability on a charge of trafficking in a restricted drug depends on whether he was a party to the offence committed by the actual vendor it is misdirection to instruct the jury that the words "for the purpose of aiding" in s. 21(1)(b) of the Criminal Code are equivalent to "with the effect of aiding". What the Crown must show is that the accused's acts were for the purpose of aiding the vendor. Moreover, if the accused was acting merely on behalf of the purchaser and not for the purpose of aiding the vendor he is not guilty of trafficking since purchasing a restricted drug is not an offence: *R. v. Barr* (1975), 23 C.C.C. (2d) 116 (Ont. C.A.).

**PROCEDURE IN PROSECUTION FOR POSSESSION FOR TRAFFICKING / Procedure on finding in respect of possession / Acquittal and conviction.**

49. (1) In any prosecution for a contravention of subsection 48(2), if the accused does not plead guilty, the trial shall proceed as if the issue to be tried is whether the accused was in possession of a restricted drug contrary to subsection 47(1).

(2) If, pursuant to subsection (1), the court finds that the accused was not in possession of a restricted drug contrary to subsection 47(1), the accused shall be acquitted but, if the court finds that the accused was in possession of a restricted drug contrary to subsection 47(1), the accused shall be given an opportunity of establishing that he was not in possession of the restricted drug for the purpose of trafficking and, thereafter, the prosecutor shall be given an opportunity of adducing evidence to the contrary.

(3) If the accused establishes, pursuant to subsection (2), that he was not in possession of the restricted drug for the purpose of trafficking, the accused shall be acquitted of the offence as charged but shall be convicted of an offence under subsection 47(1) and sentenced accordingly, and if the accused fails to so establish, the accused shall be convicted of the offence as charged and sentenced accordingly. R.S., c. F-27, s. 43.

#### ANNOTATIONS

In light of the decision of the Supreme Court of Canada in *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1 (7:0) in relation to s. 8 of the Narcotic Control Act it must be considered that this section as well is of no force and effect.

**SETTING OUT OR NEGATING EXCEPTION, ETC., NOT REQUIRED / Burden of proving exception, etc.**

50. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Part or under section 463, 464 or 465 of the *Criminal Code* in respect of an offence under this Part.

(2) In any prosecution under this Part, the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment. R.S., c. F-27, s. 44.

#### INTERPRETATION.

50.1 For the purposes of section 44.4, as that section is applicable in respect of this Part by virtue of section 51, and sections 50.2 to 51, a reference therein to an offence under section 48, 50.2 or 50.3 shall be deemed to include a reference to a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, such an offence. R.S.C. 1985, c. 42 (4th Supp.), s. 10.

**POSSESSION OF PROPERTY OBTAINED BY TRAFFICKING IN RESTRICTED DRUGS / Punishment.**

50.2 (1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) the commission in Canada of an offence under section 48; or

- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 48.
- (2) Every person who contravenes subsection (1)
  - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the subject-matter of the offence exceeds one thousand dollars; or
  - (b) is guilty
    - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
    - (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed one thousand dollars. R.S.C. 1985, c. 42 (4th Supp.), s. 10.

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**LAUNDERING PROCEEDS OF TRAFFICKING IN RESTRICTED DRUGS / Punishment.**

- 50.3 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner or by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of
- (a) the commission in Canada of an offence under section 48; or
  - (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 48.
- (2) Every person who contravenes subsection (1)
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
  - (b) is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 42 (4th Supp.), s. 10.

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**APPLICATION OF CERTAIN PROVISIONS OF PART III / Modification for purpose of application / Additional regulations.**

51. (1) Sections 42 to 44, 44.4 and 45 apply in respect of this Part.

- (2) For the purposes of subsection (1),
- (a) there shall be substituted for the expression “controlled drug”, wherever it appears in any of the sections referred to in that subsection, the expression “restricted drug”;
  - (b) a reference in any of those sections
    - (i) to “Schedule G” shall be deemed to be a reference to Schedule H, and
    - (ii) to “this Part” shall be deemed to be a reference to Part IV; and
  - (c) a reference in section 44.4 or in a provision of the *Criminal Code* mentioned therein
    - (i) to “an offence under section 39, 44.2 or 44.3” shall be deemed to be a reference to an offence under section 48, 50.2 or 50.3, and
    - (ii) to “this Part” shall be deemed to be a reference to Part IV.
- (3) In addition to the regulations provided for by subsection (1), the Governor in Council may make regulations authorizing the possession or export of restricted drugs and prescribing the circumstances and conditions under which, and the persons by whom, restricted drugs may be had in possession or exported. R.S., c. F-27, s. 45; R.S.C. 1985, c. 42 (4th Supp.), s. 11.

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**NOTE:** Schedule G repealed 1996, Bill C-8, s. 82 (to come into force by order of the



Governor in Council, but not in force as of May 15, 1996 and Bill C-8 has not yet received Royal Assent).

## **SCHEDULE G**

### **(Sections 30, 38, 45 and 51)**

As amended to December 31, 1995

**Amphetamine and its salts**  
**Androisoxazole**  
**Androstanolone**  
**Androstenediol and its derivatives**  
**Barbituric acid and its salts and derivatives**  
**Benzphetamine and its salts**  
**Bolandiol and its derivatives**  
**Bolasterone**  
**Bolazine**  
**Boldenone and its derivatives**  
**Bolenol**  
**Butorphanol and its salts**  
**Calusterone**  
**Chlorphentermine and its salts**  
**Clostebol and its derivatives**  
**Diethylpropion and its salts**  
**Drostanolone and its derivatives**  
**Enestebol**  
**Epitiostanol**  
**Ethylestrenol**  
**Fluoxymesterone**  
**Formebolone**  
**Furazabol**  
**4-Hydroxy-19-nortestosterone and its derivatives**  
**Mebolazine**  
**Mesabolone**  
**Mesterolone**  
**Metandienone**  
**Metenolone and its derivatives**  
**Methamphetamine and its salts**  
**Methandriol**  
**Methaqualone and its salts**  
**Methylphenidate and its salts**  
**Methyltestosterone and its derivatives**  
**Metribolone**  
**Mibolone**  
**Nalbuphine and its salts**  
**Nandrolone and its derivatives**  
**Norboletone**  
**Norclostebol and its derivatives**  
**Norethandrolone**  
**Oxabolone and its derivatives**  
**Oxandrolone**  
**Oxymesterone**

Oxymetholone  
Phendimetrazine and its salts  
Phenmetrazine and its salts  
Phentermine and its salts  
Prasterone  
Quinbolone  
Stanozolol  
Stenbolone and its derivatives  
Testosterone and its derivatives  
Thiobarbituric acid and its salts and derivatives  
Tibolone  
Tiomesterone  
Trenbolone and its derivatives  
Zeranol

R.S., c. F-27, Sch. G; SOR/71-357, 460; SI/73-47; SI/77-112; SOR/77-824; SOR/78-426; SOR/79-756; SOR/81-85; SI/84-66; SOR/92-387.

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**NOTE:** Schedule H repealed 1996, Bill C-8, s. 82 (to come into force by order of the Governor in Council, but not in force as of May 15, 1996 and Bill C-8 has not yet received Royal Assent).

## **SCHEDULE H**

### **(Sections 30, 46 and 51)**

As amended to December 31, 1995

Lysergic acid diethylamide (LSD) or any salt thereof  
N,N-Diethyltryptamine (DET) or any salt thereof  
N,N-Dimethyltryptamine (DMT) or any salt thereof  
4-Methyl-2,5-dimethoxyamphetamine (STP(DOM)) or any salt thereof  
3,4-methylenedioxyamphetamine (MDA) or any salt thereof  
N-methyl-3-piperidyl benzilate (LBJ) or any salt thereof  
2,3-dimethoxyamphetamine or any salt thereof  
2,4-dimethoxyamphetamine or any salt thereof  
2,5-dimethoxyamphetamine or any salt thereof  
2,6-dimethoxyamphetamine or any salt thereof  
3,4-dimethoxyamphetamine or any salt thereof  
3,5-dimethoxyamphetamine or any salt thereof  
4,9-dihydro-7-methoxy-1-methyl-3H-pyrido (3,4-b) indole (Harmaline) and any salt thereof  
4,9-dihydro-1-methyl-3H-pyrido (3,4-b) indol-7-ol (Harmalol) and any salt thereof  
4-methoxyamphetamine or any salt thereof  
3-[2-(Dimethylamino) ethyl]-4-hydroxyindole (Psilocin) or any salt thereof  
3-[2-(Dimethylamino) ethyl]-4-phosphoryloxyindole (Psilocybin) or any salt thereof  
2,4,5-Trimethoxyamphetamine or any salt, isomer, or salt of isomer, thereof  
3,4-methylenedioxy-N-methylamphetamine or any salt thereof  
N-(1-phenylcyclohexyl) ethylamine or any salt thereof  
4-bromo-2, 5-dimethoxyamphetamine or any salt thereof  
1-[1-(2-thienyl) cyclohexyl] piperidine and its salts  
1-phenyl-N-propylcyclohexanamine or any salt thereof

- 3, 4, 5-trimethoxybenzeneethanamine (Mescaline) or any salt thereof but not including peyote (lophophora)
- 4-ethoxy-2, 5-dimethoxy- $\alpha$ -methylbenzeneethanamine or any salt, isomer or salt of isomer thereof
- 7-methoxy- $\alpha$ -methyl-1, 3-benzodioxole-5-ethanamine (MMDA) or any salt, isomer or salt of isomer thereof
- N, N, $\alpha$ -trimethyl-1, 3-benzodioxole-5-ethanamine or any salt, isomer or salt of isomer thereof
- N-ethyl- $\alpha$ -methyl-1, 3-benzodioxole-5-ethanamine or any salt, isomer or salt of isomer thereof
- 4-ethyl-2, 5-dimethoxy- $\alpha$ -methylbenzeneethanamine (DOET) or any salt, isomer or salt of isomer thereof
- 4-ethoxy- $\alpha$ -methylbenzeneethanamine or any salt, isomer or salt of isomer thereof
- 4-chloro-2, 5-dimethoxy- $\alpha$ -methylbenzeneethanamine or any salt, isomer or salt of isomer thereof
- 4,5-dihydro-4-methyl-5-phenyl-2-oxazoline (4-methylaminorex) or any salt thereof
- N-ethyl- $\alpha$ -methylbenzeneethanamine or any salt thereof
- $\alpha$ -methyl-N-propyl-1, 3-benzodioxole-5-ethanamine or any salt, isomer or salt of isomer thereof
- 1-[1-phenylmethyl]cyclohexyl]piperidine or any salt, isomer or salt of isomer thereof
- 1-[1-(4-methylphenyl)cyclohexyl]piperidine or any salt, isomer or salt of isomer thereof
- 2-methylamino-1-phenyl-1-propanone or any salt thereof
- 4-bromo-2,5-dimethoxybenzeneethanamine or any salt, isomer or salt of isomer thereof
- N-(2-hydroxyethyl)- $\alpha$ -methylbenzeneethanamine or any salt, isomer or salt of isomer thereof

R.S., c. F-27, Sch. H; SOR/70-204; (SOR/71-357); SOR/71-564; SI/73-36; SOR/74-198, 611, 670; SOR/76-368; SOR/77-824; SOR/78-425; SOR/78-650; SOR/79-938; SOR/86-90; SOR/86-833; SOR/87-76; SOR/87-406; SOR/87-485; SOR/87-574; SOR/87-653; SOR/89-410; SOR/90-156; SOR/95-79.





# NARCOTIC CONTROL ACT

R.S.C. 1985, Chap. N-1

Amended R.S.C. 1985, c. 11 (1st Supp.), s. 2(1)

Amended R.S.C. 1985, c. 27 (1st Supp.), ss. 196 to 200, 203(1), 208

Amended R.S.C. 1985, c. 27 (2nd Supp.), s. 10

Amended R.S.C. 1985, c. 42 (4th Supp.), s. 12; originally proclaimed in force January 1, 1989

Amended 1990, c. 16, s. 18; brought into force July 1, 1990 by SI/90-90, *Can. Gaz., Part II*, July 18, 1990 (but see s. 24)

Amended 1990, c. 17, s. 36; brought into force September 1, 1990 by SI/90-106, *Can. Gaz., Part II*, August 29, 1990

Amended 1992, c. 1, s. 98; in force February 28, 1992

Amended 1992, c. 20, ss. 215 and 216; brought into force November 1, 1992

Amended 1992, c. 51, s. 59; brought into force January 30, 1993

Amended 1993, c. 28, s. 78; to come into force April 1, 1999

Amended 1993, c. 37, ss. 25 to 29; brought into force September 1, 1993

Repealed 1996, Bill C-8, s. 94; to come into force by order of the Governor in Council (but see ss. 61 to 63), however, Bill C-8 has not yet received Royal Assent

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## GENERALLY

**Note:** 1992, c. 20, s. 215(2) provides as follows:

(2) Wherever the expression "Parole Act" occurs in any order, regulation or other statutory instrument, there shall in every case be substituted the expression "Part II of the Corrections and Conditional Release Act".

**Note:** 1992, c. 20, s. 216(2) provides as follows:

(2) Wherever the expression "Penitentiary Act" occurs in any order, regulation or other statutory instrument, there shall in every case be substituted the expression "Part I of the Corrections and Conditional Release Act".

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## An act to provide for the control of narcotic drugs

### SHORT TITLE

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#### SHORT TITLE.

1. This Act may be cited as the *Narcotic Control Act*. R.S., c. N-1, s. 1.

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### INTERPRETATION

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DEFINITIONS / "analyst" / "conveyance" / "marihuana" / "minister" / "narcotic" / "narcotic addict" / "opium poppy" / "possession" / "practitioner" / "prescription" / "traffic".

2. In this Act,

"analyst" means a person designated as an analyst under the *Food and Drugs Act* or under this Act;

"conveyance" includes any aircraft, vessel, motor vehicle or other conveyance of any description whatever;

"marihuana" means *Cannabis sativa* L.;

"Minister" means

- (a) with respect to Part I, the Minister of National Health and Welfare, and
- (b) with respect to Part II, the Minister of Justice;

"narcotic" means any substance included in the schedule or anything that contains any substance included in the schedule;

"narcotic addict" means a person who, through the use of narcotics,

- (a) has developed a desire or need to continue to take a narcotic, or
- (b) has developed a psychological or physical dependence on the effect of a narcotic;

"opium poppy" means *Papaver somniferum* L.;

"possession" means possession as defined in the *Criminal Code*;

"practitioner" means a person who is registered and entitled under the laws of a province to practise in that province the profession of medicine, dentistry or veterinary medicine;

"prescription" means, in respect of a narcotic, an authorization given by a practitioner that a stated amount of the narcotic be dispensed for the person named therein;

"traffic" means

- (a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
- (b) to offer to do anything referred to in paragraph (a)

otherwise than under the authority of this Act or the regulations. R.S., c. N-1, s. 2; R.S.C. 1985, c. 27 (1st Supp.), s. 196.

## ANNOTATIONS

"**Marihuana**" – The phrase "*Cannabis Sativa* L." must be given the technical or scientific meaning that it had at the time of the enactment of this provision in 1961. At that time it was understood that there was but one species of *cannabis* marihuana which was fully described by this phrase. Accordingly, this definition covers all *cannabis* marihuana and not just the species which the scientific community now describes as *Cannabis Sativa* L.: *Perka et al. v. The Queen* (1984), 14 C.C.C. (3d) 385, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113 (5:0).

"**Narcotic**" – Item 1 of the Schedule which lists opium poppy "its preparations, derivatives, alkaloids and salts, including: . . . (3) morphine . . . and their preparations, derivatives and salts including . . . (10) Diacetylmorphine (heroin)" includes synthetic heroin, that is heroin derived from synthetically produced morphine: *R. v. Rourke* (1980), 54 C.C.C. (2d) 225 (B.C.C.A.).

Item 2 of the Schedule which lists "Coca (Erythroxylon), its preparations, derivatives, alkaloids and salts including: . . . (2) cocaine" includes cocaine whether or not it is proved to have been derived from the coca plant: *R. v. Maskell* (1981), 58 C.C.C. (2d) 408 (Alta. C.A.).

The gravamen of the offence of possession of *cannabis* resin is possession of *cannabis* and the word "resin" is surplusage. When the accused possesses any of the substances set out in item 3 of the Schedule he has committed the offence: *R. v. Barrett* (1980), 54 C.C.C. (2d) 75, 15 C.R. (3d) 361, [1980] 4 W.W.R. 339 (Alta. C.A.).



## Part I / OFFENCES AND ENFORCEMENT

### Particular Offences

#### POSSESSION OF NARCOTIC / Offence and punishment.

3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
- (2) Every person who contravenes subsection (1) is guilty of an offence and liable
  - (a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or
  - (b) on conviction on indictment, to imprisonment for a term not exceeding seven years. R.S., c. N-1, s. 3; 1984, c. 40, s. 79.

#### ANNOTATIONS

**Subsec. (1)** – A minute trace of a narcotic is only an evidence of earlier possession and does not establish present possession: *R. v. McBurney* (1975), 24 C.C.C. (2d) 44, [1975] 5 W.W.R. 554 (B.C.C.A.) (4:1). *Contra*: *R. v. Quigley* (1954), 111 C.C.C. 81 (Alta. S.C. App. Div.). Also see *R. v. Boyesen* (1982), 75 Cr. App. R. 51 (H.L.), where it was held in relation to s. 5(2) of the Misuse of Drugs Act 1971 (U.K.) that the test is not whether the amount is capable of being used but whether it is in possession and can be identified. Quantity is important, however, as the quantity must be sufficient for the court to find that it amounts to something as a matter of fact. But if it is visible, tangible and measurable, it is certainly something. Secondly, quantity may be relevant to the issue of knowledge. If the quantity is so minute, it may be that it cannot be proved that the accused knew it was there.

Where the evidence establishes that the accused had knowledge and control of the drug there is no requirement that the Crown also prove that the amount was usable: *R. v. Brett* (1986), 41 C.C.C. (3d) 190, 53 C.R. (3d) 189 (B.C.C.A.).

The principle of *de minimis non curat lex* does not apply to the offence under this subsection: *R. v. Keizer* (1990), 98 N.S.R. (2d) 266 (N.S.S.C.).

An admission by the accused that he was in possession of “hash” was some evidence that he was in possession of cannabis resin: *R. v. O'Brien* (1987), 41 C.C.C. (3d) 86 (Que. C.A.).

The prohibition against possession of marijuana does not infringe either ss. 15 or 7 of the Charter: *R. v. Hamon* (1993), 85 C.C.C. (3d) 490, 58 Q.A.C. 241, 20 C.R.R. (2d) 181 (C.A.), leave to appeal to S.C.C. refused 167 N.R. 239n.

Also see cases noted under s. 4(4) of the Criminal Code, *supra*.

#### FAILURE TO DISCLOSE PREVIOUS PRESCRIPTIONS / Offence and punishment / Limitation period.

3.1 (1) No person shall, at any time, seek or obtain a narcotic or a prescription for a narcotic from a practitioner unless that person discloses to the practitioner particulars of every narcotic or prescription for a narcotic issued to that person by a different practitioner within the preceding thirty days.

- (2) Every person who contravenes subsection (1)
  - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or
  - (b) is guilty of an offence punishable on summary conviction and liable

- (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, and
- (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year.

(3) Summary conviction proceedings in respect of an offence under this section may be instituted at any time within but not later than one year from the time when the subject-matter of the proceedings arose. R.S.C. 1985, c. 27 (1st Supp.), s. 197.

#### TRAFFICKING / Possession for purpose of trafficking / Offence and punishment.

4. (1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

(2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life. R.S., c. N-1, s. 4.

#### ANNOTATIONS

**Meaning of trafficking generally** [subsec. (1)] – Once a person is found to have given or delivered a drug to another the offence of trafficking is proven, and it is not necessary for the Crown to prove that he so acted to promote the distribution of the drug to another: *R. v. Larson* (1972), 6 C.C.C. (2d) 145, 18 C.R.N.S. 149 (B.C.C.A.).

Nor is profit an element of the offence: *R. v. Drysdelle* (1978), 41 C.C.C. (2d) 238, 22 N.B.R. (2d) 86 (S.C. App. Div.).

The act of an accused in merely giving a narcotic to a friend to hold for him for safe-keeping constitutes the offence under this subsection: *R. v. Lauze* (1980), 17 C.R. (3d) 90 (Que. C.A.).

Distribution means the allocation to a number of people and accordingly cannot occur where there is only one recipient: *R. v. Christiansen* (1973), 13 C.C.C. (2d) 504, 23 C.R.N.S. 229 (N.B.S.C. App. Div.).

Where the transportation by the accused of the narcotic is incidental to the accused's own personal use of the narcotic as distinct from transportation as part of a transaction involving others, then the accused does not commit the offence under this subsection: *R. v. Harrington and Scosky*, [1964] 1 C.C.C. 189, 41 C.R. 75 *sub nom.* *R. v. MacDonald*; *R. v. Harrington and Scosky* (B.C.C.A.); *R. v. Young* (1971), 2 C.C.C. (2d) 560, 14 C.R.N.S. 372 (B.C.C.A.).

"Manufacture" in the definition of traffic in s. 2 would include the act of distilling *cannabis* resin from *cannabis* marihuana so as to give the substance a new form, quality and property and an accused performing such an operation may be convicted of the offence under this section even if the *cannabis* resin was to be for the accused's own use: *R. v. Daniel* (1982), 1 C.C.C. (3d) 101, 40 O.R. (2d) 620 (C.A.).

The term "administer" in the definition of "traffic" in s. 2 means to apply as a medicine or to give remedially rather than to merely make the narcotic available by giving a prescription: *R. v. Tan* (1984), 15 C.C.C. (3d) 303, 42 C.R. (3d) 252, [1985] 1 W.W.R. 377 (Sask. C.A.).

It was held in *R. v. Dumais* (1979), 51 C.C.C. (2d) 106 (Ont. C.A.), distinguishing *R. v. Maxwell, Watson and Shaw, infra*, that the use of the words "jointly traffic" did not preclude the conviction of one accused notwithstanding the acquittal of the other.

The acts of a physician in selling prescriptions for narcotics could constitute trafficking within this section either by selling or administering: *R. v. Rousseau* (1991), 70 C.C.C. (3d) 445, [1991] R.J.Q. 2802, 43 Q.A.C. 81 (C.A.), leave to appeal to S.C.C. refused 70 C.C.C. (3d) vi.

**Liability of party to trafficking offence** – The civil law concept of "agency" cannot be used to make non-criminal an act which would otherwise be attended by criminal conse-

quences. Thus an accused who is acting on behalf of a purchaser of a narcotic may nevertheless be guilty of trafficking where he does one or more acts which render him liable as a party under s. 21(1) of the Criminal Code to the offence committed by the vendor of the narcotic: *Poitras v. The Queen* (1973), 12 C.C.C. (2d) 337, 37 D.L.R. (3d) 411, [1974] S.C.R. 649 (4:1); *R. v. Greenlaw* (1981), 60 C.C.C. (2d) 178 (Ont. C.A.).

The purchaser of a narcotic does not commit the offence of trafficking by virtue of the definition of "traffic" in s. 2 and *semble* is not a party to the vendor's offence even though his acts may constitute abetting within the meaning of s. 21(1)(c) of the Criminal Code: *R. v. Meston* (1975), 28 C.C.C. (2d) 497, 34 C.R.N.S. 323 (Ont. C.A.). This case also contains a review of some of the authorities on the "agent for the purchaser" defence to a charge under this subsection.

Such a defence was successful in *R. v. Schartner* (1977), 38 C.C.C. (2d) 89, [1978] 1 W.W.R. 165 (B.C.C.A.) where the Court found that none of the accused's acts were done for the purpose of aiding the vendor to sell so as to render him liable as a party to the vendor's offence under s. 21(1) of the Criminal Code.

**Trafficking by offer** – Once the accused offered to sell a narcotic to the undercover police officer the *actus reus* of the offence of trafficking is complete and the requisite *mens rea* is found in the accused's intention to make an offer to sell the narcotic. Thus it is no defence that the accused knew the purchaser was a police officer and his intention was to "fool" the officer into thinking he would deliver the narcotic in order to cheat the officer: *R. v. Sherman* (1977), 36 C.C.C. (2d) 207, 39 C.R.N.S. 255 (B.C.C.A.).

Similarly the accused were properly convicted even if they only offered to sell narcotics as part of a scheme to defraud the purchaser of his money and with no intention of actually delivering the narcotics: *R. v. Mancuso* (1989), 51 C.C.C. (3d) 380 (Que. C.A.).

**Trafficking by holding out** – On a charge of trafficking in a substance held out to be a narcotic it is not material to the proof of the charge that the purchaser believed the substance was a narcotic provided it was represented or held out to be a narcotic by the accused and, therefore, the actual purchaser is not a necessary witness: *R. v. Merritt* (1975), 27 C.C.C. (2d) 156, 11 N.B.R. (2d) 393 (S.C. App. Div.).

**Conspiracy to traffic** – An accused may be convicted of a conspiracy to commit this offence where the evidence establishes an agreement between the accused and another whereby the co-conspirator would sell narcotics to the accused for the purposes of resale to other persons: *R. v. Genser* (1986), 27 C.C.C. (3d) 264, 39 Man. R. (2d) 203 (C.A.), affd 39 C.C.C. (3d) 576, [1987] 2 S.C.R. 685, 50 Man. R. (2d) 128 (5:0).

**Possession for purpose of trafficking generally [subsec. (2)]** – The gravamen of the offence under this subsection is possession plus the intent or purpose of physically making the narcotic available to others even if they are owners in common with the accused: *R. v. Taylor* (1974), 17 C.C.C. (2d) 36, [1974] 5 W.W.R. 40 (B.C.C.A.).

Under this section the offence requires proof of actual knowledge or wilful blindness as to the presence of the narcotics. Mere recklessness is not sufficient: *R. v. Sandhu* (1989), 50 C.C.C. (3d) 492, 35 O.A.C. 118, 73 C.R. (3d) 162 (C.A.).

**Transporting for joint use** – The doctrine of conjugal unity does not apply to prevent a possession for the purpose of trafficking conviction against a husband for transporting drugs to his wife: *R. v. O'Connor* (1975), 23 C.C.C. (2d) 110, 29 C.R.N.S. 100 (B.C.C.A.) (5:0).

However, it was held that the driver of a vehicle is not in possession for the purpose of trafficking where he and the joint owner of a quantity of narcotic are both in the vehicle at the time of apprehension and the narcotic is for their own use. The word "transport" in the definition of traffic in s. 2 contemplates movement of the narcotic for the purpose of promoting its distribution to another person: *R. v. Binkley* (1982), 69 C.C.C. (2d) 169, 16 Sask. R. 251 (C.A.); *R. v. Gardiner* (1987), 35 C.C.C. (3d) 461 (Ont. C.A.).



**Liability of party to possession offence** – An accused who assists a narcotics trafficker in concealing the narcotics in the accused's apartment so that the trafficker may avoid detection is liable as party to offence of possession for the purpose of trafficking and is not guilty merely of simple possession: *R. v. Jackson* (1977), 35 C.C.C. (2d) 331 (Ont. C.A.).

An accused is properly convicted as a party to this offence where, although not in possession of the narcotics, she lent the principal offender the money to purchase the narcotics on terms that required him to repay the money and give her a share of the proceeds from the resale of the narcotics: *R. v. Roan* (1985), 17 C.C.C. (3d) 534 (Alta. C.A.).

An accused who set up a commercial cultivation operation and assisted in bringing the crop to maturity can be convicted as a party to the offence under this subsection although he does not own nor have any interest in the disposition of the crop: *R. v. Arason* (1992), 78 C.C.C. (3d) 1, 13 C.R.R. (2d) 248, 37 W.A.C. 20 (B.C.C.A.).

**Mistake as to nature of drug** – The defence of mistaken belief as to the true identity of the drug must be honest and its reasonableness is only a factor to be considered. This belief must be innocent and accordingly this defence will fail where the evidence establishes that the accused believed that the drug he possessed for sale was mescaline rather than a narcotic: *R. v. Couture* (1976), 33 C.C.C. (2d) 74 (Ont. C.A.).

**Proof of offence charged** – The offence under this subsection is possession of a narcotic for the purpose of trafficking. Thus where the Crown particularizes the narcotic as *cannabis* marihuana but proves possession of *cannabis* resin, it is still the same offence and unless there has been irreparable prejudice the indictment may be amended to conform with the evidence: *R. v. Morozuk* (1986), 24 C.C.C. (3d) 257, 50 C.R. (3d) 179, [1986] 1 S.C.R. 31 (7:0). Where the offence is conspiracy, see note at *R. v. Saunders* (1990), 56 C.C.C. (3d) 220 (S.C.C.) under s. 587.

An indictment charging that the accused "being then and there together, did have in their possession a narcotic . . . for the purpose of trafficking" charges the accused jointly with the commission of one offence and will not support a finding of possession by each accused: *R. v. Maxwell, Watson and Shaw* (1978), 39 C.C.C. (2d) 439 (B.C.C.A.); not folld: *R. v. Dalzell and Douglas* (1979), 46 C.C.C. (2d) 193 (Alta. C.A.) where it was held that a charge that the accused "did unlawfully have in their possession a narcotic . . . for the purpose of trafficking" charged the accused jointly and severally with the offence so that even where the joint charge failed the Judge could proceed with the trial on the basis that the accused were charged severally with the offence.

In *R. v. Doig* (1980), 54 C.C.C. (2d) 461 (B.C.C.A.), *R. v. Maxwell, Watson and Shaw, supra*, was distinguished and the conviction of one of two persons jointly charged with possession of narcotics for the purpose of trafficking upheld. The accused had been jointly charged with one of his employees who had been present when a shipment of barrels later found to contain marihuana was delivered to a warehouse rented by the accused. It was open to the Court on these facts to acquit the employee and convict the accused although they were jointly charged.

A charge that the accused trafficked in a narcotic "to wit: 1/4 gram of cocaine" is not made out where the evidence is that the substance was a harmless blend of powder, even though the accused, in giving the substance to her friend, represented that the substance was cocaine: *R. v. C. (N.)* (1991), 64 C.C.C. (3d) 45 (Que. C.A.).

**Rule precluding multiple convictions** – By reason of the rule precluding multiple convictions laid down in *R. v. Kienapple* (1974), 15 C.C.C. (2d) 54, [1975] 1 S.C.R. 729, an accused who on a single occasion trafficked in two types of narcotics to the same person should be convicted only of one offence under this section: *R. v. Voutsis* (1989), 47 C.C.C. (3d) 451, 73 Sask. R. 287 (C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vii, 102 N.R. 400n.

The doctrine of *res judicata* does not bar a conviction under this subsection where the

accused has previously been convicted of the offence of trafficking allegedly occurring on the same date and at the same place where following the sale of the narcotic the accused is still in possession of a quantity of the narcotic: *R. v. Winsor* (1976), 31 C.C.C. (2d) 228, 37 C.R.N.S. 148 (Nfld. Prov. Ct.).

**Included offences** – It is the language of the count, and not the evidence that discloses it, that decides whether there is a lesser and included offence therein. The offence of trafficking as statutorily described does not include the offence of possession: *R. v. Shewfelt* (1972), 6 C.C.C. (2d) 304, 18 C.R.N.S. 185 (B.C.C.A.); *R. v. Drysdelle*, *supra*.

A plea to the included offence of simple possession on an information charging the offence under subsec. (2) is a plea to the indictable offence of possession and the Crown is not called upon to elect whether to proceed summarily or by indictment: *R. v. Wardley* (1978), 43 C.C.C. (2d) 345, 11 C.R. (3d) 282 (Ont. C.A.); *R. v. Fudge* (1979), 49 C.C.C. (2d) 63, 26 Nfld. & P.E.I.R. 76 (Nfld. C.A.).

## IMPORTING AND EXPORTING / Offence and punishment.

**5. (1) Except as authorized by this Act or the regulations, no person shall import into Canada or export from Canada any narcotic.**

**(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for life but not less than seven years. R.S., c. N-1, s. 5.**

## ANNOTATIONS

**Meaning of “import”** – The word “import” in this section means simply to bring into the country or cause to be brought into the country. The offence of importing is not a continuing one but rather is complete when the goods enter the country. On the other hand an accused need not himself have carried the goods into Canada nor been present at the port of entry and the offence may be committed in whole or in part at more than one location in Canada. Thus, for example, the offence could be tried at the place where the accused made all the arrangements for importation and at the place where the goods entered the country: *Bell v. The Queen* (1983), 8 C.C.C. (3d) 97, 36 C.R. (3d) 289 (S.C.C.) (5:0).

Further, the offence does not necessarily end when the vessel enters into Canadian waters and persons may properly be convicted of importing who assist in the unloading of a vessel which passed into Canadian waters many hours before: *R. v. Miller et al.* (1984), 12 C.C.C. (3d) 54 (B.C.C.A.).

However, once the narcotic entered a province by crossing an international boundary, the offence was complete and the further transportation of the goods into another province did not give the latter province jurisdiction to try the importing offence: *Martel and Debarros v. The Queen* (1986), 55 C.R. (3d) 63, 61 Nfld. & P.E.I.R. 219 (P.E.I.S.C.).

A narcotic has been imported into Canada notwithstanding that it is still resting in a customs warehouse and has not passed out of the control of customs when the accused is arrested: *Re Martin and The Queen* (1973), 11 C.C.C. (2d) 224, 21 C.R.N.S. 149 *sub nom. R. v. Martin* (Ont. H.C.J.).

The fact that the police monitored the voyage of a vessel known to be carrying narcotics and actually assisted the accused at one point when the vessel encountered bad weather did not prevent the offence under this section from being committed. Lack of consent by the police is not an element of the offence: *R. v. Miller et al.*, *supra*.

**Mens rea** – Under this section the offence requires proof of actual knowledge or wilful blindness as to the presence of the narcotics. Mere recklessness is not sufficient: *R. v. Sandhu* (1989), 50 C.C.C. (3d) 492, 35 O.A.C. 118, 73 C.R. (3d) 162 (C.A.).

A belief by the accused that he was smuggling goods in violation of the Customs Act would not be sufficient *mens rea* to permit a conviction under this section but an accused may be convicted where he either knew the substance was a narcotic (not necessarily the

particular narcotic) or was wilfully blind to that fact: *R. v. Blondin* (1970), 2 C.C.C. (2d) 118, [1971] 2 W.W.R. 1 (B.C.C.A.), affd 4 C.C.C. (2d) 566n, [1971] S.C.R. v.

**Sentencing [Also see notes under s. 687 of Code]** – The seven-year minimum prescribed by subsec. (2) is unconstitutional by reason of its violation of s. 12 of the Charter of Rights and Freedoms: *Smith v. The Queen* (1987), 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, [1987] 1 S.C.R. 1045 (5:1).

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**CULTIVATION OF OPIUM POPPY OR MARIHUANA / Offence and punishment / Destruction of plant.**

**6. (1) No person shall cultivate opium poppy or marihuana except under the authority of and in accordance with a licence issued to the person under the regulations.**

**(2) Every person who contravenes subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years.**

**(3) The Minister may cause to be destroyed any growing plant of opium poppy or marihuana cultivated otherwise than under authority of and in accordance with a licence issued under the regulations. R.S., c. N-1, s. 6.**

**ANNOTATIONS**

Cultivation requires that labour and attention be bestowed upon the plants to assist them to grow: *R. v. Busby* (1972), 7 C.C.C. (2d) 234 (Y.T.C.A.).

Cultivating, under this section, is a continuing offence, commencing when the seeding takes place and continuing until the plants are harvested or the accused abandons the task of raising the crop. A person who undertakes the task of raising the crop to maturity does not cease to cultivate, within the meaning of this section, during periods of deliberate inactivity where the crop is left alone to grow and mature in the environment created by that person: *R. v. Arnold* (1990), 74 C.R. (3d) 394 (B.C.C.A.).

The word "cultivate" does not include the mere drying or curing of marihuana plants: *R. v. Gauvreau* (1982), 65 C.C.C. (2d) 316, 26 C.R. (3d) 272, 35 O.R. (2d) 388 (C.A.). Nor does it include acts relating to the harvest of the plants such as the cutting and drying of the plants: *R. v. Couture* (1994), 93 C.C.C. (3d) 540, [1994] R.J.Q. 2160 (C.A.), leave to appeal to S.C.C. refused 94 C.C.C. (3d) vii.

The offence of simple possession is not included in this offence: *R. v. Powell* (1983), 9 C.C.C. (3d) 442, 36 C.R. (3d) 396 (B.C.C.A.).

The prohibition against the cultivation of marihuana does not infringe either ss. 15 or 7 of the Charter: *R. v. Hamon* (1993), 85 C.C.C. (3d) 490, 58 Q.A.C. 241, 20 C.R.R. (2d) 181 (C.A.), leave to appeal to S.C.C. refused 62 Q.A.C. 139n, 167 N.R. 239n.

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**Prosecutions**

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**SETTING OUT OR NEGATING EXCEPTION, ETC., NOT REQUIRED / Burden of proving exception, etc.**

**7. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Act or under section 463, 464 or 465 of the *Criminal Code* in respect of an offence under this Act.**

**(2) In any prosecution under this Act, the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not**



operate in favour of the accused, whether or not it is set out in the information or indictment. R.S., c. N-1, s. 7.

#### ANNOTATIONS

**Subsec. (2)** – This subsection refers to statutory exceptions, such as possession of a licence, and does not apply to a common law defence such as necessity: *Perka et al. v. The Queen* (1984), 14 C.C.C. (3d) 385, [1984] 2 S.C.R. 232, 42 C.R. (3d) 113 (5:0).

#### PROCEDURE IN PROSECUTION FOR TRAFFICKING / *Idem* / Conviction of possession or conviction of trafficking.

8. (1) In any prosecution for a contravention of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3.

(2) After the close of the case for the prosecution pursuant to subsection (1) and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused contravened subsection 3(1) and, if the court finds that the accused did not contravene subsection 3(1), the accused shall be acquitted but, if the court finds that the accused contravened subsection 3(1), the accused shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking and, thereafter, the prosecutor shall be given an opportunity of adducing evidence to establish the contrary.

(3) After compliance with subsection (2), in the case of finding a contravention by the accused of subsection 3(1),

- (a) if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, the accused shall be acquitted of the offence as charged but shall be convicted of an offence under section 3 and sentenced accordingly; or
- (b) if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, the accused shall be convicted of the offence as charged and sentenced accordingly. R.S., c. N-1, s. 8.

#### ANNOTATIONS

It has been held that the reverse onus created by this section is an unconstitutional infringement on the guarantee to the presumption of innocence in s. 11(d) of the Canadian Charter of Rights and Freedoms and is of no force and effect: *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, [1986] 1 S.C.R. 103 (7:0).

As a consequence the entire section would be of no force and effect, including the requirement for the two-part trial. See: *Re Pizzuro and Casemore and The Queen* (1983), 5 C.C.C. (3d) 294, 148 D.L.R. (3d) 368 (Ont. H.C.J.), affd 10 C.C.C. (3d) 277, 45 O.R. (2d) 1 (C.A.).

#### CERTIFICATE OF ANALYST / Requiring attendance of analyst / Notice of intention to produce certificate / Proof of service / Attendance for examination.

9. (1) Subject to this section, a certificate purporting to be signed by an analyst stating that the analyst has analyzed or examined a substance and stating the result of the analysis or examination is admissible in evidence in any prosecution for an offence referred to in subsection 7(1) and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed the certificate.

(2) The party against whom a certificate of an analyst is produced pursuant to subsection (1) may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

(3) No certificate shall be admitted in evidence pursuant to subsection (1) unless the party intending to produce it has, before the trial, given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

(4) For the purposes of this Act, service of any certificate referred to in subsection (1) may be proved by oral evidence given under oath by, or by the affidavit or solemn declaration of, the person claiming to have served it.

(5) Notwithstanding subsection (4), the court may require the person who appears to have signed an affidavit or solemn declaration referred to in that subsection to appear before it for examination or cross-examination in respect of the issue of proof of service. R.S., c. N-1, s. 9; R.S.C. 1985, c. 27 (1st Supp.), s. 198.

## ANNOTATIONS

**Proof of continuity [subsec. (1)]** – A certificate stating that an analysis of a substance sent originally to a federal office in one province was conducted in another province is satisfactory for continuity under the broad provisions of this section: *R. v. Welsh* (1975), 24 C.C.C. (2d) 382, 31 C.R.N.S. 337 (Ont. C.A.).

The Crown is under no duty to call all persons who handled the drug exhibit envelope from the time it was sealed by the arresting officer until it reached the analyst: *R. v. Oracheski* (1979), 48 C.C.C. (2d) 217 (Alta. S.C. App. Div.). *Folld: R. v. Degraaf* (1981), 60 C.C.C. (2d) 315, 21 C.R. (3d) 238 (B.C.C.A.).

**Proof of nature of substance other than by certificate under this Act** – A certificate made by an analyst under the Food and Drugs Act is admissible under this Act: *R. v. Van Esch* (1975), 24 C.C.C. (2d) 523 (Ont. C.A.). It was also held in this case that an admission by the accused to the police that he was the owner of the “marihuana” is itself some evidence of the nature of the substance.

As well, evidence by a police officer that in his opinion the substance was marihuana because of its odour and appearance, while of little weight, is some evidence of the nature of the substance: *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.).

**Effect of destruction of sample** – The fact that the entire sample of the drug was destroyed in the Government analysis does not deprive the accused of his right to make full answer and defence nor does it amount to a denial of his rights under the Canadian Bill of Rights. Further, while the destruction of the entire sample may be a factor which could affect the weight to be accorded the analyst’s certificate, it does not render the certificate inadmissible: *R. v. O’Quinn* (1976), 36 C.C.C. (2d) (B.C.C.A.).

**Meaning of evidence to the contrary [subsec. (1)]** – “Evidence to the contrary” is any evidence which tends to put in doubt the probative value Parliament has legislatively conferred upon the statements contained in the certificate. Thus any evidence with respect to the analyst himself, his qualifications, integrity or in regard to the procedures he followed to draw his conclusions which could as a matter of law leave the trier of fact with a reasonable doubt as to the analyst’s conclusions had he testified as an expert witness in Court may constitute evidence to the contrary: *Oliver et al. v. The Queen* (1981), 62 C.C.C. (2d) 97, 24 C.R. (3d) 1 (S.C.C.) (9:0).

**Sufficiency of analysis** – In reaching his conclusion as to the identity of the substance the analyst is entitled to rely on tests performed by others and to make use of standard graphs supplied by other laboratories: *R. v. Jordan* (1984), 11 C.C.C. (3d) 565, 39 C.R. (3d) 50 (B.C.C.A.).

**Leave to cross-examine [subsec. (2)]** – A time lapse of some 18 days between the date when the substance was submitted and the date it was analyzed is not sufficient reason to grant leave under this subsection: *R. v. Dannenbaum and Bevans* (1973), 11 C.C.C. (2d) 299 (B.C.S.C.).

It was held in *Re Klippenstein and Isherwood and The Queen* (1975), 28 C.C.C. (2d) 235 (Man. Q.B.) that a trial Judge properly exercised his discretion in refusing to grant leave under this subsection despite affidavit evidence that there existed scientific research casting doubt on the analysis normally used to detect the presence of the species of *cannabis* proscribed by this Act.

**Reasonable notice [subsec. (3)]** – Where reasonable notice to the accused was proven in a manner that was not strictly admissible, the silence of the accused on that point may be taken as a tacit admission of it: *R. v. Bowles* (1974), 16 C.C.C. (2d) 425 (Ont. C.A.).

Even though defence counsel did not object at the time of its reception into evidence he may at the close of the Crown's case move for acquittal on the ground that there was no evidence before the court because no prior notice of the Crown's intention to use the certificate was given: *R. v. Braithwaite* (1972), 6 C.C.C. (2d) 257 (Alta. S.C.T.D.).

The issue of reasonable notice is to be determined before the admission of the certificate, not after it is in the evidence to then determine whether or not a case has been established against the accused: *R. v. M.* (1975), 25 C.C.C. (2d) 507 (Man. Q.B.).

For the Crown to avail itself of this section it must strictly comply with the provisions of notice: *R. v. Henri* (1972), 9 C.C.C. (2d) 52, [1972] 6 W.W.R. 368 (B.C.C.A.). Followed: *R. v. Breen* (1975), 30 C.C.C. (2d) 229, 12 N.B.R. (2d) 616 (S.C. App. Div.).

Since a preliminary inquiry is not a trial no notice need be given by the Crown of its intention to introduce a certificate of analysis into evidence: *Re Wong and Mar and The Queen* (1973), 14 C.C.C. (2d) 117, 24 C.R.N.S. 398 *sub nom.* *R. v. Ka Chun Wong and Mar* (B.C.S.C.).

However, merely tendering the certificate at the preliminary inquiry without proof of notice does not constitute notice within the meaning of this subsection for the purposes of the trial proper: *R. v. De Vincentis* (1982), 5 C.C.C. (3d) 562 (Que. C.A.).

A notice incorrectly referring to the wrong subsection is still reasonable especially where the accused was not prejudiced or misled by the error: *R. v. Woodward* (1975), 23 C.C.C. (2d) 508 (Ont. C.A.).

An inaccurate reference to the Criminal Code rather than this Act did not render the notice void nor unreasonable: *R. v. Taylor* (1983), 5 C.C.C. (3d) 260 (Ont. C.A.).

When the defence first raises the question of reasonableness of notice at the end of the case, the Crown may reopen its case: *R. v. Marcil* (1976), 31 C.C.C. (2d) 172 (Sask. C.A.).

The fact that the certificate referred to a package with a different date on it than testified to by the undercover police officer who placed it in the security envelope was not in any way relevant to the issue of whether the accused was given reasonable notice in compliance with this subsection. This discrepancy went at most to the question of whether the substance sold by the accused was the substance referred to in the certificate. In determining this latter question the Court must look at all the circumstances including the correspondence between other writings on the envelope and those contained in the certificate: *Ebner v. The Queen* (1979), 47 C.C.C. (2d) 293, [1979] 2 S.C.R. 996 (7:0).

**Service of notice [subsec. (3)]** – This subsection is not complied with by service on the accused's mother: *R. v. Lewis* (1972), 6 C.C.C. (2d) 516 (Ont. C.A.).

A new notice is not required where the Crown, prior to trial, withdraws the original information and lays a new information: *R. v. Giesbrecht* (1976), 60 C.C.C. (2d) 135 (B.C.C.A.).

Proof of service of an intention to rely on the certificate may be made by affidavit pursuant to s. 4(6) of the Criminal Code: *R. v. Wood* (1991), 64 C.C.C. (3d) 330, 3 O.R. (3d) 504 (Gen. Div.).



## Search, Seizure and Forfeiture

### ENTRY AND SEARCH.

10. A peace officer may, at any time, without a warrant enter and search any place other than a dwelling-house, and under the authority of a warrant issued under section 12, enter and search any dwelling-house in which the peace officer believes on reasonable grounds there is a narcotic by means of or in respect of which an offence under this Act has been committed. R.S., c. N-1, s. 10; R.S.C. 1985, c. 27 (1st Supp.), s. 199.

#### Transitional provision

**Note:** Section 208 of the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.) provides as follows:

208. Nothing in sections 190, 195, 199 and 200 of this Act shall be construed as rendering invalid or inadmissible in any proceedings any evidence obtained by the exercise of a writ of assistance prior to the coming into force of those sections.

#### ANNOTATIONS

To be consistent with s. 8 of the Charter, this provision is to be read as authorizing a warrantless search only where exigent circumstances render it impracticable to obtain a warrant. While the fact that the evidence sought is believed to be present on a motor vehicle or other conveyance will often create exigent circumstances, there is no blanket exception to the warrant requirement for such conveyances: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 (9:0).

The perimeter of a dwelling house is a place within the meaning of this section and thus a so-called "perimeter search" is not authorized under this section unless there are reasonable and probable grounds to believe that a narcotic is present. Where the perimeter search is made purely on the basis of suspicion then the search, which involved approaching the perimeter of the house and attempting to peer into the residence, is unreasonable and constitutes a violation of s. 8 of the Charter. There is no common law right which allows police officers to trespass on private property in order to conduct a search of this kind: *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, [1991] 1 W.W.R. 193 (S.C.C.).

An automobile is a "place" and the warrantless search of an automobile as authorized by this section and s. 42 of the Food and Drugs Act will be reasonable under s. 8 of the Canadian Charter of Rights and Freedoms where the vehicle is moving away quickly and there are reasonable grounds for believing that the vehicle contains drugs: *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120 (Ont. C.A.), affd 52 C.C.C. (3d) 193 (S.C.C.).

Mere suspicion is not sufficient to permit a search under this section, even as simple and elementary a search as looking in the cab of a truck and moving certain items around on the seat: *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548, [1988] 6 W.W.R. 1 (Sask. C.A.).

In an unusual case it was held that peace officers were entitled to pursue the accused's ship into international waters and search and seize the ship and arrest the accused for conspiracy to import narcotics. The ship had briefly entered Canadian waters to off-load a cargo of narcotics to another vessel which was used to in fact import the narcotics. The accused's ship had been under continuous surveillance until intercepted by the police. The conduct of the authorities complied with the international law relating to pursuit of ships onto the high seas: *R. v. Sunila and Solayman* (1986), 26 C.C.C. (3d) 177, 49 C.R. (3d) 272 (N.S.C.A.).

### SEARCH OF PERSON AND SEIZURE.

11. A peace officer may search any person found in a place entered pursuant to sec-

tion 10 and may seize and, from a place so entered, take away any narcotic found therein, any thing therein in which the peace officer reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which the officer believes on reasonable grounds an offence under this Act has been committed or that may be evidence of the commission of such an offence. R.S., c. N-1, s. 10.

## ANNOTATIONS

The power to search under this section depends on the officer having a reasonable belief that the person searched is in possession of a prohibited drug: *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 54 C.R. (3d) 120 (Ont. C.A.). It should be noted that in this case the court reviewed at length the circumstances in which an officer could have the requisite reasonable grounds, particularly when based on information supplied by an informer, a superior officer and the suspect's reputation in police circles. This case also sanctioned the validity of a warrantless search as an incident of arrest although the search precedes the arrest, provided that the officer had reasonable and probable grounds to make the arrest. A further appeal by the accused to the Supreme Court of Canada was dismissed (1989), 52 C.C.C. (3d) 193 (S.C.C.) (5:0). The court agreed that the appropriate standard to establish reasonable grounds for a search is one of "reasonable probability" and in making this determination the court must have regard to the totality of the circumstances. The court also held that the suspect's criminal record and reputation could be taken into account provided that, *inter alia*, the reputation is related to the ostensible reasons for the search. Where the police rely on information from an informer it is not necessary for the police to confirm each detail in the informer's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. On the other hand, the level of verification required may be higher where the police rely on an informant whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater. Finally, it was held that in the case of a warrantless search carried out by a police officer pursuant to orders from a superior, it is that officer who must have the requisite reasonable and probable grounds.

A conclusion that the police had reliable information that the accused was attempting to import narcotics must be based on more than the fact of a subsequent recovery of the drugs. There must be a proper inquiry into the source and reliability of the confidential information in order to determine whether, "in the totality of the circumstances", there existed reasonable and probable grounds to believe the accused was carrying the narcotic or whether there was only a suspicion. A rectal examination of the accused, based on the mere suspicion that he was carrying drugs and as an incident to an arrest for outstanding traffic fines, was a serious violation of s. 8 of the Charter and, in the circumstances of the case, required exclusion of the evidence as to the finding of the narcotics: *R. v. Greffe* (1990), 55 C.C.C. (3d) 161, 75 C.R. (3d) 259, [1990] 1 S.C.R. 755 (4:3).

Immediately upon detention a detainee has the right to be informed of the right to retain and instruct counsel but the police are not obligated to suspend the search incident to arrest until the detainee has the opportunity to retain counsel except in certain circumstances, as where the lawfulness of the search is dependent on the detainee's consent or the statute gives a person a right to seek review of the decision to search: *R. v. Debot*, *supra*.

This section does not give an officer any right to stop and search a person in a public place. The authority to do so must be found in the criminal law or as an incident to an arrest made upon reasonable and probable grounds: *R. v. Stevens* (1983), 7 C.C.C. (3d) 260, 35 C.R. (3d) 1 (N.S.S.C. App. Div.).

The word "place" includes a public street and would authorize search of a person in a public street where there is a reasonable belief that the person is in possession of a narcotic: *R. v. Morrison* (1983), 6 C.C.C. (3d) 256, 34 C.R. (3d) 362 (B.C. Co. Ct.), *affd* 15 C.C.C. (3d) 415 (B.C.C.A.).

In *Collins v. The Queen* (1987), 33 C.C.C. (3d) 1, 56 C.R. (3d) 193, [1987] 1 S.C.R. 265 (5:1), the court considered the lawfulness of a search under this section where the accused had been subjected to a throat hold. It was held that for the search to be lawful the Crown must establish that the officer believed on reasonable grounds that there was a narcotic in the place where the person searched was found. The nature of the belief will also determine whether the manner in which the search was carried out was reasonable. For example, if a police officer is told by a reliable source that there are persons in possession of drugs in a certain place, the officer may, depending on the circumstances and the nature and precision of the information given by that source, search persons found in that place, but without very specific information, a seizure by the throat would be unreasonable. However, if he is lawfully searching a person whom he believes on reasonable grounds to be a "drug handler", then the "throat-hold" would not be unreasonable.

#### WARRANT TO SEARCH DWELLING-HOUSE.

**12. A justice who is satisfied by information on oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling-house may issue a warrant, under the hand of the justice, authorizing a peace officer named therein at any time to enter the dwelling-house and search for narcotics. R.S., c. N-1, s. 10.**

#### ANNOTATIONS

A warrant may only be issued under this section where the narcotics are, at the time of the application, in the premises to be searched. A warrant may not be issued where the information before the justice is only that the narcotics are to be delivered to the premises prior to execution of the warrant: *R. v. Cameron* (1984), 16 C.C.C. (3d) 240 (B.C.C.A.).

There must be a belief that the narcotics are presently in the premises at the time of application for the warrant. Further, the justice has no jurisdiction to "amend" a warrant to extend the time for its execution where the warrant had expired without being executed prior to the application for the amendment. Even if the justice had power to amend the warrant he would have to be supplied with further information under oath to show that narcotics were then on the premises to be searched: *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287, 90 N.S.R. (2d) 164 (C.A.).

It was held, considering the predecessor to this section, that the requirement that a warrant issued under this section be directed to a named police officer is an important safeguard having regard to the wider search powers under this Act and that for example the warrant can be executed at any time: *R. v. Genest* (1989), 45 C.C.C. (3d) 385, 91 N.R. 161 (S.C.C.). However, provided that the named officers are in control of the search then they may be assisted by unnamed officers. In fact to name, for example, all the members of a drug squad may undermine the effectiveness of the naming requirement which is to ensure that the officer or officers named in the warrant execute it personally and are responsible for the control and conduct of the search: *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, 67 C.R. (3d) 87, [1988] 2 S.C.R. 980, [1989] 1 W.W.R. 385 (7:0).

The guarantee to protection against unreasonable search and seizure in s. 8 of the Charter of Rights and Freedoms requires that the justice be unbiased, neutral and detached and that there be no real or apprehended perception of partiality. Where, by reason of the justice's relationship with the police force seeking the warrant, a reasonable person would believe that there was a real danger of bias by reason of a perceived susceptibility of the justice to intimidation or coercion by the police then this requirement is not satisfied. In this case such perception arose from the fact that the justice was also a member of the corps of commissionaires with duties at an airport where she reported to and worked out of the R.C.M.P. offices at the airport, was in daily contact with the R.C.M.P. and was subject to the direct control of a member of that force. The R.C.M.P.



was also charged with the enforcement of this Act and a member of that force had applied for the warrant: *R. v. Baylis* (1988), 43 C.C.C. (3d) 514, 65 C.R. (3d) 62, 66 Sask. R. 268 (C.A.).

A warrant which has the "wrong" address on it may not be amended by the officer and the justice by simply inserting the correct address, at least if the officer is not placed under oath at the time of the amendment: *Re Sieger and Avery and The Queen* (1982), 65 C.C.C. (2d) 449, 27 C.R. (3d) 91 *sub nom. Sieger and Avery v. Barker et al.* (B.C.S.C.).

The failure to specify the place to be searched is a serious defect which not only renders the warrant invalid but the search, pursuant to such warrant, unreasonable within the meaning of s. 8 of the Charter of Rights and Freedoms: *R. v. Parent* (1989), 47 C.C.C. (3d) 385, 41 C.R.R. 322 (Y.T.C.A.).

The police may apply for a warrant under this section or s. 487 of the Criminal Code. Where, however, the warrant is obtained under s. 487, the police must execute it in accordance with the Criminal Code and cannot resort to the special provisions in this Act: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 (9:0).

Any factual submissions which are made orally by the police officer supplementing the written information should be made under oath and a record kept of them. The material to obtain the warrant must be current, and appear to be current, and should be sufficient to enable the justice to form an opinion using independent judgment as to whether reasonable grounds exist for believing that there is a narcotic on the premises. The police officer is not required to disclose the identity of a confidential informant: *Re Dodge and The Queen* (1984), 16 C.C.C. (3d) 385, 50 Nfld. & P.E.I.R. 349 (Nfld. S.C.T.D.).

The validity of a search warrant may properly be raised at trial even if no application has been made prior to trial to have the warrant set aside. In fact, it is preferable that the validity of the warrant be determined by the trial judge where the object of the attack on the warrant is to exclude evidence obtained through its execution by reason of a violation of s. 8 of the Charter, since it is the trial judge alone who has jurisdiction under s. 24(2) to exclude evidence: *R. v. Zevallos* (1987), 37 C.C.C. (3d) 79, 59 C.R. (3d) 153 (Ont. C.A.); *R. v. Tanner* (1989), 46 C.C.C. (3d) 513 (Alta. C.A.); *R. v. Jamieson* (1989), 48 C.C.C. (3d) 287 (N.S.C.A.). *Contra: R. v. Komadowski* (1986), 27 C.C.C. (3d) 319, [1986] 3 W.W.R. 657 (Man. C.A.).

Moreover, the trial judge has jurisdiction to set aside a sealing order, made by the justice at the time the warrant was issued, barring access to the information in support of the warrant: *R. v. Tanner, supra*.

Lack of a requirement that the seizing officer make a return to the justice of the peace does not render this provision unconstitutional: *R. v. MacFarlane* (1992), 76 C.C.C. (3d) 54 (P.E.I.S.C. App. Div.).

### **13. [Repealed. R.S.C. 1985, c. 27 (1st Supp.), s. 200.]**

#### **Transitional provision**

**Note:** Section 208 of the Criminal Law Amendment Act, R.S.C. 1985, c. 27 (1st Supp.) provides as follows:

"208. Nothing in sections 190, 195, 199 and 200 of this Act shall be construed as rendering invalid or inadmissible in any proceedings any evidence obtained by the exercise of a writ of assistance prior to the coming into force of those sections."

#### **POWERS OF PEACE OFFICER.**

**14. For the purpose of exercising authority pursuant to any of sections 10 to 13, a peace officer may, with such assistance as that officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing. R.S., c. N-1, s. 10.**

## ANNOTATIONS

Where there is a risk of loss or destruction of evidence so that rapid action is required or where there is a real threat of violent behaviour whether directed at the police or third parties then the police may be justified in using special procedures in executing the warrant. However, the consideration of the possibility of violence must be carefully limited and should not amount to a *carte blanche* for the police to ignore completely all restrictions on police behaviour. The greater the departure from the standards of behaviour required by the common law and the Charter of Rights and Freedoms, then the heavier the onus on the police to show why they thought it necessary to use force in the execution of the warrant: *R. v. Genest* (1989), 45 C.C.C. (3d) 385, 91 N.R. 161 (S.C.C.) (7:0).

The special search provisions in this Act are designed to be a comprehensive set of rules, replacing older common law rules relating to the execution of search warrants. Thus this section permits the officer to break open any door for the purpose of executing the search warrant and does not impose any requirement of announcement prior to entry. While s. 8 of the Charter of Rights and Freedoms imposes limits on the manner in which a search warrant is executed and may in some circumstances require that there be prior announcement, Parliament, in enacting these special entry and search provisions, was well aware of the need for unannounced entry in order to allow the police to surprise the occupants of a dwelling house whom they had reason to believe were dealing in narcotics. In each case the issue will be whether the search was carried out in a reasonable manner; whether it was necessary to resort to the statutory power to force entry. Thus in this case the police had information from a reliable informer that the premises were being used as a retail outlet for cocaine and that the front door was probably barred. In the circumstances they were entitled to force entry without prior announcement: *R. v. Gimson* (1990), 54 C.C.C. (3d) 253, 77 C.R. (3d) 307, 37 O.A.C. 243 (C.A.).

This section authorizes the use of force to execute the warrant and it was not unreasonable for the officers to force entry into a residence which they had reasonable grounds to believe contained a narcotic. There was no requirement that the officers delay execution until the occupants returned: *R. v. Grenier* (1991), 65 C.C.C. (3d) 76 (Que. C.A.).

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APPLICATION FOR RESTORATION / Order of immediate restoration / Order of restoration at specified time / Where application not made or order refused.

15. (1) Where a narcotic or other thing has been seized under section 11, any person may, within two months after the date of the seizure, on prior notification being given to the Crown in the manner prescribed by the regulations, apply to a provincial court judge within whose territorial jurisdiction the seizure was made for an order of restoration under this section.

(2) Subject to section 16, where on the hearing of an application made under subsection (1) the provincial court judge is satisfied that the applicant is entitled to possession of the narcotic or other thing seized and that the thing seized is not or will not be required as evidence in any proceedings in respect of an offence under this Act, the provincial court judge shall order that the thing seized be restored forthwith to the applicant.

(3) Where on the hearing of an application made under subsection (1) the provincial court judge is satisfied that the applicant is entitled to possession of the thing seized but is not satisfied that the thing is not or will not be required as evidence in any proceedings in respect of an offence under this Act, the provincial court judge shall order that the thing seized be restored to the applicant.

(a) on the expiration of four months after the date of the seizure, if no proceedings in respect of an offence under this Act have been commenced before that time;  
or

(b) on the final conclusion of any such proceedings in any other case.

(4) Where no application has been made for the return of any narcotic or other thing seized under section 11 within two months after the date of the seizure, or an application therefor has been made but, on the hearing of the application, no order of restoration is made, the thing seized shall be delivered

- (a) in the case of a narcotic, to the Minister, who may make such disposition thereof as the Minister thinks fit; and
- (b) in the case of any other thing,
  - (i) where the prosecution of the offence in respect of which the thing was seized was commenced at the instance of the government of a province and conducted by or on behalf of that government, to the Attorney General or Solicitor General of that province, and
  - (ii) in any other case, to the Minister of Supply and Services, who may dispose of the thing in accordance with the law. R.S., c. N-1, s. 10; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1); 1993, c. 37, s. 25.

#### ANNOTATIONS

**Subsec. (1)** – This subsection ousts the inherent jurisdiction of a Court over its own exhibits and must be followed by a person desiring restoration of a seized item: *Re Gronsksis and The Queen* (1974), 21 C.C.C. (2d) 292 (Ont. Dist. Ct.). *Contra: Re Graf, Grainger and Ditson and The Queen* (1975), 27 C.C.C. (2d) 151 (B.C. Prov. Ct.).

Failure to comply with this subsection will not preclude the accused proceeding by civil action for recovery of his property: *Smith v. The Queen* (1975), 27 C.C.C. (2d) 252, 67 D.L.R. (3d) 177 (Fed. Ct. T.D.).

However, where an application for restoration has been brought under this subsection and dismissed by the judge then the doctrine of *res judicata* bars recovery of the money in a subsequent civil action brought by the owner. The issue of the owner's right to possession of the money has been conclusively determined in the proceedings under this Act: *Aimonetti v. The Queen* (1985), 19 C.C.C. (3d) 481, [1985] 5 W.W.R. 309 (Fed. C.A.).

These provisions do not apply where the original arrest and search was for a Criminal Code offence with the accused being charged with offences under this Act only after further investigation. Where the accused is acquitted of the narcotic offences and the Crown adduces no evidence that the money found was connected to narcotics, the Court should exercise its inherent jurisdiction over exhibits and order the return of the money: *R. v. Newstead* (1981), 59 C.C.C. (2d) 510, 21 C.R. (3d) 369 (B.C. Co. Ct.).

However, when the original seizure is pursuant to the provisions of this Act, the procedure in this section must be complied with or an application made to the Federal Court even if the owner is convicted of a Criminal Code offence: *Re McIntyre and The Queen* (1983), 6 C.C.C. (3d) 178, 47 N.B.R. (2d) 104 (Q.B.).

Strict adherence to this section and the regulations thereunder is necessary for jurisdiction to hear the application: *Re Regina and Music Explosions Ltd.* (1973), 29 C.C.C. (2d) 533 (Man. Q.B.), and *Re A.-G. Can. and Rochon* (1976), 31 C.C.C. (2d) 240 (Que. Sup. Ct.).

**Subsec. (2)** – On an application under this subsection the applicant, in order to show entitlement within the meaning of the subsection, must show on a balance of probabilities that he was in possession of the property at the time of the seizure under s. 11. It is then for the Crown to demonstrate that the applicant is not entitled to the items seized by reason of the rule of public policy that a person should not be allowed to profit from his own wrong-doing. In the context of this section that rule operates only where there is turpitude. Since this legislation is penal in nature the burden of proof on the Crown is proof beyond a reasonable doubt. This requires that there has been a prior conviction of the owner. However, the rule of public policy has been codified by s. 16(1) in the context of narcotics convictions by the requirement that the things seized were “used in any manner” in connection with a narcotics offence of which a person has been convicted. In the absence of a specific finding at the antecedent criminal proceedings under this Act of



the requisite tainted convictions, the Crown may fill the evidentiary gap by proving taint on the reasonable doubt standard at the restoration hearing. Where there is no antecedent conviction and no basis for laying a narcotics related charge, proceedings should be initiated under s. 354 of the Criminal Code. The Crown may also defeat entitlement by proving that entitlement would be unlawful. In either case, however, the fact of a previous conviction is a condition precedent. Finally, where the rule of public policy legitimately applies the status of an applicant as the innocent representative of a convicted but deceased owner would not entitle the applicant to restoration. It follows, however, where the moneys were seized under s. 11 from a person who is now deceased, prior to such person's conviction for the narcotics charges which were laid against him and which have since been discontinued, then the administrator of the deceased's estate, who was innocent of any wrong-doing, is entitled to restoration of the moneys. The administrator had status to continue the application, the moneys were not required as evidence and there was sufficient evidence of the deceased's possession to meet the burden of proof of entitlement. The Crown was unable to defeat entitlement in view of the lack of the fact of a previous conviction: *Fleming v. The Queen* (1986), 25 C.C.C. (3d) 297, 51 C.R. (3d) 337, [1986] 1 S.C.R. 415 (7:0).

*Certiorari* lies at the instance of the Crown to quash an order made under this subsection not only for jurisdictional errors but errors of law on the face of the record. The improper limiting of cross-examination by Crown counsel of the accused as to the source of the funds is grounds for quashing the order: *Re R. and Blaney* (1979), 50 C.C.C. (2d) 395 (Ont. H.C.J.).

While the Judge may proceed either by way of affidavit or *viva voce* evidence, if by way of affidavit the Crown is entitled to cross-examine on the affidavits: *Re Senechal and The Queen* (1980), 52 C.C.C. (2d) 313, 18 C.R. (3d) 93 (Ont. H.C.J.).

#### FORFEITURE ON CONVICTION / *Idem* / Forfeiture of conveyance on application.

16. (1) Where a person has been convicted of an offence under section 3, 4 or 5, any narcotic seized under section 11 by means of or in respect of which the offence was committed, and any hypodermic needle, syringe, capping machine or other apparatus so seized that was used in any manner in connection with the offence, is forfeited to Her Majesty and shall be disposed of as the Minister directs.

(1.1) Where a person has been convicted of an offence under section 3, 4 or 5, any money seized under section 11 that was used for the purchase of the narcotic by means of or in respect of which the offence was committed is,

- (a) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, forfeited to Her Majesty in right of that province and shall be disposed of by the Attorney General or the Solicitor General of the province in accordance with the law; and
- (b) in any other case, forfeited to Her Majesty in right of Canada and shall be disposed of by the Minister of Supply and Services in accordance with the law.

(2) Where a person has been convicted of an offence under section 4 or 5, the court may, on application by counsel for the Crown, order that any conveyance seized under section 11 that has been proved to have been used in any manner in connection with the offence be forfeited

- (a) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, to Her Majesty in right of that province, and
- (b) in any other case, to Her Majesty in right of Canada,

and, on the making of that order, the conveyance, except as provided in sections 17 to 19, shall, on the expiration of thirty days after the date of the forfeiture, be dis-

posed of by the Attorney General or the Solicitor General of the province, or by the Minister of Supply and Services, as the case may be, in accordance with the law. R.S., c. N-1, s. 10; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1); 1993, c. 37, s. 26.

## ANNOTATIONS

**Subsec. (2)** – Although an order of restoration under s. 15(2) is subject to this subsection once the accused has satisfied the requirements in s. 15(2) the Judge is required to restore the property to him. The forfeiture provision of this subsection simply provides that the Court may forfeit the conveyance where the accused is convicted of an offence; it does not say that the conveyance shall have remained seized in the interim or that no order of restoration shall have been made. An order of restoration is not necessarily inconsistent with an order of forfeiture and possession by the Crown of the conveyance is not a prerequisite to an application for an order of forfeiture: *Re Hicks and The Queen* (1977), 36 C.C.C. (2d) 91, 38 C.R.N.S. 223 (Man. C.A.).

The Judge's refusal to make an order under this subsection forfeiting a motor vehicle is not appealable by the Crown on a sentence appeal: *R. v. Pope* (1980), 52 C.C.C. (2d) 538 (B.C.C.A.).

The forfeiture of an accused's vehicle after he has already been convicted and sentenced to imprisonment for a term not exceeding an offence under this Act does not offend the double jeopardy provision in s. 11(h) of the Charter of Rights and Freedoms: *Re R. and Green* (1983), 5 C.C.C. (3d) 95, 148 D.L.R. (3d) 767 (Ont. H.C.J.).

Section 16(2) does not apply to persons convicted of conspiracy to import or traffic in narcotics under ss. 4 or 5: *R. v. Sevillano* (1995), 104 C.C.C. (3d) 189, 23 O.R. (3d) 95, 82 O.A.C. 35 (C.A.).

## APPLICATION BY PERSON CLAIMING INTEREST IN FORFEITED CONVEYANCE / Date of hearing / Notice to Minister or Attorney General of a province / Order by judge / Appeal.

17. (1) Where any conveyance is forfeited to Her Majesty under subsection 6(2), any person (other than a person convicted of the offence that resulted in the forfeiture or a person in whose possession the conveyance was when seized) who claims an interest therein as owner, mortgagee, lienholder or holder of any like interest may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4).

(2) The judge to whom an application is made under subsection (1) shall fix a day, not less than thirty days after the date of filing of the application, for the hearing thereof.

(3) The applicant for an order under subsection (4) shall, at least fifteen days before the day fixed for the hearing, serve a notice of the application and of the hearing on

(a) where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General or the Solicitor General of the province, as the case may be; and

(b) in any other case, the Minister of Supply and Services.

(4) Where, on the hearing of an application made under subsection (1), it is made to appear to the satisfaction of the judge

(a) that the applicant is innocent of any complicity in the offence that resulted in the forfeiture and of any collusion in relation to that offence with the person who was convicted thereof, and

(b) that the applicant exercised, with respect to the person permitted to obtain possession of the conveyance, all reasonable care in order to be satisfied that the conveyance was not likely to be used in connection with the commission of an unlawful act or, in the case of a mortgagee or lienholder, that the applicant

exercised, with respect to the mortgagor or lien-giver, all reasonable care in order to be so satisfied,

the applicant is entitled to an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and extent of the interest.

(5) The applicant, the Attorney General or the Solicitor General of the province or the Minister of Supply and Services, as the case may be, may appeal to the court of appeal from an order made under subsection (4) and the appeal shall be asserted, heard and decided according to the ordinary procedure governing appeals to the court of appeal from orders or judgments of a judge. R.S., c. N-1, s. 11; 1993, c. 37, s. 27.

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**DEFINITIONS / "court of appeal" / judge".**

18. In section 17,

"court of appeal" means, in the province in which an order under section 17 is made, the court of appeal for that province as defined in the definition "court of appeal" in section 2 of the *Criminal Code*;

"judge" means

- (a) in the Province of Ontario, a judge of the Ontario Court (General Division),
- (b) in the Province of Quebec, a judge of the Superior Court for the district in which the conveyance, in respect of which an application for an order under section 17 is made, was seized,
- (c) [*Repealed. 1992, c. 51, s. 59(1).*]
- (d) in the Provinces of New Brunswick, Manitoba, Saskatchewan and Alberta, a judge of the Court of Queen's Bench,
- (e) in the Provinces of Nova Scotia and British Columbia, the Yukon Territory and the Northwest Territories, a judge of the Supreme Court, and

**NOTE:** Paragraph (e) re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (e) *in the Provinces of Nova Scotia and British Columbia, the Yukon Territory, the Northwest Territories and Nunavut, a judge of the Supreme Court, and*
- (f) *in the Provinces of Prince Edward Island and Newfoundland, a judge of the Trial Division of the Supreme Court. R.S., c. N-1, s. 11; 1972, c. 17, s. 2; 1974-75-76, c. 48, s. 25; 1978-79, c. 11, s. 10; R.S.C. 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 16, s. 18; 1990, c. 17, s. 36; 1992, c. 1, s. 98; 1992, c. 51, s. 59.*

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**DIRECTION FOR RESTORATION OR PAYMENT.**

19. The Minister of Supply and Services or the Attorney General or the Solicitor General of the province, as the case may be, shall, on application made to that Minister or to the Attorney General or the Solicitor General of the province by any person who has obtained a final order under section 17, direct that the conveyance to which the interest of the applicant relates be returned to the applicant or that an amount equal to the value of that interest, as declared in the order, be paid to the applicant. R.S., c. N-1, s. 11; 1993, c. 37, s. 28.

**ANNOTATIONS**

The Judge who made a forfeiture order under this section has jurisdiction to subsequently set the order aside: *Re R. and Breckner et al.*; *Re R. and Wright et al.* (1983), 6 C.C.C. (3d) 42 (B.C.C.A.).



## Proceeds of Crime

### POSSESSION OF PROPERTY OBTAINED BY CERTAIN OFFENCES / Punishment.

19.1 (1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under section 4, 5 or 6; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 4, 5 or 6.

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the subject-matter of the offence exceeds one thousand dollars; or
- (b) is guilty
  - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
  - (ii) of an offence punishable on summary conviction, where the value of the subject-matter of the offence does not exceed one thousand dollars. R.S.C. 1985, c. 42 (4th Supp.), s. 12.

### ANNOTATIONS

In *R. v. Tortone*, [1993] 2 S.C.R. 973, 84 C.C.C. (3d) 15, 156 N.R. 241 the accused was charged in several counts with possession of certain specified amounts and then in a "global" count covering all of the moneys. Where the Crown had proven beyond a reasonable doubt that at least one of those transactions involved the proceeds of narcotic trafficking, it was open to the judge to convict on the global count although the judge could not identify which of the transactions particularized in the various other counts involved proceeds of narcotic trafficking.

An accused may be convicted of this offence and the offence of trafficking in narcotics although both offences arise out of the same transaction: *R. v. Khouri* (1995), 97 C.C.C. (3d) 223, 95 W.A.C. 32, 131 Sask. R. 32 (C.A.); *R. v. Falahatchian* (1995), 99 C.C.C. (3d) 420, 83 O.A.C. 55 (C.A.).

### LAUNDERING PROCEEDS OF CERTAIN OFFENCES / Punishment.

19.2 (1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under section 4, 5 or 6; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence under section 4, 5 or 6.

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 42 (4th Supp.), s. 12.

### ANNOTATIONS

**Mens Rea** – The Crown must show that the accused has specific knowledge that the ori-

gin of the property is an offence under ss. 4, 5, or 6 of the Act. Wilful "ignorance" or "blindness" equals actual knowledge where the accused has suspicions as to the origin and refuses to eliminate his suspicions, preferring to remain in ignorance: *R. v. Hayes* (1995), 104 C.C.C. (3d) 316 (Que. C.A.).

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**PART XII.2 OF THE CRIMINAL CODE APPLICABLE / Idem.**

**19.3** (1) Sections 462.3 and 462.32 to 462.5 of the *Criminal Code* apply, with such modifications as the circumstances require, in respect of proceedings for

- (a) an offence under section 4, 5, 6, 19.1 or 19.2; or
- (b) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a).

(2) For the purposes of subsection (1),

- (a) a reference in section 462.37 or 462.38 or subsection 462.41(2) of the *Criminal Code* to an enterprise crime offence shall be deemed to be a reference to an offence mentioned in paragraph (1)(a) or (b); and
- (b) a reference, in relation to the manner in which forfeited property is to be disposed of, in subsection 462.37(1) or 462.38(2), paragraph 462.43(c) or section 462.5 of the *Criminal Code*, to the Attorney General shall be deemed to be a reference to
  - (i) where the prosecution of the offence in respect of which the thing was forfeited was commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General or Solicitor General of that province; and
  - (ii) in any other case, the Minister of Supply and Services. R.S.C. 1985, c. 42 (4th Supp.), s. 12.

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## General

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### REGULATIONS.

**20.** The Governor in Council may make regulations

- (a) providing for the issue of licences for the importation, export, sale, manufacture, production or distribution of narcotics and for the cultivation of opium poppy or marihuana;
- (b) prescribing the form, duration and terms and conditions of any licence described in paragraph (a) and the fees payable therefor, and providing for the cancellation and suspension of licences described in that paragraph;
- (c) authorizing the sale or possession of or other dealing in narcotics and prescribing the circumstances and conditions under which, and the persons by whom, narcotics may be sold, had in possession or otherwise dealt in;
- (d) requiring physicians, dentists, veterinarians, pharmacists and other persons who deal in narcotics as authorized by this Act or the regulations to keep records and make returns;
- (e) authorizing the communication of any information obtained under this Act or the regulations to provincial professional licensing authorities;
- (f) prescribing the punishment by a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months, or both, to be imposed on summary conviction for breach of any regulation; and
- (g) generally, for carrying out the purposes and provisions of this Act. R.S., c. N-1, s. 12.

**Regulations:**

C.R.C. 1978, c. 1041 as amended to December 31, 1994.  
SOR/78-154, *Can. Gaz. Pt. II* 1978, *Sp. Issue*, Vol. 1, p. 288.  
SOR/80-547, *Can. Gaz. Pt. II*, 23/7/80, p. 2530.  
SOR/81-22, *Can. Gaz. Pt. II*, 14/1/81, p. 53.  
SOR/81-361, *Can. Gaz. Pt. II*, 27/5/81, p. 1398.  
SOR/82-121, *Can. Gaz. Pt. II*, 27/1/82, p. 358.  
SOR/82-1073, *Can. Gaz. Pt. II*, 3/12/82, p. 4008.  
SOR/85-588, *Can. Gaz. Pt. II*, 21/6/85, p. 2943.  
SOR/85-930, *Can. Gaz. Pt. II*, 19/9/85, p. 4108.  
SOR/86-173, *Can. Gaz. Pt. II*, 30/1/86, p. 596.  
SOR/86-882, *Can. Gaz. Pt. II*, 14/8/86, p. 3742.  
SOR/88-279, *Can. Gaz. Pt. II*, 12/5/88, p. 2536.  
SOR/90-189, *Can. Gaz. Pt. II*, 22/3/90, p. 1173.

**DESIGNATION OF ANALYST.**

21. The Minister may designate any person as an analyst for the purpose of this Act. R.S., c. N-1, s. 13; 1984, c. 40, s. 45.

**AMENDMENT OF SCHEDULE.**

22. The Governor in Council may amend the schedule by adding thereto or deleting therefrom any substance, the inclusion or exclusion of which, as the case may be, is deemed necessary by the Governor in Council in the public interest. R.S., c. N-1, s. 14.

**Part II / PREVENTIVE DETENTION AND CUSTODY FOR TREATMENT**

**Note:** Pursuant to section 28, this Part of the Act is expressed to come into force on proclamation. At the time of going to press no proclamation has yet been made.

**SENTENCE OF PREVENTIVE DETENTION.**

23. Where a person is convicted of an offence under section 4 or 5, the court shall, if that person

(a) has been previously convicted on at least one separate and independent occasion of an offence under section 4 or 5 of this Act or an offence under subsection 4(3) of the *Opium and Narcotic Drug Act*, chapter 201 of the *Revised Statutes of Canada*, 1952, or

(b) has been previously sentenced to preventive detention under this section, impose a sentence of preventive detention in a penitentiary for an indeterminate period, in lieu of any other sentence that might be imposed for the offence of which that person was convicted. R.S., c. N-1, s. 15.

**REMAND FOR OBSERVATION AND EXAMINATION.**

24. Where any person is charged with an offence under section 3, 4 or 5, the court or any judge having jurisdiction to try the offence may, on application by counsel for the Crown, or on application by the person charged with the offence or by counsel for that person, either before or after that person is committed for trial and before any sentence that might be imposed for the offence is passed, remand that person, by order in writing, to such custody as the court directs for observation and examination for a period not exceeding seven days. R.S., c. N-1, s. 16.



CONVICTION AFTER REMAND / Sentence to custody for treatment / Appeal / Application of Criminal Code.

25. (1) *Where a person who has been remanded to custody for observation and examination pursuant to section 24 is convicted of the offence in respect of which the person was remanded, the court shall, before passing sentence, consider the evidence arising out of the observation and examination, including the evidence of at least one duly qualified medical practitioner and such other evidence as may be adduced.*

(2) *Where the court is satisfied, on consideration of such evidence under subsection (1), that the convicted person is a narcotic addict, the court shall, notwithstanding anything in section 23, sentence that person to custody for treatment for an indeterminate period in lieu of any other sentence that might be imposed for the offence of which that person was convicted.*

(3) *A person who is sentenced to custody for treatment for an indeterminate period under this section may appeal to the court of appeal against the sentence on any ground of law or fact or mixed law and fact.*

(4) *The provisions of section 759 of the Criminal Code with respect to appeals against a sentence of detention in a penitentiary for an indeterminate period apply, with such modifications as the circumstances require, to an appeal under this section. R.S., c. N-1, s. 17.*

CONFINEMENT FOR TREATMENT / Application of Corrections and Conditional Release Act / Expiration of sentence.

26. (1) *Where a person is sentenced to custody for treatment for an indeterminate period, the person shall be confined for treatment in an institution maintained and operated pursuant to the Corrections and Conditional Release Act.*

(2) *A person who is sentenced to custody for treatment for an indeterminate period is subject to the Corrections and Conditional Release Act and, for all purposes of that Act, shall be deemed, during the period of confinement of that person, to be an inmate within the meaning of that Act, and on release under certificate of the Parole Board, to be a paroled inmate within the meaning of that Act.*

(3) *A sentence of custody for treatment for an indeterminate period, where the person so sentenced has not, at any time before the conviction resulting in the sentence, been convicted of an offence under this Act or the Opium and Narcotic Drug Act, chapter 201 of the Revised Statutes of Canada, 1952, expires at the end of such period, not exceeding ten years after the date of the person's release under certificate of the Parole Board, as may be fixed by the Parole Board, unless before that time the person's parole is forfeited or revoked. R.S., c. N-1, s. 18; 1992, c. 20, ss. 215, 216.*

AGREEMENT WITH PROVINCE / Idem.

27. (1) *Where the legislature of a province enacts legislation that is designed to provide custody for treatment for persons who, although not charged with the offence of possession of a narcotic, are narcotic addicts, the Minister may enter into an agreement with the province, subject to the approval of the Governor in Council, for the confinement and treatment of those persons in institutions maintained and operated pursuant to the Corrections and Conditional Release Act and for the release and supervision of those persons pursuant to the Corrections and Conditional Release Act.*

(2) *A narcotic addict who is committed to custody for treatment pursuant to an Act of the legislature of a province shall be deemed, for the purposes of the Corrections and Conditional Release Act, to have been sentenced to custody for treatment under this Act. R.S., c. N-1, s. 19; 1992, c. 20, ss. 215, 216.*

## ANNOTATIONS

The treatment programme for persons addicted to heroin, opium and methadone established by the British Columbia Legislature in the Heroin Treatment Act, 1978 and which provides for compulsory treatment for a period of three years including possible detention for six months or more is *intra vires* the province. The problem of heroin addiction is largely a local or provincial problem in British Columbia and is distinct from the illegal trade in drugs which is a matter over which Parliament has jurisdiction. The medical treatment of drug addiction is a *bona fide* concern of the province under its general jurisdiction with respect to public health. As this Part of the Narcotic Control Act has not been proclaimed no question of paramountcy arose: *Schneider v. The Queen* (1982), 68 C.C.C. (2d) 449, 139 D.L.R. (3d) 417, [1982] 6 W.W.R. 673, [1982] 2 S.C.R. 112 (9:0).

## Coming into Force

### COMING INTO FORCE.

28. Part II or any provision thereof shall come into force on a day or days to be fixed by proclamation of the Governor in Council.

## SCHEDULE

As amended to September 30, 1993

1. Opium Poppy (*Papaver somniferum*) its preparations, derivatives, alkaloids and salts, including:

- (1) Opium,
- (2) Codeine (Methylmorphine),
- (3) Morphine,
- (4) Thebaine,

and their preparations, derivatives, and salts, including:

- (5) Acetorphine,
- (6) Acetyldihydrocodeine,
- (7) Benzylmorphine,
- (8) Codoxime,
- (9) Desomorphine (dihydrodeoxymorphine),
- (10) Diacetylmorphine (heroin),
- (11) Dihydrocodeine,
- (12) Dihydromorphine,
- (13) Ethylmorphine,
- (14) Etorphine,
- (15) Hydrocodone (dihydrocodeinone),
- (16) Hydromorphone (dihydromorphinone),
- (17) Hydromorphenol (dihydro-14-hydroxymorphine),
- (18) Methyldesorphine ( $\Delta^6$ -deoxy-6-methylmorphine),
- (19) Methyldihydromorphine (dihydro-6-methylmorphine),
- (20) Metopon (dihydromethylmorphinone),
- (21) Morphine-N-oxide (morphine-N-oxide),
- (22) Myrophine (benzylmorphine myristate),
- (23) Nalorphine (N-allylnormorphine),
- (24) Nicocodine (6-nicotinylcodeine),
- (25) Nicomorphine (dinicotinylmorphine),

- (26) Norcodeine,
- (27) Normorphine,
- (28) Oxycodone (dihydrohydroxycodone),
- (29) Oxymorphone (dihydrohydroxymorphine),
- (30) Pholcodine ( $\beta$ -4-morpholinoethylmorphine), and
- (31) Thebacon (acetyldihydrocodeinone),

but not including:

- (32) Apomorphine,
- (33) Cyprenorphine,
- (34) Naloxone,
- (35) Narcotine,
- (36) Papaverine, and
- (37) Poppy seed.

2. Coca (*Erythroxylon*), its preparations, derivatives, alkaloids and salts, including:

- (1) Coca leaves,
- (2) Cocaine, and
- (3) Ecgonine (3-hydroxy-2-tropane carboxylic acid).

3. *Cannabis sativa*, its preparations, derivatives and similar synthetic preparations, including:

- (1) Cannabis resin,
- (2) Cannabis (marihuana),
- (3) Cannabidiol,
- (4) Cannabinol (3-n-amyl-6,6,9-trimethyl-6-dibenzopyran-1-ol),
- (4.1) Nabilone (( $\pm$ ) - trans - 3 (1,1 - dimethylheptyl) - 6, 6a, 7, 8, 10, 10a-hexahydro-1-hydroxy-6,6-dimethyl-9h-dibenzo[b,d] pyran-9-one),
- (5) Pyrahexyl (3-n-hexyl-6,6,9-trimethyl-7,8,9,10-tetrahydro-6dibenzopyran-1-ol), and
- (6) Tetrahydrocannabinol.

but not including:

- (7) non-viable *Cannabis* seed.

4. Phenylpiperidines, their preparations, intermediates, derivatives and salts, including:

- (1) Allyprodine (3-allyl-1-methyl-4-phenyl-4-piperidyl propionate),
- (2) Alphameprodine ( $\alpha$ -3-ethyl-1-methyl-4-phenyl-4-piperidyl propionate),
- (3) Alphaprodine ( $\alpha$ -1,3-dimethyl-4-phenyl-4-piperidyl propionate),
- (4) Anileridine (ethyl 1-[2-(p-aminophenyl) ethyl]-4-phenylpiperidine-4-carboxylate),
- (5) Betameprodine ( $\beta$ -3-ethyl-1-methyl-4-phenyl-4-piperidyl propionate),
- (6) Betaprodine ( $\beta$ -1,3-dimethyl-4-phenyl-4-piperidyl propionate),
- (7) Benzethidine (ethyl 1-(2-benzyloxyethyl)-4-phenylpiperidine-4-carboxylate),
- (8) Diphenoxylate (ethyl 1-(3-cyano-3,3-diphenylpropyl)-4-phenylpiperidine-4-carboxylate),
- (9) Etoxeridine (ethyl 1-[2-(2-hydroxyethoxy) ethyl]-4-phenylpiperidine-4-carboxylate),
- (10) Furethidine (ethyl 1-(2-tetrahydrofurfuryloxyethyl)-4-phenylpiperidine-4-carboxylate),
- (11) Hydroxypethidine (ethyl 4-(m-hydroxyphenyl)-1-methyl-4-phenylpiperidine-4-carboxylate),
- (12) Ketobemidone (1-[4-(m-hydroxyphenyl)-1-methyl-4-piperidyl]-1-propanone),
- (13) Methylphenylisonipecotonitrile (4-cyano-1-methyl-4-phenylpiperidine),
- (14) Morpheridine (ethyl 1-(2-morpholinoethyl)-4-phenylpiperidine-4-carboxylate),
- (15) Norpethidine (ethyl 4-phenylpiperidine-4-carboxylate),



- (16) Pethidine (ethyl 1-methyl-4-phenylpiperidine-4-carboxylate),  
(17) Phenoperidine (ethyl 1-(3-hydroxy-3-phenylpropyl)-4-phenylpiperidine-4-carboxylate),  
(18) Piminodine (ethyl 1-[3-(phenylamino)propyl]-4-phenylpiperidine-4-carboxylate),  
(19) Properidine (isopropyl 1-methyl-4-phenylpiperidine-4-carboxylate), and  
(20) Trimeperidine (1,2-5-trimethyl-4-phenyl-4-piperidyl propionate),  
but not including:  
(21) Carbamethidine (ethyl 1-(2-carbamylethyl)-4-phenylpiperidine-4-carboxylate),  
and  
(22) Oxpheneridine (ethyl 1-(2-hydroxy-2-phenylethyl)-4-phenylpiperidine-4-carboxylate).
5. Phenazepines, their preparations, derivatives and salts, including:  
(1) Proheptazine (hexahydro-1,3-dimethyl-4-phenyl-4-azepinyl propionate),  
but not including:  
(2) Ethoheptazine (ethyl hexahydro-1-methyl-4-phenylazepine-4-carboxylate),  
(3) Metethoheptazine (ethyl hexahydro-1,3-dimethyl-4-phenylazepine-4-carboxylate),  
and  
(4) Metheptazine (ethyl hexahydro-1,2-dimethyl-4-phenylazepine-4-carboxylate).
6. Amidones, their preparations, intermediates, derivatives and salts, including:  
(1) Dimethylaminodiphenylbutanonitrile (4-cyano-2-dimethylamino-4,4-diphenyl butane),  
(2) Dipipanone (4,4-diphenyl-6-piperidino-3-heptanone),  
(3) Isomethadone (6-dimethylamino-5-methyl-4,4-diphenyl-3-hexanone),  
(4) Methadone (6-dimethylamino-4,4-diphenyl-3-heptanone),  
(5) Normethadone (6-dimethylamino-4,4-diphenyl-3-hexanone), and  
(6) Phenadoxone (6-morpholino-4,4-diphenyl-3-heptanone).
7. Methadols, their preparations, derivatives and salts, including:  
(1) Acetylmethadol (6-dimethylamino-4,4-diphenyl-3-heptanyl acetate),  
(2) Alphacetylmethadol ( $\alpha$ -6-dimethylamino-4,4-diphenyl-3-heptanyl acetate),  
(3) Alphamethadol ( $\alpha$ -6-dimethylamino-4,4-diphenyl-3-heptanol),  
(4) Betacetylmethadol ( $\beta$ -6-dimethylamino-4,4-diphenyl-3-heptanyl acetate),  
(5) Betamethadol ( $\beta$ -6-dimethylamino-4,4-diphenyl-3-heptanol),  
(6) Dimepheptanol (6-dimethylamino-4,4-diphenyl-3-heptanol), and  
(7) Noracymethadol ( $\alpha$ -6-methylamino-4,4-diphenyl-3-heptanyl acetate).
8. Phenalkoxams, their preparations, derivatives and salts, including:  
(1) Dimenoxadol (dimethylaminoethyl 1-ethoxy-1,1-diphenylacetate),  
(2) Dioxaphetylbutyrate (ethyl 2,2-diphenyl-4-morpholino butyrate), and  
(3) Dextropropoxyphene ([S-(R\*,S\*)]- $\alpha$ -[2-(dimethylamino)-1methylethyl]- $\alpha$ -phenyl-benzeneethanol, propanoate ester).
9. Thiambutenes, their preparations, derivatives and salts, including:  
(1) Diethylthiambutene (N,N-diethyl-1-methyl-3,3-di-2-thienylallylamine),  
(2) Dimethylthiambutene (N,N,1-trimethyl-3,3-di-2-thienylallylamine), and  
(3) Ethylmethylthiambutene (N-ethyl-N,1-dimethyl-3,3-di-2-thienylallylamine).
10. Moramides, their preparations, intermediates, derivatives and salts, including:  
(1) Dextromoramide (d-1-(3-methyl-4-morpholino-2,2-diphenylbutyryl) pyrrolidine),  
(2) Diphenylmorpholinoisovaleric acid (2-methyl-3-morpholino-1,1-diphenylpropionic acid),

- (3) Levomoramide (*l*-1-(3-methyl-4-morpholino-2,2-diphenylbutyryl) pyrrolidine), and
  - (4) Racemoramide (*d,l*-1-(3-methyl-4-morpholino-2,2-diphenylbutyryl) pyrrolidine).
11. Morphinans, their preparations, derivatives and salts, including:
- (1) Levomethorphan (*l*-1,2,3,9,10,10a-hexahydro-6-methoxy-11-methyl-4H-10,4a-iminoethanophenanthrene),
  - (2) Levorphanol (*l*-1,2,3,9,10,10a-hexahydro-11-methyl-4H-10, 4a-iminoethanophenanthren-6-ol),
  - (3) Levophenacylmorphan (*l*-1,2,3,9,10,10a-hexahydro-11-phenacyl-4H-10,4a-iminoethanophenanthren-6-ol),
  - (4) Norlevorphanol (*l*-1,2,3,9,10,10a-hexahydro-4H-10,4a-iminoethanophenanthren-6-ol),
  - (5) Phenomorphan (*d,l*-1,2,3,9,10,10a-hexahydro-11-phenethyl-4H-10,4a-iminoethanophenanthren-6-ol),
  - (6) Racemethorphan (*d,l*-1,2,3,9,10,10a-hexahydro-6-methoxy-11-methyl-4H-10,4a-iminoethanophenanthrene), and
  - (7) Racemorphan (*d,l*-1,2,3,9,10,10a-hexahydro-11-methyl-4H-10,4a-iminoethanophenanthren-6-ol),
- but not including:
- (8) Dextromethorphan (*d*-1,2,3,9,10,10a-hexahydro-6-methoxy-11-methyl-4H-10,4a-iminoethanophenanthrene),
  - (9) Dextrorphan (*d*-1,2,3,9,10,10a-hexahydro-11-methyl-4H-10, 4a-iminoethanophenanthren-6-ol),
  - (10) Levallorphan (*l*-11-allyl-1,2,3,9,10,10a-hexahydro-4H-10, 4a-iminoethanophenanthren-6-ol),
  - (11) Levargorphan (*l*-11-propargyl-1,2,3,9,10,10a-hexahydro-4H-10,4a-iminoethanophenanthren-6-ol),
  - (12) Butorphanol and its salts, and
  - (13) Nalbuphine (17-(cyclobutylmethyl)-4,5 $\alpha$ -epoxymorphinan-3, 6 $\alpha$ ,14-triol).
12. Benzazocines, their preparations, derivatives and salts, including:
- (1) Phenazocine (1,2,3,4,5,6-hexahydro-6,11-dimethyl-3-phenethyl-2,6-methano-3-benzazocin-8-ol),
  - (2) Metazocine (1,2,3,4,5,6-hexahydro-3,6,11-trimethyl-2,6-methano-3-benzazocin-8-ol), and
  - (3) Pentazocine (1,2,3,4,5,6-hexahydro-6,11-dimethyl-3-(3-methyl-2-butenyl)-2,6-methano-3-benzazocin-8-ol),
- but not including:
- (4) Cyclazocine (1,2,3,4,5,6-hexahydro-6-11-dimethyl-3-(cyclopropylmethyl)-2,6-methano-3-benzazocin-8-ol).
13. Ampromides, their preparations, derivatives and salts, including:
- (1) Diampromide (N-[2-(methylphenethylamino)-propyl]-propionanilide),
  - (2) Phenampromide (N-[2-(1-methyl-2-piperidyl)-ethyl]-propionanilide),
  - (3) Propiram (N-(1-methyl-2-piperidinoethyl)-N-2-pyridylpropionamide).
14. Benzimidazoles, their preparations, derivatives and salts, including:
- (1) Clonitazene (2-(*p*-chlorobenzyl)-1-diethylaminoethyl-5-nitrobenzimidazole), and
  - (2) Etonitazene (2-(*p*-ethoxybenzyl)-1-diethylaminoethyl-5-nitrobenzimidazole).
15. Phencyclidine, its salts and derivatives.

16. Fentanyl (1-phenylethyl-4-(phenylpropionylamino)-piperidine), its salts and derivatives.
17. Sufentanil (N-[4-(methoxymethyl)-1-[2-(2-thienyl) ethyl]-4piperidinyl]-N-phenylpropanamide), its salts and derivatives.
18. Tilidine (3-cyclohexene-1-carboxylic acid, 2-(dimethylamino)-1-phenylethyl ester, trans ( $\pm$ )), its preparations, derivatives and salts.
19. Carfentanil (methyl 4-[(1-oxopropyl)phenylamino]-1-(2phenylethyl)-4-piperidine-carboxylate), its salts and derivatives.
20. Alfentanil (N-[1-[2-(4-ethyl-4,5-dihydro-5-oxo-1H-tetrazol-yl)ethyl]-4-(methoxymethyl)-4-piperidinyl]-N-phenylpropanamide), its salts and derivatives.

R.S., c. N-1, Sch.; SOR/71-359; SI/73-48; SI/77-113; SI/81-14, 150; SI/82-114, 241; SI/84-67; SI/86-6; SOR/87-517.





# YOUNG OFFENDERS ACT

## R.S.C. 1985, c. Y-1

Amended R.S.C. 1985, c. 27 (1st Supp.), ss. 187, 203(1)  
Amended R.S.C. 1985, c. 24 (2nd Supp.), ss. 1 to 44, 50 and 51  
Amended R.S.C. 1985, c. 1 (3rd Supp.), s. 12(5)  
Amended, R.S.C. 1985, c. 1 (4th Supp.), ss. 38 to 43; originally in force February 4, 1988  
Amended 1991, c. 43, ss. 31 to 35; brought into force February 4, 1992 (but see s. 36)  
Amended 1992, c. 1, s. 143; in force February 28, 1992 (but see s. 18)  
Amended 1992, c. 11, ss. 1 to 13; in force May 15, 1992  
Amended 1992, c. 47, ss. 81 to 83; to come into force by order of the Governor in Council  
Amended 1993, c. 28, s. 78; to come into force April 1, 1999  
Amended 1993, c. 45, s. 15; brought into force August 1, 1993  
Amended 1994, c. 26, s. 76; in force June 23, 1994  
Amended 1995, c. 19, ss. 1 to 36 and 42; brought into force December 1, 1995  
Amended 1995, c. 22, ss. 16 and 17; to come into force by order of the Governor in Council  
Amended 1995, c. 27, s. 2; in force July 13, 1995  
Amended 1995, c. 39, ss. 177 to 187 and 189; to come into force by order of the Governor in Council (but see s. 193)

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## An Act respecting young offenders

### SHORT TITLE

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#### SHORT TITLE.

1. This Act may be cited as the *Young Offenders Act*. 1980-81-82-83, c. 110, s. 1.

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### INTERPRETATION

DEFINITIONS / "adult" / "alternative measures" / "child" / "disposition" / "offence" / "ordinary court" / "parent" / "pre-disposition report" / "progress report" / "provincial director" / "review board" / "young person" / "youth court" / "youth court judge" / "youth worker" / Words and expressions.

2. (1) In this Act,

"adult" means a person who is neither a young person nor a child;

"alternative measures" means measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence;

"child" means a person who is or, in the absence of evidence to the contrary, appears to be under the age of twelve years;

**“disposition”** means a disposition made under section 20 or sections 28 to 32 and includes a confirmation or a variation of a disposition;

**NOTE:** Definition “disposition” replaced 1995, c. 39, s. 177 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*“disposition” means a disposition made under any of sections 20, 20.1 and 28 to 32, and includes a confirmation or a variation of a disposition;*

**“offence”** means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories;

**NOTE:** Definition “offence” re-enacted 1993, c. 28, s. 78 (to come into force April 1, 1999). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*“offence” means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder, other than an ordinance of the Yukon Territory or the Northwest Territories or a law made by the Legislature for Nunavut or continued by section 29 of the Nunavut Act.*

**“ordinary court”** means the court that would, but for this Act, have jurisdiction in respect of an offence alleged to have been committed;

**“parent”** includes, in respect of another person, any person who is under a legal duty to provide for that other person or any person who has, in law or in fact, the custody or control of that other person, but does not include a person who has the custody or control of that other person by reason only of proceedings under this Act;

**“pre-disposition report”** means a report on the personal and family history and present environment of a young person made in accordance with section 14;

**“progress report”** means a report made in accordance with section 28 on the performance of a young person against whom a disposition has been made;

**“provincial director”** means a person, a group or class of persons or a body appointed or designated by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate to perform in that province, either generally or in a specific case, any of the duties or functions of a provincial director under this Act;

**“review board”** means a review board established or designated by a province for the purposes of section 30;

**“young person”** means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under eighteen years of age and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act;

**“youth court”** means a court established or designated by or under an Act of the legislature of a province, or designated by the Governor in Council or the Lieutenant Governor in Council of a province, as a youth court for the purposes of this Act;

**“youth court judge”** means a person appointed to be a judge of a youth court;

**“youth worker”** means a person appointed or designated, whether by title of youth worker or probation officer or by any other title, by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his



delegate, to perform, either generally or in a specific case, in that province any of the duties or functions of a youth worker under this Act.

(2) Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*. 1980-81-82-83, c. 110, s. 2; R.S.C. 1985, c. 24 (2nd Supp.), s. 1.

## ANNOTATIONS

An accused who, following his 18th birthday, fails to comply with a disposition made by the youth court is no longer a young person and the offence contrary to s. 26 is properly tried in adult court: *R. v. M.(R.E.)* (1988), 46 C.C.C. (3d) 315 (B.C.S.C.).

**Youth court judge** – A duly appointed Provincial Court Judge with authority to preside over a court designated by provincial legislation as a youth court has been “appointed” to be a judge of a youth court within the meaning of this section: *R. v. N* (1984), 12 C.C.C. (3d) 350 (Ont. H.C.J.); *R. v. L* (1984), 13 C.C.C. (3d) 148 (B.C.S.C.).

The justice of the peace court, having been designated a youth court pursuant to the Territorial Court Act (Y.T.), a justice of the peace in the Yukon Territory has the power to conduct the trial of a young offender under this Act: *R. v. G.(A.P.)* (1990), 57 C.C.C. (3d) 496 (Y.T.C.A.).

The practice in Ontario of having offenders aged 16 and 17 years tried by provincial court judges who ordinarily sit in the criminal division rather than the family division, as is the case with offenders aged 16, does not offend s. 15 of the Charter of Rights. All the judges are qualified to sit as judges in the youth court and to hear cases involving offenders of all ages: *R. v. C. (R.)* (1987), 56 C.R. (3d) 185 (Ont. C.A.).

It is open to the Lieutenant-Governor in Council to designate the Provincial Court as the Youth Court, although that court is not presided over by judges appointed under s. 96 of the Constitution Act, 1867: *Reference re Young Offenders Act, s. 2 (P.E.I.)* (1991), 62 C.C.C. (3d) 385, 77 D.L.R. (4th) 492, 121 N.R. 81 (S.C.C.) (7:0).

And it is open to the Lieutenant Governor to designate the Court of Queen’s Bench, Family Division as a youth court and a judge of that court as a youth court judge: *Reference re Young Offenders Act (P.E.I.)*, *supra*.

## POWERS, DUTIES AND FUNCTIONS OF PROVINCIAL DIRECTORS.

2.1 Any power, duty or function of a provincial director under this Act may be exercised or performed by any person authorized by the provincial director to do so and, if so exercised or performed, shall be deemed to have been exercised or performed by the provincial director. R.S.C. 1985, c. 24 (2nd Supp.), s. 2.

## DECLARATION OF PRINCIPLE

POLICY FOR CANADA WITH RESPECT TO YOUNG OFFENDERS / Act to be liberally construed.

3. (1) It is hereby recognized and declared that

- (a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;
- (a.1) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

- (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
  - (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
  - (c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;
  - (d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;
  - (e) young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or in the *Canadian Bill of Rights*, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;
  - (f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;
  - (g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and
  - (h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.
- (2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1). 1980-81-82-83, c. 110, s. 3; 1995, c. 19, s. 1.

#### ANNOTATIONS

Neither this section nor s. 19 of the Act gives the youth court the jurisdiction to dismiss a charge, where the elements of the offence are otherwise made out, because the court is of the view that the offence is a minor one which should have been left to the discipline of the parent or guardian: *R. v. T.(V.)* 71 C.C.C. (3d) 32, 12 C.R. (4th) 133, [1992] 1 S.C.R. 749.

It is appropriate for a judge sentencing a young offender to take into account the conduct of the accused in the interval between the time of the offence and the disposition, including involvement in other criminal activity. In particular, subsec. (1)(c) requires the sentencing judge to consider all circumstances bearing on the special needs of the young person and his requirements for guidance and assistance. While the presumption of innocence requires that subsequent offences not be used in relation to the punitive aspects of sentencing, the emphasis on rehabilitation permits the judge to consider all of the relevant background and conduct of the young person in order to fashion an appropriate and effective disposition: *R. v. P.(T.M.)* (unreported, February 13, 1996, B.C.C.A.) [096/054/001-19 pp.].

## ALTERNATIVE MEASURES

ALTERNATIVE MEASURES / Restriction on use / Admissions not admissible in evidence / No bar to proceedings / Laying of information, etc.

4. (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
- (b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;
- (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person

- (a) denies his participation or involvement in the commission of the offence; or
- (b) expresses his wish to have any charge against him dealt with by the youth court.

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a young person alleged to have committed an offence as a condition of his being dealt with by alternative measures shall be admissible in evidence against him in any civil or criminal proceedings.

(4) The use of alternative measures in respect of a young person alleged to have committed an offence is not a bar to proceedings against him under this Act, but

- (a) where the youth court is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the alternative measures, the youth court shall dismiss any charge against him; and
- (b) where the youth court is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the alternative measures, the youth court may dismiss any charge against him if, in the opinion of the court, the prosecution of the charge would, having regard to the circumstances, be unfair, and the youth court may consider the young person's performance with respect to the alternative measures before making a disposition under this Act.

(5) Subject to subsection (4), nothing in this section shall be construed to prevent any person from laying an information, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law. 1980-81-82-83, c. 110, s. 4.

## ANNOTATIONS

This section is *intra vires* Parliament, being a matter properly within the Criminal law



power in s. 91(27) of the Constitution Act, 1867: *R. v. S.(S.)* (1990), 57 C.C.C. (3d) 115, [1990] 2 S.C.R. 254, 77 C.R. (3d) 273 (7:0).

There is no requirement that the authorities consider alternative measures in the case of every young offender. Further the offender is not entitled to a hearing and an opportunity to participate in and be heard when the authorities are in fact considering such measures: *R. v. W. (T.)* (1986), 25 C.C.C. (3d) 89 (Sask. Q.B.). *Contra: R. v. B. (J.)* (1985), 20 C.C.C. (3d) 67 (B.C. Prov. Ct.) where it was held that the young person is entitled to notice and to be present and represented by counsel when the authorities are considering alternative measures under this section.

Properly interpreted, this section does not require the province to establish a programme of alternative measures, and failure of the Attorney General to authorize alternative measures does not violate s. 15 of the Charter: *R. v. S.(S.)*, *supra*. It follows that the fact that the programme in Ontario contains different entry requirements than the programmes established in other provinces does not violate s. 15, nor s. 7 of the Charter: *R. v. S.(G.)*, *supra*.

## JURISDICTION

**EXCLUSIVE JURISDICTION OF YOUTH COURT / Period of limitation / Proceedings continued when adult / Powers of youth court judge / Court of record.**

**5. (1) Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act.**

**NOTE:** Subsection (1) re-enacted by 1992, c. 47, s. 81 (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics* reads as follows:

*5. (1) Notwithstanding any other Act of Parliament but subject to the Contraventions Act and the National Defence Act and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while a young person and any such person shall be dealt with as provided in this Act.*

**(2) No proceedings in respect of an offence shall be commenced under this Act after the expiration of the time limit set out in any other Act of Parliament or any regulation made thereunder for the institution of proceedings in respect of that offence.**

**(3) Proceedings commenced under this Act against a young person may be continued, after he becomes an adult, in all respects as if he remained a young person.**

**(4) A youth court judge, for the purpose of carrying out the provisions of this Act, is a justice and a provincial court judge and has the jurisdiction and powers of a summary conviction court under the *Criminal Code*.**

**(5) A youth court is a court of record. 1980-81-82-83, c. 110, s. 5; R.S.C. 1985, c. 27 (1st Supp.), s. 203(1); c. 24 (2nd Supp.), s. 3.**

## ANNOTATIONS

Except for certain offences the age of the offender is not an element of the offence and need not be proved as part of the prosecution's case: *R. v. R and C* (1985), 23 C.C.C. (3d) 11, 49 C.R. (3d) 93 (B.C.C.A.); it is, however, open to the defence to raise the issue of the youth court's jurisdiction by providing proof that the accused is not a young offender: *R. v. L* (1984), 17 C.C.C. (3d) 335 (Ont. Prov. Ct.).

Neither the age of the offender nor the fact that he was a "young person" need be set out in the information: *R. v. C.(S.A.)* (1989), 47 C.C.C. (3d) 76, 92 A.R. 237 (C.A.).

A young offender who has been released on a recognizance but who breaches that recognizance after his 18th birthday is to be tried in adult court with breach of recognizance under the Criminal Code: *R. v. Merrick* (1987), 37 C.C.C. (3d) 285, 51 Man. R. (2d) 14 (Q.B.).

A person who at the age of 17 years committed an offence at a time prior to 1985 when the age limit for young offenders in the province was set at under 17 years of age is to be tried as an adult: *R. v. Sampson* (1993), 83 C.C.C. (3d) 149, 53 W.A.C. 106 (B.C.C.A.), leave to appeal to S.C.C. refused 85 C.C.C. (3d) vi.

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#### CERTAIN PROCEEDINGS MAY BE TAKEN BEFORE JUSTICES.

6. Any proceeding that may be carried out before a justice under the Criminal Code, other than a plea, a trial or an adjudication, may be carried out before such justice in respect of an offence alleged to have been committed by a young person, and any process that may be issued by a justice under the Criminal Code may be issued by such justice in respect of an offence alleged to have been committed by a young person. 1980-81-82-83, c. 110, s. 6; R.S.C. 1985, c. 24 (2nd Supp.), s. 4.

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### DETENTION PRIOR TO DISPOSITION

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DESIGNATED PLACE OF TEMPORARY DETENTION / Exception / Detention separate from adults / Transfer by provincial director / Exception relating to temporary detention / Authorization of provincial authority for detention / Determination by provincial authority of place of detention.

7. (1) A young person who is

- (a) arrested and detained prior to the making of a disposition in respect of the young person under section 20, or
  - (b) detained pursuant to a warrant issued under subsection 32(6)
- shall, subject to subsection (4), be detained in a place of temporary detention designated as such by the Lieutenant Governor in Council of the appropriate province or his delegate or in a place within a class of such places so designated.

(1.1) A young person who is detained in a place of temporary detention pursuant to subsection (1) may, in the course of being transferred from that place to the court or from the court to that place, be held under the supervision and control of a peace officer.

(2) A young person referred to in subsection (1) shall be held separate and apart from any adult who is detained or held in custody unless a youth court judge or a justice is satisfied that

- (a) the young person cannot, having regard to his own safety or the safety of others, be detained in a place of detention for young persons; or
- (b) no place of detention for young persons is available within a reasonable distance.

(3) A young person who is detained in custody in accordance with subsection (1) may, during the period of detention, be transferred by the provincial director from one place of temporary detention to another.

(4) Subsections (1) and (2) do not apply in respect of any temporary restraint of a young person under the supervision and control of a peace officer after arrest, but a young person who is so restrained shall be transferred to a place of temporary detention referred to in subsection (1) as soon as is reasonably practicable, and in no case later than the first reasonable opportunity after the appearance of the young person before a youth court judge or a justice pursuant to section 503 of the *Criminal Code*.

(5) In any province for which the Lieutenant Governor in Council has designated a person or a group of persons whose authorization is required, either in all circumstances or in circumstances specified by the Lieutenant Governor in Council, before a young person who has been arrested may be detained in accordance with this section, no young person shall be so detained unless the authorization is obtained.

(6) In any province of which the Lieutenant Governor in Council has designated a person or a group of persons who may determine the place where a young person who has been arrested may be detained in accordance with this section, no young person may be so detained in a place other than the one so determined. 1980-81-82-83, c. 110, s. 7; R.S.C. 1985, c. 24 (2nd Supp.), s. 5.

#### ANNOTATIONS

**Subsec. (1)** – Once a young person has been ordered transferred to the ordinary courts pursuant to s. 16 then any order made under this Act for the offender's temporary detention loses its force and pursuant to s. 537 of the Criminal Code the offender would be remanded to prison: *Re F and The Queen* (1985), 20 C.C.C. (3d) 56 (Ont. H.C.J.).

**Subsec. (2)** – In *R. v. P.*, [1979] 2 W.W.R. 262, 8 R.F.L. (2d) 277 (Man. Q.B.), the Court considered the comparable provision in the Juvenile Delinquents Act, s. 13(4) which permitted the confinement of a juvenile in a gaol or lock-up where he cannot otherwise "safely be confined". The Court considered that that phrase related to all the circumstances of the intended confinement: safety of the accused himself, safety of other persons sharing that confinement, safety of persons charged with his supervision, and safety of his associates in that area of confinement.

#### PLACEMENT OF YOUNG PERSON IN CARE OF RESPONSIBLE PERSON / Condition of placement / Removing young person from care / Order / Effect of arrest.

**7.1 (1)** Where a youth court judge or a justice is satisfied that

- (a) a young person who has been arrested would, but for this subsection, be detained in custody.
  - (b) a responsible person is willing and able to take care of and exercise control over the young person, and
  - (c) the young person is willing to be placed in the care of that person
- the young person may be placed in the care of that person instead of being detained in custody.

(2) A young person shall not be placed in the care of a person under subsection (1) unless

- (a) that person undertakes in writing to take care of and to be responsible for the attendance of the young person in court when required and to comply with such other conditions as the youth court judge or justice may specify; and
  - (b) the young person undertakes in writing to comply with the arrangement and to comply with such other conditions as the youth court judge or justice may specify.
- (3) Where a young person has been placed in the care of a person under subsection (1) and
- (a) that person is no longer willing or able to take care of or exercise control over the young person, or
  - (b) it is, for any other reason, no longer appropriate that the young person be placed in the care of that person,
- the young person, the person in whose care the young person has been placed or any other person may, by application in writing to a youth court judge or a justice, apply for an order under subsection (4).



(4) Where a youth court judge or a justice is satisfied that a young person should not remain in the custody of the person in whose care he was placed under subsection (1), the youth court judge or justice shall

- (a) make an order relieving the person and the young person of the obligations undertaken pursuant to subsection (2); and
- (b) issue a warrant for the arrest of the young person.

(5) Where a young person is arrested pursuant to a warrant issued under paragraph (4)(b), the young person shall be taken before a youth court judge or justice forthwith and dealt with under section 515 of the *Criminal Code*. R.S.C. 1985, c. 24 (2nd Supp.), s. 5.

## OFFENCE AND PUNISHMENT.

7.2 Any person who wilfully fails to comply with section 7, or with an undertaking entered into pursuant to subsection 7.1(2), is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 24 (2nd Supp.), s. 5.

APPLICATION TO YOUTH COURT / Notice to prosecutor / Notice to young person / Waiver of notice / Application for review under section 520 or 521 of *Criminal Code* / Idem / Interim release by youth court judge only / Review by court of appeal.

8. (1) [*Repealed*. R.S.C. 1985, c. 24 (2nd Supp.), s. 6.]

(2) Where an order is made under section 515 of the *Criminal Code* in respect of a young person by a justice who is not a youth court judge, an application may, at any time after the order is made, be made to a youth court for the release from or detention in custody of the young person, as the case may be, and the youth court shall hear the matter as an original application.

(3) An application under subsection (2) for release from custody shall not be heard unless the young person has given the prosecutor at least two clear days notice in writing of the application.

(4) An application under subsection (2) for detention in custody shall not be heard unless the prosecutor has given the young person at least two clear days notice in writing of the application.

(5) The requirement for a notice under subsection (3) or (4) may be waived by the prosecutor or by the young person or his counsel, as the case may be.

(6) An application under section 520 or 521 of the *Criminal Code* for a review of an order made in respect of a young person by a youth court judge who is a judge of a superior, county or district court shall be made to a judge of the court of appeal.

(7) No application may be made under section 520 or 521 of the *Criminal Code* for a review of an order made in respect of a young person by a justice who is not a youth court judge.

(8) Where a young person against whom proceedings have been taken under this Act is charged with an offence referred to in section 522 of the *Criminal Code*, a youth court judge, but no other court, judge or justice, may release the young person from custody under that section.

(9) A decision made by a youth court judge under subsection (8) may be reviewed in accordance with section 680 of the *Criminal Code* and that section applies, with such modifications as the circumstances require, to any decision so made. 1980-81-82-83, c. 110, s. 8; R.S.C. 1985, c. 24 (2nd Supp.), s. 6.

## NOTICES TO PARENTS

**NOTICE TO PARENT IN CASE OF ARREST / Notice to parent in case of summons or appearance notice / Notice to relative or other adult / Notice to spouse / Notice on direction of youth court judge or justice / Contents of notice / Service of notice / Proceedings not invalid / Exception / Where a notice not served.**

9. (1) Subject to subsections (3) and (4), where a young person is arrested and detained in custody pending his appearance in court, the officer in charge at the time the young person is detained shall, as soon as possible, give or cause to be given, orally or in writing, to a parent of the young person notice of the arrest stating the place of detention and the reason for the arrest.

(2) Subject to subsections (3) and (4), where a summons or an appearance notice is issued in respect of a young person, the person who issued the summons or appearance notice, or, where a young person is released on giving his promise to appear or entering into a recognizance, the officer in charge, shall, as soon as possible, give or cause to be given, in writing, to a parent of the young person notice of the summons, appearance notice, promise to appear or recognizance.

**NOTE:** Subsection (2.1) enacted by 1992, c. 47, s. 82(1) (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*Notice to parents in case of ticket.*

(2.1) Subject to subsections (3) and (4), a person who serves a ticket under the Contraventions Act on a young person, other than a ticket served for a contravention relating to parking a vehicle, shall, as soon as possible, give or cause to be given notice in writing of the ticket to a parent of the young person.

(3) Where the whereabouts of the parents of a young person

(a) who is arrested and detained in custody,

(b) in respect of whom a summons or an appearance notice is issued, or

(c) who is released on giving his promise to appear or entering into a recognizance are not known or it appears that no parent is available, a notice under this section may be given to an adult relative of the young person who is known to the young person and is likely to assist him or, if no such adult relative is available, to such other adult who is known to the young person and is likely to assist him as the person giving the notice considers appropriate.

**NOTE:** Subsection (3) amended by 1992, c. 47, s. 82(2) (to come into force by order of the Governor in Council) by striking out the word "or" at the end of para. (b), by adding the word "or" at the end of para. (c), and by enacting new para. (d). The unproclaimed text of para. (d), printed in *lightface italics*, reads as follows:

*(d) on whom a ticket is served under the Contraventions Act, other than a ticket served for a contravention relating to parking a vehicle.*

(4) Where a young person described in paragraph (3)(a), (b) or (c) is married, a notice under this section may be given to the spouse of the young person instead of a parent.

**NOTE:** Subsection (4) re-enacted by 1992, c. 47, s. 82(3) (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*Notice of spouse.*

(4) A notice under this section may be given to the spouse of a young person described in paragraph (3)(a), (b), (c) or (d) instead of to a parent.

(5) Where doubt exists as to the person to whom a notice under this section should be given, a youth court judge or, where a youth court judge is, having regard to the circumstances, not reasonably available, a justice may give directions as to the person to whom the notice should be given, and a notice given in accordance with those directions is sufficient notice for the purposes of this section.

(6) Any notice under this section shall, in addition to any other requirements under this section, include

- (a) the name of the young person in respect of whom it is given;
- (b) the charge against the young person and the time and place of appearance; and

**NOTE:** Paragraph (b) re-enacted by 1992, c. 47, s. 82(4) (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

(b) the charge against the young person and, except in the case of a notice of a ticket served under the Contraventions Act, the time and place of appearance; and

- (c) a statement that the young person has the right to be represented by counsel.

**NOTE:** Subsection (6.1) enacted by 1992, c. 47, s. 82(5) (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*Notice of ticket under Contravention Act.*

(6.1) A notice under subsection (2.1) shall include a copy of the ticket.

(7) Subject to subsections (9) and (10), a notice under this section given in writing may be served personally or may be sent by mail.

(8) Subject to subsections (9) and (10), failure to give notice in accordance with this section does not affect the validity of proceedings under this Act.

(9) Failure to give notice under subsection (2) in accordance with this section in any case renders invalid any subsequent proceedings under this Act relating to the case unless

- (a) a parent of the young person against whom proceedings are held attends court with the young person; or
- (b) a youth court judge or a justice before whom proceedings are held against the young person
  - (i) adjourns the proceedings and orders that the notice be given in such manner and to such persons as the judge or justice directs, or
  - (ii) dispenses with the notice where the judge or justice is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

(10) Where there has been a failure to give a notice under subsection (1) in accordance with this section and none of the persons to whom such notice may be given attends court with a young person, a youth court judge or a justice before whom proceedings are held against the young person may

**NOTE:** All that portion preceding para. (a) re-enacted by 1992, c. 47, s. 82(6) (to come into force by order of the Governor in Council). The unproclaimed text, printed in *lightface italics*, reads as follows:

*Where notice is not served.*

(10) Where there has been a failure to give a notice under subsection (1) or (2.1) in accordance with this section and none of the persons to whom the notice may be given attends court with the young person, a youth court judge or a justice before whom proceedings are held against the young person may

- (a) adjourn the proceedings and order that the notice be given in such manner and to such persons as he directs; or
- (b) dispense with the notice where, in his opinion, having regard to the circum-



stances, notice may be dispensed with. 1980-81-82-83, c. 110, s. 9; R.S.C. 1985, c. 24 (2nd Supp.), s. 7; 1991, c. 43, s. 31.

11) [*Repealed*. R.S.C. 1985, c. 24 (2nd Supp.), s. 7(2).]

## ANNOTATIONS

It was held in relation to s. 10 of the Juvenile Delinquents Act which required notice to the parents of a "child" that no proof of notice was required where by the time of the hearing in a juvenile Court the accused is no longer a "child": *R. v. D.L.W.*, 1981, 64 C.C.C. (3d) 40, 14 Man. R. (2d) 268 (Q.B.), *revid* on other grounds 1 C.C.C. (3d) 288w, 18 Man. R. (2d) 377 (C.A.). On the other hand s. 2 of the Juvenile Delinquents Act contained a narrow definition of a "child" as a boy or girl actually or apparently under the age of 16 years. The more expansive definition of "young person" in s. 2(1) of this Act which "where the context requires" includes any person who is charged under the Act with having committed an offence while he was a young person, may dictate a different result.

In cases where the absence of notice could render the subsequent proceedings invalid the Crown should prove service of notice at the commencement of the proceedings. It is open to the court to point out to the Crown the failure to notify the parents about the proceedings: *R. v. L* (1984), 17 C.C.C. (3d) 335 (Ont. Prov. Ct.).

A motorist arrested for impaired driving and taken to a police station to comply with a breathalyzer demand is not detained "pending his appearance in court" within the meaning of subsec. (1) so as to require compliance with this section, since in the normal course following the administration of the test the offender would be released either on an appearance notice or with the intention of issuing him a summons in which case subsec. (2) would apply: *R. v. R.W.T.*, 1986, 28 C.C.C. (3d) 193, 41 M.V.R. 72 (N.S.C.A.).

## ORDER REQUIRING ATTENDANCE OF PARENT

Service of order Failure to attend Appeal Warrant to arrest parent.

10. (1) Where a parent does not attend proceedings before a youth court in respect of a young person, the court may, if in its opinion the presence of the parent is necessary or in the best interest of the young person, by order in writing require the parent to attend at any stage of the proceedings.

NOTE: Subsection (1) enacted by 1992, c. 47, s. 83 to come into force by order of the Governor in Council. The unproclaimed text, printed in *lightface italics*, reads as follows:

*No order in ticket proceedings.*

(1.1) Subsection (1) does not apply in proceedings commenced by filing a ticket under the Contraventions Act.

(2) A copy of any order made under subsection (1) shall be served by a peace officer or by a person designated by a youth court by delivering it personally to the parent to whom it is directed, unless the youth court authorizes service by registered mail.

(3) A parent who is ordered to attend a youth court pursuant to subsection (1) and who fails without reasonable excuse, the proof of which lies on that parent, to comply with the order

(a) is guilty of contempt of court;

(b) may be dealt with summarily by the court; and

(c) is liable to the punishment provided for in the *Criminal Code* for a summary conviction offence.

4 Section 10 of the *Criminal Code* applies where a person is convicted of contempt of court under subsection (3).

(5) If a parent who is ordered to attend a youth court pursuant to subsection (1) does not attend at the time and place named in the order or fails to remain in attendance as required and it is proved that a copy of the order was served on the parent, a youth court may issue a warrant to compel the attendance of the parent. 1980-81-82-83, c. 110, s. 10; R.S.C. 1985, c. 24 (2nd Supp.), s. 8.

(6) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 8(2).]

## RIGHT TO COUNSEL

**RIGHT TO RETAIN COUNSEL** / Arresting officer to advise young person of right to counsel / Justice, youth court or review board to advise young person of right to counsel / Trial, hearing or review before youth court or review board / Appointment of counsel / Release hearing before justice / Young person may be assisted by adult / Counsel independent of parents / Statement of right to counsel.

11. (1) A young person has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings against the young person and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against the young person under this Act, to use alternative measures to deal with the young person.

(2) Every young person who is arrested or detained shall, forthwith on his arrest or detention, be advised by the arresting officer or the officer in charge, as the case may be, of his right to be represented by counsel and shall be given an opportunity to obtain counsel.

(3) Where a young person is not represented by counsel

(a) at a hearing at which it will be determined whether to release the young person or detain him in custody prior to disposition of his case,

(b) at a hearing held pursuant to section 16,

(c) at his trial,

(c.1) at any proceedings held pursuant to subsection 26.1 (1), 26.2(1) or 26.6(1),

(d) at a review of a disposition held before a youth court or a review board under this Act, or

(e) at a review of the level of custody pursuant to subsection 28.1(1),

the justice before whom, or the youth court or review board before which, the hearing, trial or review is held shall advise the young person of his right to be represented by counsel and shall give the young person a reasonable opportunity to obtain counsel.

(4) Where a young person at his trial or at a hearing or review referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, where there is a legal aid or an assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

(5) Where a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General of the province in which the direction is made shall appoint counsel, or cause counsel to be appointed, to represent the young person.

(6) Where a young person at a hearing before a justice who is not a youth court judge

at which it will be determined whether to release the young person or detain him in custody prior to disposition of his case wishes to obtain counsel but is unable to do so, the justice shall

- (a) where there is a legal aid or an assistance program available in the province where the hearing is held,
  - (i) refer the young person to that program for the appointment of counsel, or
  - (ii) refer the matter to a youth court to be dealt with in accordance with paragraph (4)(a) or (b); or
- (b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such program, refer the matter to a youth court to be dealt with in accordance with paragraph (4)(b).

(7) Where a young person is not represented by counsel at his trial or at a hearing or review referred to in subsection (3), the justice before whom or the youth court or review board before which the proceedings are held may, on the request of the young person, allow the young person to be assisted by an adult whom the justice, court or review board considers to be suitable.

(8) In any case where it appears to a youth court judge or a justice that the interests of a young person and his parents are in conflict or that it would be in the best interest of the young person to be represented by his own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of his parents.

(9) A statement that a young person has the right to be represented by counsel shall be included in

- (a) any appearance notice or summons issued to the young person;
- (b) any warrant to arrest the young person;
- (c) any promise to appear given by the young person;
- (d) any recognizance entered into before an officer in charge by the young person;
- (e) any notice given to the young person in relation to any proceedings held pursuant to subsection 26.1 (1), 26.2(1) or 26.6(1); or
- (f) any notice of a review of a disposition given to the young person. 1980-81-82-83, c. 110, s. 11; R.S.C. 1985, c. 24 (2nd Supp.), s. 9; 1992, c. 11, s. 1; 1995, c. 19, s. 2.

## ANNOTATIONS

The general right given an accused by subsec. (2) of this section now must yield to the specific requirements of s. 254(2) of the Criminal Code and a young offender need not be informed of his right to counsel prior to being required to comply with a demand under s. 254(2) to supply breath samples for analysis in a roadside screening device: *R. v. Frohman*; *R. v. O. (M.C.)* (1987), 35 C.C.C. (3d) 163, 56 C.R. (3d) 130, 41 D.L.R. (4th) 474 (Ont. C.A.).

The court has no discretion to decline to direct the employment of counsel where the young person has been unable to obtain legal aid. The youth court need only be satisfied that the young person wishes to obtain counsel and has been unable to do so because legal aid is not available. An affidavit to that effect, or in the alternative a simple inquiry into those facts alone would suffice. The court has no discretion to determine whether a young person should be provided with a lawyer out of public funds. The issue of payment for those services to be determined by provincial authorities: *R. v. C. (S.T.)*; *R. v. T. (D.M.)* (1993), 81 C.C.C. (3d) 407, 140 A.R. 259 (Q.B.).

The power granted by subsec. (4)(a) does not include a power to direct legal aid to provide counsel for the young person. The purpose of s. 11(4)(a) is merely to refer the young person to determine a possibility of his being represented by legal aid counsel, taking into account the normal criteria applied on such applications. It is only where no legal aid program is available or the young person is unable to obtain counsel through



such program that the youth court judge, pursuant to subsec. (4)(b), may direct that the young person be represented by counsel. Where such direction is made, however, then subsec. (5) applies and the Attorney General of the province must appoint counsel or cause counsel to be appointed to represent the young person. Where an order is made, the process of giving notice of the order by forwarding it to the Attorney General should be initiated by the court: *R. v. F. (S.L.)* (1993), 81 C.C.C. (3d) 268, 106 Nfld. & P.E.T.R. 228 (Nfld. S.C.).

## APPEARANCE

**WHERE YOUNG PERSON APPEARS / Waiver / Where young person not represented by counsel / Idem / Where youth court not satisfied / Idem.**

**12. (1) A young person against whom an information is laid must first appear before a youth court judge or a justice, and the judge or justice shall**

- (a) cause the information to be read to the young person;
- (b) where the young person is not represented by counsel, inform the young person of the right to be so represented; and
- (c) where the young person is a young person referred to in subsection 16(1.01), inform the young person that the young person will be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence unless an application is made to the youth court by the young person, the young person's counsel or the Attorney General or an agent of the Attorney General to have the young person proceeded against in the youth court and an order is made to that effect.

**(2) A young person may waive the requirement under paragraph (1)(a) where the young person is represented by counsel.**

**(3) Where a young person is not represented in youth court by counsel, the youth court shall, before accepting a plea,**

- (a) satisfy itself that the young person understands the charge against him; and
- (b) explain to the young person that he may plead guilty or not guilty to the charge.

**(3.1) Where a young person is a young person referred to in subsection 16(1.01) and is not represented in youth court by counsel, the youth court shall satisfy itself that the young person understands**

- (a) the charge against the young person;
- (b) the consequences of being proceeded against in ordinary court; and
- (c) the young person's right to apply to be proceeded against in youth court.

**(4) Where the youth court is not satisfied that a young person understands the charge against him, as required under paragraph (3)(a), the court shall enter a plea of not guilty on behalf of the young person and shall proceed with the trial in accordance with subsection 19(2).**

**(5) Where the youth court is not satisfied that a young person understands the matters referred to in subsection (3.1), the court shall direct that the young person be represented by counsel. 1980-81-82-83, c. 110, s. 12; 1995, c. 19, s. 3.**

## ANNOTATIONS

The jurisdiction of the court is dependent on strict compliance with the procedure in subsec. (1)(a) and it is not sufficient that the substance of the information is stated to the young offender who at the time of the first appearance is unrepresented by counsel and only assisted by duty counsel: *R. v. H* (1985), 21 C.C.C. (3d) 396 (B.C.S.C.).

A waiver of the requirement under subsec. (1)(a) can be implied by conduct of counsel

indicating that he was asking for an adjournment as a result of discussions with Crown counsel and the offender's parent: *R. v. J. (J.T.)* (No. 2) (1986), 28 C.C.C. (3d) 62 (Man. Q.B.).

## MEDICAL AND PSYCHOLOGICAL REPORTS

**MEDICAL OR PSYCHOLOGICAL ASSESSMENT / Purpose of assessment / Custody for assessment / Presumption against custodial remand / Report of qualified person in writing / Application to vary assessment order where circumstances change / Disclosure of report / Cross-examination / Report to be withheld where disclosure unnecessary or prejudicial / Report to be withheld where disclosure dangerous to any person / Idem / Report to be part of record / Disclosure by qualified person / Definition of "qualified person".**

13. (1) A youth court may, at any stage of proceedings against a young person,
- (a) with the consent of the young person and the prosecutor, or
  - (b) on its own motion or on application of the young person or the prosecutor, where
    - (i) the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability,
    - (ii) the young person's history indicates a pattern of repeated findings of guilt under this Act, or
    - (iii) the young person is alleged to have committed an offence involving serious personal injury,
- and the court believes a medical, psychological or psychiatric report in respect of the young person is necessary for a purpose mentioned in paragraphs (2)(a) to (f),

by order require that the young person be assessed by a qualified person and require the person who conducts the examination to report the results thereof in writing to the court.

(2) A youth court may make an order under subsection (1) in respect of a young person for the purpose of

- (a) considering an application under section 16;
- (b) making or reviewing a disposition under this Act, other than a disposition made under section 672.54 or 672.58 of the *Criminal Code*;
- (c) considering an application under subsection 26.1(1);
- (d) setting conditions under subsection 26.2(1);
- (e) making an order under subsection 26.6(2); or
- (f) authorizing disclosure under subsection 38(1.5).

(3) Subject to subsections (3.1) and (3.3), for the purpose of an assessment under this section, a youth court may remand a young person to such custody as it directs for a period not exceeding thirty days.

(3.1) A young person shall not be remanded in custody pursuant to an order made by a youth court under subsection (1) unless

- (a) the youth court is satisfied that on the evidence custody is necessary to conduct an assessment of the young person, or that on the evidence of a qualified person detention of the young person in custody is desirable to conduct the assessment of the young person and the young person consents to custody; or
- (b) the young person is required to be detained in custody in respect of any other matter or by virtue of any provision of the *Criminal Code*.

(3.2) For the purposes of paragraph (3.1)(a), when the prosecutor and the young person agree, evidence of a qualified person may be received in the form of a report in writing.

(3.3) A youth court may, at any time while an order in respect of a young person made by the court under subsection (1) is in force, on cause being shown, vary the terms and conditions specified in that order in such a manner as the court considers appropriate in the circumstances.

(4) Where a youth court receives a report made in respect of a young person pursuant to subsection (1),

(a) the court shall, subject to subsection (6), cause a copy of the report to be given to

(i) the young person,

(ii) a parent of the young person, if the parent is in attendance at the proceedings against the young person,

(iii) counsel, if any, representing the young person, and

(iv) the prosecutor; and

(b) the court may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

(5) Where a report is made in respect of a young person pursuant to subsection (1), the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (6), on application to the youth court, be given an opportunity to cross-examine the person who made the report.

(6) A youth court shall withhold all or part of a report made in respect of a young person pursuant to subsection (1) from a private prosecutor, where disclosure of the report or part, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the young person.

(7) A youth court shall withhold all or part of a report made in respect of a young person pursuant to subsection (1) from the young person, the young person's parents or a private prosecutor where the court is satisfied, on the basis of the report or evidence given in the absence of the young person, parents or private prosecutor by the person who made the report, that disclosure of all or part of the report would seriously impair the treatment or recovery of the young person, or would be likely to endanger the life or safety of, or result in serious psychological harm to, another person.

(8) Notwithstanding subsection (7), the youth court may release all or part of the report referred to in that subsection to the young person, the young person's parents or the private prosecutor where the interests of justice make disclosure essential in the court's opinion.

(9) A report made pursuant to subsection (1) shall form part of the record of the case in respect of which it was requested.

(10) Notwithstanding any other provision of this Act, a qualified person who is of the opinion that a young person held in detention or committed to custody is likely to endanger his own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the young person whether or not the same information is contained in a report made pursuant to subsection (1).

(11) In this section, "qualified person" means a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, where no such law exists, a person



who is, in the opinion of the youth court, so qualified, and includes a person or a person within a class of persons designated by the Lieutenant Governor in Council of a province or his delegate. 1980-81-82-83, c. 110, s. 13; R.S.C. 1985, c. 24 (2nd Supp.), s. 10; 1991, c. 43, s. 32, 35; 1995, c. 19, s. 4.

(12) [*Repealed*. R.S.C. 1985, c. 24 (2nd Supp.), s. 10.]

#### STATEMENTS NOT ADMISSIBLE AGAINST YOUNG PERSON / Exceptions.

13.1 (1) Subject to subsection (2) where a young person is assessed pursuant to an order made under subsection 13(1), no statement or reference to a statement made by the young person during the course and for the purposes of the assessment to the person who conducts the assessment or to anyone acting under that person's direction is admissible in evidence, without the consent of the young person, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.

(2) A statement referred to in subsection (1) is admissible in evidence for the purposes of

- (a) considering an application under section 16 in respect of the young person;
- (b) determining whether the young person is unfit to stand trial;
- (c) determining whether the balance of the mind of the young person was disturbed at the time of commission of the alleged offence, where the young person is a female person charged with an offence arising out of the death of her newly-born child;
- (d) making or reviewing a disposition in respect of the young person;
- (e) determining whether the young person was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1) of the *Criminal Code*, if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
- (f) challenging the credibility of a young person in any proceeding where the testimony of the young person is inconsistent in a material particular with a statement referred to in subsection (1) that the young person made previously;
- (g) establishing the perjury of a young person who is charged with perjury in respect of a statement made in any proceeding;
- (h) deciding an application for an order under subsection 26.1(1);
- (i) setting the conditions under subsection 26.2(1);
- (j) conducting a review under subsection 26.6(1); or
- (k) deciding an application for a disclosure order under subsection 38(1.5). 1991, c. 43, ss. 33, 35(b); 1994, c. 26, s. 76; 1995, c. 19, s. 5.

## APPLICATION OF PART XX.1 OF THE CRIMINAL CODE (MENTAL DISORDER)

SECTIONS OF CRIMINAL CODE APPLICABLE / Notice and copies to Counsel and parents / Proceedings not invalid / Exception / No hospital order assessments / Considerations of court or Review Board making a disposition / Cap applicable to young persons / Application to increase cap of unfit young person subject to transfer / Consideration of youth court for increase in cap / *Prima facie* case to be made every year / Designation of hospitals for young persons.

13.2 (1) Except to the extent that they are inconsistent with or excluded by this Act, section 16 and Part XX.1 of the *Criminal Code*, except sections 672.65 and 672.66,

apply, with such modifications as the circumstances require, in respect of proceedings under this Act in relation to offences alleged to have been committed by young persons.

(2) For the purposes of subsection (1), wherever in Part XX.1 of the *Criminal Code* a reference is made to

- (a) a copy to be sent or otherwise given to an accused or a party to the proceedings, the reference shall be read as including a reference to a copy to be sent or otherwise given to
  - (i) counsel, if any, representing the young person,
  - (ii) any parent of the young person who is in attendance at the proceedings against the young person, and
  - (iii) any parent of the young person who is, in the opinion of the youth court or Review Board, taking an active interest in the proceedings; and
- (b) notice to be given to an accused or a party to proceedings, the reference shall be read as including a reference to notice to be given to counsel, if any, representing the young person and the parents of the young person.

(3) Subject to subsection (4), failure to give a notice referred to in paragraph (2)(b) to a parent of a young person does not affect the validity of proceedings under this Act.

(4) Failure to give a notice referred to in paragraph (2)(b) to a parent of a young person in any case renders invalid any subsequent proceedings under this Act relating to the case unless

- (a) a parent of the young person attends at the court or Review Board with the young person; or
- (b) a youth court judge or Review Board before whom proceedings are held against the young person
  - (i) adjourns the proceedings and orders that the notice be given in such manner and to such persons as the judge or Review Board directs, or
  - (ii) dispenses with the notice where the youth court or Review Board is of the opinion that, having regard to the circumstances, the notice may be dispensed with.

(5) A youth court may not make an order under subsection 672.11 of the *Criminal Code* in respect of a young person for the purpose of assisting in the determination of an issue mentioned in paragraph 672.11(e) of that Act.

(6) Before making or reviewing a disposition in respect of a young person under Part XX.1 of the *Criminal Code*, a youth court or Review Board shall consider the age and special needs of the young person and any representations or submissions made by the young person's parents.

(7) Subject to subsection (9), for the purpose of applying subsection 672.64(3) of the *Criminal Code* to proceedings under this Act in relation to an offence alleged to have been committed by a young person, the applicable cap shall be the maximum period during which the young person would be subject to a disposition by the youth court if found guilty of the offence.

(8) Where an application is made under section 16 to proceed against a young person in ordinary court and the young person is found unfit to stand trial, the Attorney General or the agent of the Attorney General may, before the youth court makes or refuses to make an order under that section, apply to the court to increase the cap that shall apply to the young person.

(9) The youth court, after giving the Attorney General and the counsel and parents of the young person in respect of whom an application is made under subsection (8) an opportunity to be heard, shall take into consideration

- (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed,
- (b) the age, maturity, character and background of the young person and any previous findings of guilt against the young person under any Act of Parliament,
- (c) the likelihood that the young person will cause significant harm to any person if released on expiration of the cap that applies to the young person pursuant to subsection (7), and
- (d) the respective caps that would apply to the young person under this Act and under the *Criminal Code*,

and the youth court shall, where satisfied that the application under section 16 would likely succeed if the young person were fit to stand trial, apply to the young person the cap that would apply to an adult for the same offence.

(10) For the purpose of applying subsection 672.33(1) of the *Criminal Code* to proceedings under this Act in relation to an offence alleged to have been committed by a young person, wherever in that subsection a reference is made to two years, there shall be substituted a reference to one year.

(11) A reference in Part XX.1 of the *Criminal Code* to a hospital in a province shall be construed as a reference to a hospital designated by the Minister of Health of the province for the custody, treatment or assessment of young persons; 1991, c. 43, s. 33.

## PRE-DISPOSITION REPORT

PRE-DISPOSITION REPORT / Contents of report / Oral report with leave / Report to form part of record / Copies of pre-disposition report / Cross-examination / Report may be withheld from young person or private prosecutor / Report disclosed to other persons / Disclosure by the provincial director / Inadmissibility of statements.

14. (1) Where a youth court deems it advisable before making a disposition under section 20 in respect of a young person who is found guilty of an offence it may, and where a youth court is required under this Act to consider a pre-disposition report before making an order or a disposition in respect of a young person it shall, require the provincial director to cause to be prepared a pre-disposition report in respect of the young person and to submit the report to the court.

(2) A pre-disposition report made in respect of a young person shall, subject to subsection (3), be in writing and shall include

- (a) the results of an interview with
  - (i) the young person,
  - (ii) where reasonably possible, the parents of the young person and,
  - (iii) where appropriate and reasonably possible, members of the young person's extended family;
- (b) the results of an interview with the victim in the case, where applicable and where reasonably possible;
- (c) such information as is applicable to the case including, where applicable,
  - (i) the age, maturity, character, behaviour and attitude of the young person and his willingness to make amends,
  - (ii) any plans put forward by the young person to change his conduct or to participate in activities or undertake measures to improve himself,
  - (iii) the history of previous findings of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this or any other Act of Parliament or any regulation made thereunder or under an Act of the legislature of a province or any reg-



ulation made thereunder or a by-law or ordinance of a municipality, the history of community or other services rendered to the young person with respect to those findings and the response of the young person to previous sentences or dispositions and to services rendered to him,

- (iv) the history of alternative measures used to deal with the young person and the response of the young person thereto,
  - (v) the availability and appropriateness of community services and facilities for young persons and the willingness of the young person to avail himself or herself of those services or facilities,
  - (vi) the relationship between the young person and the young person's parents and the degree of control and influence of the parents over the young person and, where appropriate and reasonably possible, the relationship between the young person and the young person's extended family and the degree of control and influence of the young person's extended family over the young person, and
  - (vii) the school attendance and performance record and the employment record of the young person; and
- (d) such information as the provincial director considers relevant, including any recommendation that the provincial director considers appropriate.
- (3) Where a pre-disposition report cannot reasonably be committed to writing, it may, with leave of the youth court, be submitted orally in court.
- (4) A pre-disposition report shall form part of the record of the case in respect of which it was requested.
- (5) Where a pre-disposition report made in respect of a young person is submitted to a youth court in writing, the court
- (a) shall, subject to subsection (7), cause a copy of the report to be given to
    - (i) the young person,
    - (ii) a parent of the young person, if the parent is in attendance at the proceedings against the young person,
    - (iii) counsel, if any, representing the young person, and
    - (iv) the prosecutor; and
  - (b) may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.
- (6) Where a pre-disposition report made in respect of a young person is submitted to a youth court, the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (7), on application to the youth court, be given the opportunity to cross-examine the person who made the report.
- (7) Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court may, where the prosecutor is a private prosecutor and disclosure of the report or any part thereof to the prosecutor might, in the opinion of the court, be prejudicial to the young person and is not, in the opinion of the court, necessary for the prosecution of the case against the young person,
- (a) withhold the report or part thereof from the prosecutor, if the report is submitted in writing; or
  - (b) exclude the prosecutor from the court during the submission of the report or part thereof, if the report is submitted orally in court.
- (8) Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court
- (a) shall, on request, cause a copy or a transcript of the report to be supplied to

- (i) any court that is dealing with matters relating to the young person, and
  - (ii) any youth worker to whom the young person's case has been assigned; and
  - (b) may, on request, cause a copy or a transcript of the report, or a part thereof, to be supplied to any person not otherwise authorized under this section to receive a copy or a transcript of the report if, in the opinion of the court, the person has a valid interest in the proceedings.
- (9) A provincial director who submits a pre-disposition report made in respect of a young person to a youth court may make the report, or any part thereof, available to any person in whose custody or under whose supervision the young person is placed or to any other person who is directly assisting in the care or treatment of the young person.
- (10) No statement made by a young person in the course of the preparation of a pre-disposition report in respect of the young person is admissible in evidence against him in any civil or criminal proceedings except in proceedings under section 16 or 20 or sections 28 to 32. 1980-81-82-83, c. 110, s. 14; R.S.C. 1985, c. 24 (2nd Supp.), s. 11; 1995, c. 19, s. 6.

#### ANNOTATIONS

Only in exceptional circumstances should the young offender be remanded in custody while the pre-disposition report is being prepared: *R. v. G. (C.)* (1993), 79 C.C.C. (3d) 446, 61 O.A.C. 316 (C.A.).

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## DISQUALIFICATION OF JUDGE

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### DISQUALIFICATION OF JUDGE / Exception.

15. (1) Subject to subsection (2), a youth court judge who, prior to an adjudication in respect of a young person charged with an offence, examines a pre-disposition report made in respect of the young person, or hears an application under section 16 in respect of the young person, in connection with that offence shall not in any capacity conduct or continue the trial of the young person for the offence and shall transfer the case to another judge to be dealt with according to law.
- (2) A youth court judge may, in the circumstances referred to in subsection (1), with the consent of the young person and the prosecutor, conduct or continue the trial of the young person if the judge is satisfied that he has not been predisposed by information contained in the pre-disposition report or by representations made in respect of the application under section 16. 1980-81-82-83, c. 110, s. 15.
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## TRANSFER

1995, c. 19, s. 7.

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TRANSFER TO ORDINARY COURT / Trial in ordinary court for certain offences / Making of application / Where application is opposed / Where application is unopposed / Deeming / Time may be extended / Order / Onus / Considerations by youth court / Pre-disposition reports / Where young person on transfer status / Court to state reasons / No further applications for transfer / Effect of order / *Idem* / Jurisdiction of ordinary court limited / Review of youth court decision / Extension of time to make application / Notice of application / Inadmissibility of statement.

16. (1) Subject to subsection (1.01), at any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an

indictable offence other than an offence referred to in section 553 of the *Criminal Code* but prior to adjudication, a youth court shall, on application of the young person or the young person's counsel or the Attorney General or an agent of the Attorney General, determine, in accordance with subsection (1.1), whether the young person should be proceeded against in ordinary court.

(1.01) Every young person against whom an information is laid who is alleged to have committed

- (a) first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*,
- (b) an offence under section 239 of the *Criminal Code* (attempt to commit murder),
- (c) an offence under section 232 or 234 of the *Criminal Code* (manslaughter), or
- (d) an offence under section 273 of the *Criminal Code* (aggravated sexual assault),

and who was sixteen or seventeen years of age at the time of the alleged commission of the offence shall be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence unless the youth court, on application by the young person, the young person's counsel or the Attorney General or an agent of the Attorney General, makes an order under subsection (1.04) or (1.05) or subparagraph (1.1)(a)(ii) that the young person should be proceeded against in youth court.

(1.02) An application to the youth court under subsection (1.01) must be made orally, in the presence of the other party to the proceedings, or in writing, with a notice served on the other party to the proceedings.

(1.03) Whether the other party to the proceedings referred to in subsection (1.02) files a notice of opposition to the application with the youth court within twenty-one days after the making of the oral application, or the service of the notice referred to in that subsection, as the case may be, the youth court shall, in accordance with subsection (1.1), determine whether the young person should be proceeded against in youth court.

(1.04) Where the other party to the proceedings referred to in subsection (1.02) files a notice of non-opposition to the application with the youth court within the time referred to in subsection (1.03), the youth court shall order that the young person be proceeded against in youth court.

(1.05) Where the other party to the proceedings referred to in subsection (1.02) does not file a notice referred to in subsection (1.03) or (1.04) within the time referred to in subsection (1.03), the youth court shall order that the young person be proceeded against in youth court.

(1.06) The time referred to in subsections (1.03) to (1.05) may be extended by mutual agreement of the parties to the proceedings by filing a notice to that effect with the youth court.

(1.1) In making the determination referred to in subsection (1) or (1.03), the youth court, after affording both parties and the parents of the young person an opportunity to be heard, shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court, and

- (a) if the court is of the opinion that those objectives can be so reconciled, the court shall
  - (i) in the case of an application under subsection (1), refuse to make an order that the young person be proceeded against in ordinary court, and



- (ii) in the case of an application under subsection (1.01), order that the young person be proceeded against in youth court; or
  - (b) if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall
    - (i) in the case of an application under subsection (1), order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence, and
    - (ii) in the case of an application under subsection (1.01), refuse to make an order that the young person be proceeded against in youth court.
- (1.11) Where an application is made under subsection (1) or (1.01), the onus of satisfying the youth court of the matters referred to in subsection (1.1) rests with the applicant.
- (2) In making the determination referred to in subsection (1) or (1.03) in respect of a young person, a youth court shall take into account
- (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
  - (b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, or previous findings of guilt under this Act or any other Act of Parliament or any regulation made thereunder;
  - (c) the adequacy of this Act, and the adequacy of the *Criminal Code* or any other Act of Parliament that would apply in respect of the young person if an order were made under this section to meet the circumstances of the case;
  - (d) the availability of treatment or correctional resources;
  - (e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and
  - (f) any other factors that the court considers relevant.
- (3) In making the determination referred to in subsection (1) or (1.03) in respect of a young person, a youth court shall consider a pre-disposition report.
- (4) Notwithstanding subsections (1) and (3), where an application is made under subsection (1) by the Attorney General or the Attorney General's agent in respect of an offence alleged to have been committed by a young person while the young person was being proceeded against in ordinary court pursuant to an order previously made under this section or serving a sentence as a result of proceedings in ordinary court, the youth court may make a further order under this section without a hearing and without considering a pre-disposition report.
- (5) Where a youth court makes an order or refuses to make an order under this section, it shall state the reasons for its decision and the reasons shall form part of the record of the proceedings in the youth court.
- (6) Where a youth court refuses to make an order under this section in respect of an alleged offence, no further application may be made under this section in respect of that offence.
- (7) Where an order is made under this section pursuant to an application under subsection (1), proceedings under this Act shall be discontinued and the young person against whom the proceedings are taken shall be taken before the ordinary court.
- (7.1) Where an order is made under this section pursuant to an application under subsection (1.01), the proceedings against the young person shall be in the youth court.

(8) Where a young person is proceeded against in ordinary court in respect of an offence by reason of

- (a) subsection (1.01), where no application is made under that subsection,
- (b) an order made under subparagraph (1.1)(b)(i), or
- (c) the refusal under subparagraph (1.1)(b)(ii) to make an order,

that court has jurisdiction only in respect of that offence or an offence included therein.

(9) An order made in respect of a young person under this section or a refusal to make such an order shall, on application of the young person or the young person's counsel or the Attorney General or the Attorney General's agent made within thirty days after the decision of the youth court, be reviewed by the court of appeal, and that court may, in its discretion, confirm or reverse the decision of the youth court.

(10) The court of appeal may, at any time, extend the time within which an application under subsection (9) may be made.

(11) A person who proposes to apply for a review under subsection (9) shall give notice of the application in such manner and within such period of time as may be directed by rules of court.

(12) No statement made by a young person in the course of a hearing held under this section is admissible in evidence against the young person in any civil or criminal proceeding held subsequent to that hearing. 1980-81-82-83, c. 110, s. 16; 1992, c. 11, s. 2; 1995, c. 19, s. 8.

(13) [*Repealed*. 1992, c. 11, s. 2.]

(14) [*Repealed*. R.S.C. 1985, c. 24 (2nd Supp.), s. 12.]

## ANNOTATIONS

**NOTE:** These cases were decided prior to the amendments made by 1995, c. 19 to this section and should be read in that light.

**Principles generally** – While there is a burden on the party seeking the order to persuade the court that transfer to ordinary court is appropriate based on the factors set out in subsection (2), the onus should not be regarded as a heavy one. The question is whether the judge is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to the ordinary court: *R. v. M. (S.H.)* (1989), 50 C.C.C. (3d) 503, [1989] 2 S.C.R. 446, 71 C.R. (3d) 257 (7:2); *R. v. L. (J.E.)* (1989), 50 C.C.C. (3d) 385, [1989] 2 S.C.R. 510, 71 C.R. (3d) 306 (7:2).

The court is not required to give equal weight to all the factors listed in subsection (2) and it may properly consider that the gravity and heinous nature of the alleged offences, here first degree murder, was a more important factor than some of the other factors: *R. v. L. (J.E.)*, *supra*.

It was held in *R. v. H. (W.)* (1989), 47 C.C.C. (3d) 72, 69 E.R. (3d) 168, 31 O.A.C. 372 (C.A.), that transfer orders on charges of, *inter alia*, forcible confinement and sexual assault could not be upheld where they were based primarily on the need for deterrence. If deterrence referred to the need for public proceedings, then the youth court overlooked that, aside from intervention of a jury, proceedings in youth court are similar to a trial in adult court and, in particular, the youth court is open to the public and especially the press. If the reference to deterrence was to the need for a sentence reflecting general deterrence presumably this referred to imposition of a penitentiary sentence. However, in light of the age and character of the offender it was not inevitable that such a sentence would be imposed, and in fact such a sentence should be avoided if at all possible.

The fact that the young offenders are jointly charged is only a factor to be considered on an application brought by the Crown under this section. Each offender must be

viewed separately and while both should be treated the same if the circumstances warrant, that does not have to be the case. Thus in this case the court, while ordering that the one offender be transferred to adult court in view of his age, maturity, background and record, refused to order the transfer of the other offender: *R. v. R. (E.S.) and R. (W.J.)* (1985), 49 C.R. (3d) 88 (Man. C.A.).

In *R. v. M. (F.D.)* (1987), 33 C.C.C. (3d) 116, 45 Man. R. (2d) 24 (C.A.) (2:1) and *R. v. C. (R.M.)* (1987), 33 C.C.C. (3d) 136, 45 Man. R. (2d) 38 (C.A.) (2:1) a majority of the court in each case was of the view that the possibility of a successful insanity defence was not a proper consideration on an application under this section, nor was it relevant to consider provincial legislation applicable to treatment of mentally ill prisoners. On the other hand, at least two of the justices (Twaddle J.A. and Huband J.A. dissenting) were of the view that an offender's mental illness and prospects for treatment were proper considerations.

Where the young offender facilities are not adequate to deal with older offenders who commit offences while under the age of 18 years, the preferable solution is for the provincial director to apply to transfer the offender to a provincial adult facility pursuant to s. 25.5, rather than for the youth court to transfer the offender to adult court pursuant to this section. Offenders in a provincial institution are less likely to be exposed to the pernicious influences that might come their way in a penitentiary setting: *R. v. D. (G.J.)* (1991), 62 C.C.C. (3d) 433, 112 A.R. 18 *sub nom. R. v. C. (G.J.D.)* (C.A.).

The effect of subsec. (1.1) is that if the objectives of protection of the public and rehabilitation cannot be reconciled in the youth court then public protection must be given the pre-eminent position and the charge transferred to the ordinary courts: *R. v. C. (D.)* (1993), 85 C.C.C. (3d) 547, 14 O.R. (3d) 705 (C.A.).

It was not a proper consideration to order a transfer because better treatment facilities existed in the penitentiary system. The finding that the transfer is not necessary in order to protect the public is determinative: *R. v. L. (R.A.)* (1995), 103 C.C.C. (3d) 151 (B.C.C.A.).

**Procedure** – While as part of the transfer hearing the Crown must establish that an offence was committed and that the accused was implicated in it, it would seem that the judge may rely on hearsay evidence, although such evidence should be treated with great caution: *R. v. W* (1985), 22 C.C.C. (3d) 269 (B.C.S.C.).

Except for disputed facts, the strict rules of evidence do not necessarily apply at a transfer hearing or review. Thus the youth court judge could take into account his own knowledge of the availability of a programme at a youth centre in much the same way that a trial judge can take into account similar background information at a sentence hearing: *R. v. M* (1985), 23 C.C.C. (3d) 538, 49 C.R. (3d) 226 (Man. C.A.).

Once the offender has been transferred to the ordinary courts he is subject to the procedures provided by the Criminal Code, including the right of the Attorney-General to prefer an indictment notwithstanding the accused's discharge following a preliminary inquiry: *R. v. J. (J.T.)* (1986), 27 C.C.C. (3d) 574 (Man. Q.B.).

A youth court judge who merely orders the preparation of a pre-disposition report as required by subsec. (3) does not thereby become seized with jurisdiction over the transfer application: *R. v. W* (1986), 28 C.C.C. (3d) 510 (B.C.C.A.).

While an application to review a transfer order or an appeal from that application is pending, the case should not proceed through a preliminary inquiry: *R. v. M. (F.D.)* (1987), 33 C.C.C. (3d) 116, 45 Man. R. (2d) 24 (C.A.).

**Application of Charter of Rights** – This section does not offend ss. 7 and 11(d) of the Charter of Rights and Freedoms: *R. v. M. (L.A.)* (1986), 33 C.C.C. (3d) 364 (B.C.C.A.).

**Review** – The powers of the court of appeal to “in its discretion, confirm or reverse the decision” of the youth court, involves evaluation, not only of whether the court below made an error of law or jurisdiction, but whether its conclusions are correct, based on



the factors set out in this Act. The reviewing court may go into the merits of the application and if its review leads to the conclusion that the decision below is wrong for any of these reasons, the reviewing court in the exercise of its discretion may substitute its own view for that of the judge below. This jurisdiction is subject to the important limit that since the reviewing court has not heard the evidence, it must accept the youth court's findings of fact and defer to it in matters involving the credibility of witnesses. However, the reviewing court is not confined to asking whether the youth court judge has erred but should make an independent evaluation on the basis of the facts found by the youth court judge: *R. v. M. (S.M.)*, *supra*; *R. v. L. (J.E.)*, *supra*.

At least where all parties consent, the court of appeal may receive new evidence on an appeal from the dismissal of an application for review: *R. v. S. (G.)* (1991), 5 O.R. (3d) 97 (C.A.).

It is inevitable that in the course of the review by the Court of Appeal some factors will assume greater importance than others, depending on the nature of the case and the viewpoint of the tribunal in question. This Act does not require that all factors be given equal weight but only that each be considered: *R. v. M. (S.H.)*, *supra*.

The power under subsec. (9) to review the decision under this section includes the power to quash the transfer order and remit the matter back to the youth court for a new hearing: *R. v. F* (1985), 20 C.C.C. (3d) 334 (Ont. H.C.J.).

In the subsequent case of *R. v. S. (G.)* (1991), 5 O.R. (3d) 97 (C.A.) the court seems to cast considerable doubt on the power to remit the matter back to the youth court for a rehearing. In this case, the court on consent received new evidence to supplement the record.

While these subsections give the court of appeal the right to review, confirm or reverse that decision in its discretion, the Act makes no provision for the exercise of an independent discretion by the Supreme Court of Canada. Accordingly, the usual rules governing the Supreme Court's interference with the exercise of judicial discretion by intermediate appellate courts apply and the Supreme Court will interfere only where there has been an error of law or jurisdiction in the court below: *R. v. M. (S.H.)*, *supra*.

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#### **DETENTION PENDING TRIAL — YOUNG PERSON UNDER EIGHTEEN / Detention pending trial — young person over eighteen / Review / Who may make application / Notice / Statement of rights / Limit — age 20.**

**16.1 (1)** Notwithstanding anything in this or any other Act of Parliament, where a young person who is under the age of eighteen is to be proceeded against in ordinary court by reason of

- (a) subsection 16(1.01), where no application is made under that subsection,
  - (b) an order under subparagraph 16(1.1)(b)(i), or
  - (c) the refusal under subparagraph 16(1.1)(b)(ii) to make an order,
- and the young person is to be in custody pending the proceedings in that court, the young person shall be held separate and apart from any adult who is detained or held in custody unless the youth court is satisfied, on application, that the young person, having regard to the best interests of the young person and the safety of others, cannot be detained in a place of detention for young persons.

**(2)** Notwithstanding anything in this or any other Act of Parliament, where a young person who is over the age of eighteen is to be proceeded against in ordinary court by reason of

- (a) subsection 16(1.01), where no application is made under that subsection,
  - (b) an order under subparagraph 16(1.1)(b)(i), or
  - (c) the refusal under subparagraph 16(1.1)(b)(ii) to make an order,
- and the young person is to be in custody pending the proceedings in that court, the young person shall be held in a place of detention for adults unless the youth court is satisfied, on application, that the young person, having regard to the best interests of

the young person and the safety of others, should be detained in a place of custody for young persons.

(3) On application, the youth court shall review the placement of a young person in detention pursuant to this section and, if satisfied, having regard to the best interests of the young person and the safety of others, and after having afforded the young person, the provincial director and a representative of a provincial department responsible for adult correctional facilities an opportunity to be heard, that the young person should remain in detention where the young person is or be transferred to youth or adult detention, as the case may be, the court may so order.

(4) An application referred to in this section may be made by the young person, the young person's parents, the provincial director, the Attorney General or the Attorney General's agent

(5) Where an application referred to in this section is made, the applicant shall cause a notice of the application to be given

- (a) where the applicant is the young person or one of the young person's parents, to the provincial director and the Attorney General;
- (b) where the applicant is the Attorney General or the Attorney General's agent, to the young person, the young person's parents and the provincial director; and
- (c) where the applicant is the provincial director, to the young person, the parents of the young person and the Attorney General.

(6) A notice given under subsection (5) by the Attorney General or the provincial director shall include a statement that the young person has the opportunity to be heard and the right to be represented by counsel.

(7) Notwithstanding anything in this section, no young person shall remain in custody in a place of detention for young persons under this section after the young person attains the age of twenty years. 1992, c. 11, s. 2; 1995, c. 19, s. 9.

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**PLACEMENT ON CONVICTION BY ORDINARY COURT / Factors to be taken into account / Report necessary / Review / Who may make application / Notice.**

16.2 (1) Notwithstanding anything in this or any other Act of Parliament, where a young person who is proceeded against in ordinary court by reason of subsection 16(1.01), where no application is made under that subsection, or by reason of an order under subparagraph 16(1.1)(b)(i) or the refusal under subparagraph 16(1.1)(b)(ii) to make an order, is convicted and sentenced to imprisonment, the court shall, after affording the young person, the parents of the young person, the Attorney General, the provincial director and representatives of the provincial and federal correctional systems an opportunity to be heard, order that the young person serve any portion of the imprisonment in

- (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
- (b) a provincial correctional facility for adults; or
- (c) where the sentence is for two years or more, a penitentiary.

(2) In making an order under subsection (1), the court shall take into account

- (a) the safety of the young person;
- (b) the safety of the public;
- (c) the young person's accessibility to family;
- (d) the safety of other young persons if the young person were to be held in custody in a place of custody for young persons;
- (e) whether the young person would have a detrimental influence on other young persons if the young person were to be held in custody in a place of custody for young persons;

- (f) the young person's level of maturity;
  - (g) the availability and suitability of treatment, educational and other resources that would be provided to the young person in a place of custody for young persons and in a place of custody for adults;
  - (h) the young person's prior experiences and behaviour while in detention or custody;
  - (i) the recommendations of the provincial director and representatives of the provincial and federal correctional facilities; and
  - (j) any other factor the court considers relevant.
- (3) Prior to making an order under subsection (1), the court shall require that a report be prepared for the purpose of assisting the court.
- (4) On application, the court shall review the placement of a young person in detention pursuant to this section and, if satisfied that the circumstances that resulted in the initial order have changed materially, and after having afforded the young person, the provincial director and the representatives of the provincial and federal correctional systems an opportunity to be heard, the court may order that the young person be placed in
- (a) a place of custody for young persons separate and apart from any adult who is detained or held in custody;
  - (b) a provincial correctional facility for adults, or
  - (c) where the sentence is for two years or more, a penitentiary.
- (5) An application referred to in this section may be made by the young person, the young person's parents, the provincial director, a representative of the provincial and federal correctional systems and the Attorney General
- (6) Where an application referred to in this section is made, the applicant shall cause a notice of the application to be given
- (a) where the applicant is the young person or one of the young person's parents, to the provincial director, to representatives of the provincial and federal correction systems and to the Attorney General;
  - (b) where the applicant is the Attorney General or the Attorney General's agent, to the young person, the young person's parents and the provincial director and representatives of the provincial and federal correction systems; and
  - (c) where an applicant is the provincial director, to the young person, the parents of the young person, the Attorney General and representatives of the provincial and federal correction systems. 1992, c. 11, s. 2; 1995, c. 19, s. 10.

## ANNOTATIONS

This section does not apply to an accused who, by the time of conviction, is 18 years of age and therefore no longer a "young person": *R. v. Godlewski*, [1994] 3 W.W.R. 153, 92 Man. R. (2d) 127, 61 W.A.C. 127 (C.A.).

## ORDER RESTRICTING PUBLICATION OF INFORMATION PRESENTED AT TRANSFER HEARING / Offence / Definition of "newspaper".

17. (1) Where a youth court hears an application for a transfer under section 16, it shall

- (a) where the young person is not represented by counsel, or
  - (b) on application made by or on behalf of the young person or the prosecutor, where the young person is represented by counsel,
- make an order directing that any information respecting the offence presented at the hearing shall not be published in any newspaper or broadcast before such time as
- (c) an order for a transfer is refused or set aside on review and the time for all



reviews against the decision has expired or all proceedings in respect of any such review have been completed; or

(d) the trial is ended, if the case is transferred to ordinary court.

(2) Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

(3) In this section, "newspaper" has the meaning set out in section 297 of the *Criminal Code*. 1980-81-82-83, c. 110, s. 17; 1995, c. 19, s. 11.

## ANNOTATIONS

It was held in *R. v. R. (T.) (No. 1)* (1984), 10 C.C.C. (3d) 481 (Alta. Q.B.) that the restriction on publication of proceedings in juvenile Court contained in s. 12(3) of the Juvenile Delinquents Act also applied to the proceedings on an appeal from the making of a transfer order made under that Act. Reference should also be made to s. 38(1), *infra*.

It was held, considering the transfer provisions of the Juvenile Delinquents Act, that while the superior court has power to prohibit publication of the evidence heard at a transfer hearing the order should not be permanent but extend only to the expiry of the appeal period following the trial: *R. v. Canadian Newspapers Co.* (1984), 16 C.C.C. (3d) 495 (Man. C.A.).

## TRANSFER OF JURISDICTION

### TRANSFER OF JURISDICTION.

18. Notwithstanding subsections 478(1) and (3) of the *Criminal Code*, where a young person is charged with an offence that is alleged to have been committed in one province, he may, if the Attorney General of the province where the offence is alleged to have been committed consents, appear before a youth court of any other province and,

(a) where the young person signifies his consent to plead guilty and pleads guilty to that offence, the court shall, if it is satisfied that the facts support the charge, find the young person guilty of the offence alleged in the information; and

(b) where the young person does not signify his consent to plead guilty and does not plead guilty, or where the court is not satisfied that the facts support the charge, the young person shall, if he was detained in custody prior to his appearance, be returned to custody and dealt with according to law. 1980-81-82-83, c. 110, s. 18.

## ADJUDICATION

WHERE YOUNG PERSON PLEADS GUILTY / Where young person pleads not guilty / Application for transfer to ordinary court / Election—offence of murder / Where no election made / Preliminary inquiry / Preliminary inquiry provisions of Criminal Code / Part XIX and XX of the Criminal Code.

19. (1) Where a young person pleads guilty to an offence charged against him and the youth court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.

(2) Where a young person charged with an offence pleads not guilty to the offence or pleads guilty but the youth court is not satisfied that the facts support the charge, the court shall, subject to subsection (4), proceed with the trial and shall, after consider-

ing the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be.

(3) The court shall not make a finding under this section in respect of a young person in respect of whom an application may be made under section 16 for an order that the young person be proceeded against in ordinary court unless it has inquired as to whether any of the parties to the proceedings wishes to make such an application, and, if any party so wishes, has given that party an opportunity to do so.

(4) Notwithstanding section 5, where a young person is charged with having committed first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the youth court, before proceeding with the trial, shall ask the young person to elect to be tried by a youth court judge alone or by a judge of a superior court of criminal jurisdiction with a jury, and where a young person elects to be tried by a judge of a superior court of criminal jurisdiction with a jury, the young person shall be dealt with as provided in this Act.

(5) Notwithstanding section 5, where an election is not made under subsection (4), the young person shall be deemed to have elected to be tried by a judge of a superior court of criminal jurisdiction with a jury and dealt with as provided for in this Act.

(5.1) Where a young person elects or is deemed to have elected to be tried by a judge of a superior court of criminal jurisdiction with a jury, the youth court shall conduct a preliminary inquiry and if, on its conclusion, the young person is ordered to stand trial, the proceedings shall be before a judge of the superior court of criminal jurisdiction with a jury.

(5.2) A preliminary inquiry referred to in subsection (5.1) shall be conducted in accordance with the provisions of Part XVIII of the *Criminal Code*, except to the extent that they are inconsistent with this Act.

(6) Proceedings under this Act before a judge of a superior court of criminal jurisdiction with a jury shall be conducted, with such modifications as the circumstances require, in accordance with the provisions of Parts XIX and XX of the *Criminal Code*, except that

- (a) the provisions of this Act respecting the protection of privacy of young persons prevail over the provisions of the *Criminal Code*; and
- (b) the young person is entitled to be represented in court by counsel if the young person is removed from court pursuant to subsection 650(2) of the *Criminal Code*. 1980-81-82-83, c. 110, s. 19; R.S.C. 1985, c. 24 (2nd Supp.), s. 13; 1995, c. 19, s. 12.

## ANNOTATIONS

**Subsec. (1)** – The requirements of this subsection are not met by the bare recital of the charge together with brief questioning of the offender as to whether he understood the charge. It would seem that this subsection requires a statement of the facts supporting the charge: *R. v. K* (1985), 18 C.C.C. (3d) 94 (N.S.S.C. App. Div.).

**Subsec. (3)** – Where the failure to comply with this subsection was inadvertent, the trial judge attempted to comply with its requirements after making the finding of guilt, and the offender suffered no prejudice, then the curative provision of s. 686(1)(b)(iv) of the *Criminal Code* could be applied and the finding upheld: *R. v. C. (D.)* (1990), 83 Nfld. & P.E.I.R. 166 (P.E.I.S.C. App. Div.).

## DISPOSITIONS

DISPOSITIONS THAT MAY BE MADE / Coming into force of disposition / Duration of disposition / Combined duration of dispositions / Duration of dispositions made at different times / Custody first / Conditional supervision suspended / Disposition continues when adult / Reasons for the disposition / Limitation on punishment / Application of Part XXIII of *Criminal Code* / Section 787 of *Criminal Code* does not apply / Contents of probation order / No orders under section 161 of *Criminal Code*.

20. (1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, other than the disposition referred to in paragraph (k.1), or any number thereof that are not inconsistent with each other, and where the offence is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, the court shall make the disposition referred to in paragraph (k.1) and may make such other disposition as the court considers appropriate:

- (a) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;
- (a.1) by order direct that the young person be discharged on such conditions as the court considers appropriate;
- (b) impose on the young person a fine not exceeding one thousand dollars to be paid at such time and on such terms as the court may fix;
- (c) order the young person to pay to any other person at such time and on such terms as the court may fix an amount by way of compensation for loss of or damage to property, for loss of income or support or for special damages for personal injury arising from the commission of the offence where the value thereof is readily ascertainable, but no order shall be made for general damages;
- (d) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within such time as the court may fix, if the property is owned by that other person or was, at the time of the offence, in his lawful possession;
- (e) if any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at such time and on such terms as the court may fix, an amount not exceeding the amount paid by the purchaser for the property;
- (f) subject to section 21, order the young person to compensate any person in kind or by way of personal services at such time and on such terms as the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (c) or (e);
- (g) subject to section 21, order the young person to perform a community service at such time and on such terms as the court may fix;
- (h) make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;

**NOTE:** Subsection (1)(h) replaced 1995, c. 39, s. 178 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:



- (h) subject to section 20.1, make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;
  - (i) [Repealed. 1995, c. 19, s. 13(2).]
  - (j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;
  - (k) subject to sections 24 to 24.5, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
    - (i) two years from the date of committal, or
    - (ii) where the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal;
  - (k.1) order the young person to serve a disposition not to exceed
    - (i) in the case of first degree murder, ten years comprised of
      - (A) a committal to custody, to be served continuously, for a period that shall not, subject to subsection 26.1(1), exceed six years from the date of committal, and
      - (B) a placement under conditional supervision to be served in the community in accordance with section 26.2, and
    - (ii) in the case of second degree murder, seven years comprised of
      - (A) a committal to custody, to be served continuously, for a period that shall not, subject to subsection 26.1(1), exceed four years from the date of committal, and
      - (B) a placement under conditional supervision to be served in the community in accordance with section 26.2; and
  - (l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public.
- (2) A disposition made under this section shall come into force on the date on which it is made or on such later date as the youth court specifies therein.
- (3) No disposition made under this section, other than an order made under paragraph (1)(h), (k) or (k.1), shall continue in force for more than two years and, where the youth court makes more than one disposition at the same time in respect of the same offence, the combined duration of the dispositions, except in respect of an order made under paragraph (1)(h), (k) or (k.1), shall not exceed two years.
- (4) Subject to subsection (4.1), where more than one disposition is made under this section in respect of a young person with respect to different offences, the continuous combined duration of those dispositions shall not exceed three years, except where one of those offences is first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*, in which case the continuous combined duration of those dispositions shall not exceed ten years in the case of first degree murder, or seven years in the case of second degree murder.
- (4.1) Where a disposition is made under this section in respect of an offence committed by a young person after the commencement of, but before the completion of, any dispositions made in respect of previous offences committed by the young person,
- (a) the duration of the disposition made in respect of the subsequent offence shall be determined in accordance with subsections (3) and (4);
  - (b) the disposition may be served consecutively to the dispositions made in respect of the previous offences; and
  - (c) the combined duration of all the dispositions may exceed three years, except where the offence is, or one of the previous offences was,
    - (i) first degree murder within the meaning of section 231 of the *Criminal Code*, in which case the continuous combined duration of the dispositions may exceed ten years, or
    - (ii) second degree murder within the meaning of section 231 of the *Criminal*

*Code*, in which case the continuous combined duration of the dispositions may exceed seven years.

(4.2) Subject to subsection (4.3), where a young person who is serving a disposition made under paragraph (1)(k.1) is ordered to custody in respect of an offence committed after the commencement of, but before the completion of, that disposition, the custody in respect of that subsequent offence shall be served before the young person is placed under conditional supervision.

(4.3) Where a young person referred to in subsection (4.2) is under conditional supervision at the time the young person is ordered to custody in respect of a subsequent offence, the conditional supervision shall be suspended until the young person is released from custody.

(5) Subject to section 741.1 of the *Criminal Code*, a disposition made under this section shall continue in effect in accordance with the terms thereof, after the young person against whom it is made becomes an adult.

**NOTE:** Subsection (5) amended by 1995, c. 22, s. 17 (to come into force by order of the Governor in Council) by replacing the reference to s. 741.1 with a reference to s. 743.5.

(6) Where a youth court makes a disposition under this section, it shall state its reasons therefor in the record of the case and shall

(a) provide or cause to be provided a copy of the disposition, and

(b) on request, provide or cause to be provided a transcript or a copy of the reasons for the disposition

to the young person in respect of whom the disposition was made, the young person's counsel and parents, the provincial director, where the provincial director has an interest in the disposition, the prosecutor and, in the case of a custodial disposition made under paragraph (1)(k) or (k.1), the review board, if a review board has been established or designated.

(7) No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence.

(8) Part XXIII of the *Criminal Code* does not apply in respect of proceedings under this Act except for subsections 735(1.1) to (1.4), 736(2) and (4), and 738(4) and sections 749, 750 and 751, which provisions apply with such modifications as the circumstances require.

**NOTE:** Subsection (8) re-enacted by 1995, c. 22, s. 16 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

APPLICATION OF PART XXIII OF CRIMINAL CODE.

(8) *Part XXIII of the Criminal Code does not apply in respect of proceedings under this Act except for subsection 730(2) and sections 748, 748.1 and 749, which provisions apply with such modifications as the circumstances require.*

**NOTE:** Subsection (8) re-enacted by 1995, c. 22, s. 25(b) (to come into force if 1995, c. 19, s. 13(6) comes into force before 1995, c. 22, s. 16 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

(8) *Part XXIII of the Criminal Code does not apply in respect of proceedings under this Act except for section 722, subsection 730(2) and sections 748, 748.1 and 749, which provisions apply with such modifications as the circumstances require.*

(9) Section 787 of the *Criminal Code* does not apply in respect of proceedings under this Act.

(10) The youth court shall specify in any probation order made under paragraph (1)(j) the period for which it is to remain in force.

(11) (old provision) [*Repealed*. R.S.C. 1985, c. 24 (2nd Supp.), s. 14(2).]

(11) Notwithstanding paragraph (1)(h), a youth court shall not make an order of prohibition under section 161 of the *Criminal Code* against a young person. 1980-81-82-83, c. 110, s. 20; R.S.C. 1985, c. 27 (1st Supp.), s. 187, c. 24 (2nd Supp.), s. 14, c. 1 (4th Supp.), s. 38; 1992, c. 11, s. 3; 1993, c. 45, s. 15; 1995, c. 19, s. 13.

## ANNOTATIONS

**Principles generally in making disposition** – While the sentence to be imposed on both adults and young offenders must be proportional to the offence committed, the principle of proportionality will have greater significance for adults than it will in the disposition of young offenders. For the young offender, a proper disposition must take into account not only the seriousness of the crime but also all relevant factors. Intolerable conditions in the home will indicate both a special need for care and the absence of any guidance within the home. The situation in the home should neither be ignored nor made the pre-dominate factor in sentencing. The aim of the disposition must be both to protect society and at the same time to provide the young offender with the necessary guidance and assistance that he may not be receiving at home. It is also appropriate to take into account the availability of a yearly review pursuant to s. 28. Such a review is an integral part of the disposition and therefore it is appropriate to take it into account as a factor, albeit not a major one, in assessing the appropriateness of the disposition: *R. v. M. (J. J.)*, [1993] 2 S.C.R. 421, 81 C.C.C. (3d) 487, 20 C.R. (4th) 295 (7:0). Also see *R. v. I. (R.)* (1985), 17 C.C.C. (3d) 523, 44 C.R. (3d) 168 (Ont. C.A.).

The court is not entitled to impose a custodial sentence out of proportion to the facts of the offence merely because of the offender's serious psychiatric problems: *R. v. B. (M.)* (1987), 36 C.C.C. (3d) 573 (Ont. C.A.).

It was an error to impose a sentence approaching the maximum where the circumstances of the offence, and of the accused's participation, did not warrant that kind of disposition, notwithstanding the indication in the pre-disposition report that the accused was unmanageable at home and had not responded to previous dispositions. The circumstances could not be described as the worst kind: *R. v. A. (D.)* (1986), 30 C.C.C. (3d) 564, 44 Man. R. (2d) 104 (C.A.).

While the protection of society is a central principle of this Act, it is one that has to be reconciled with other considerations, such as the needs of young persons and, in any event, it is not a principle which must inevitably be reflected in a severe disposition. In many cases, unless the degree of seriousness of the offence and the circumstances in which it was committed militate otherwise, it is best given effect to by a disposition which gives emphasis to the factors of individual deterrence and rehabilitation: *R. v. F. (J.)* (1985), 22 C.C.C. (3d) 555 (Ont. C.A.).

The principle of sentencing that the maximum sentence is reserved for the worst case is not fully applicable to dispositions under this Act in view of the narrow range of disposition available. The narrow range compresses all serious cases at the top of the range and it would be unrealistic to scale all sentences down from the maximum or to reserve the sentence only for the very worst possible cases: *R. v. H. (A.)* (1991), 65 C.C.C. (3d) 116 (B.C.C.A.).

The special needs of the offender cannot justify an imposition of a heavier penalty than would be imposed on an adult: *R. v. N. (E.)* (1990), 68 C.C.C. (3d) 574 (Que. C.A.).

**General deterrence** – The principle of general deterrence must be considered although it has diminished importance in determining the appropriate disposition in the case of a youthful offender. Dispositions under the *Young Offender's Act* can have an effective



deterrent effect in view of the large number of offences committed by young offenders in groups. *R. v. M. (J.F.)*, *supra*.

**Types of dispositions** – In view of the specific power given the court by para. (1)(g) to make a disposition of an order for community service, community service cannot be made a term of a probation order through the combined operation of para. (1)(j) and s. 23(2)(g): *R. v. P. (K.R.)* (1987), 40 C.C.C. (3d) 376 (B.C.C.A.).

There is no power to impose a term of custody and then suspend that disposition: *R. v. D* (1985), 18 C.C.C. (3d) 476 (N.S.C.A.). Similarly: *R. v. G. (W.)* (1985), 23 C.C.C. (3d) 93 (B.C.C.A.).

The minimum one-year imprisonment prescribed by s. 85 of the Criminal Code does not apply to sentencing of a young offender under this Act: *R. v. T. (K.D.)* (1986), 28 C.C.C. (3d) 110 (N.S.C.A.); *R. v. H. (R.)* (1992), 77 C.C.C. (3d) 198, 10 O.R. (3d) 723 (C.A.).

Subsection (2) permits the court to provide that the custodial sentence take effect at some future date, such as the summer months, so as not to interfere with the offender's schooling: *R. v. T. (K.D.)* (1986), 28 C.C.C. (3d) 110 (N.S.C.A.); *R. v. M. (E.)* (1992), 76 C.C.C. (3d) 159, 10 O.R. (3d) 481 (C.A.).

However, it is not a proper exercise of the power under subsec. (2) to postpone the date upon which the custodial portion of the disposition is to take effect in the expectation that prior to that date, if the offender had been of good behaviour, he could successfully apply for a review of that disposition: *R. v. P. (J.R.)* (1987), 36 C.C.C. (3d) 134, 79 N.S.R. (2d) 181 (S.C. App. Div.).

There is no jurisdiction to grant a young offender a conditional discharge: *R. v. H. (S.D.)* (1989), 49 C.C.C. (3d) 451, [1989] 5 W.W.R. 350, 76 Sask. R. 159 (C.A.); *R. v. R. (B.)* (1990), 73 O.R. (2d) 347 (C.A.).

The lack of availability of a conditional discharge does not infringe the equality guarantees in s. 15 of the Charter: *R. v. G. (D.)* (1990), 56 C.C.C. (3d) 147 (B.C. Co. Ct.).

**Consecutive dispositions** – Subsec. (4.1) does not permit a judge to make a disposition consecutive to a disposition imposed by another judge where the offender was not under such disposition at the time that he committed the offence: *R. v. C. (W.J.)* (1988), 42 C.C.C. (3d) 253, 83 N.S.R. (2d) 352 (C.A.). *Contra*: *R. v. B. (D.W.)* (1991), 64 C.C.C. (3d) 164, 2 O.R. (3d) 790 (Ont. C.A.) and *R. v. R. (D.J.)* (1992), 76 C.C.C. (3d) 88 (Man. C.A.) where it was held that subsec. (4.1) was not the exclusive provision dealing with consecutive dispositions and did not affect the court's power to make consecutive dispositions by virtue of subsec. (2).

A youth court may impose consecutive dispositions where the dispositions in issue are imposed simultaneously: *R. v. M. (D.R.)* (1987), 79 N.S.R. (2d) 222 (C.A.); *R. v. F. (D.J.)* (1988), 29 O.A.C. 92 (C.A.); *R. v. G. (W.J.)* (1986), 29 C.C.C. (3d) 430, 60 Nfld. & P.E.I.R. 59 (P.E.I.S.C.).

Subsection (2) gives the court power to impose a disposition which is consecutive to a sentence imposed upon the offender by an ordinary court for offences committed by the offender as an adult: *R. v. F. (K.R.)* (1995) 96 C.C.C. (3d) 469, [1995] 5 W.W.R. 556, 162 A.R. 378 (C.A.); *V. (T.) v. Ontario (Attorney General)* (1989), 51 C.C.C. (3d) 155 (Ont. H.C.J.).

The court has power to impose a consecutive disposition although the offender was not serving a disposition at the time of the conviction for the offence for which the consecutive disposition is later imposed. Although, by virtue of s. 717(4), an ordinary court could not impose a consecutive sentence on an adult in those circumstances, the imposition of the consecutive disposition does not offend subsec. (7) of this section: *R. v. F. (K.R.)* (1995), 96 C.C.C. (3d) 469, [1995] 5 W.W.R. 556, 162 A.R. 378 (C.A.).

Where a number of consecutive dispositions which include periods of custody have been imposed by different judges, then the custodial dispositions must be served first before any periods of probation: *R. v. H. (J.)* (1992), 71 C.C.C. (3d) 309 (Ont. C.A.).

The maximum duration of a detention order for treatment in a hospital is limited to two years. There is no authority for consecutive dispositions permitting a longer order where the offender has been convicted of several offences. In particular, s. 20(2) was intended to give the youth court a power to defer a disposition but does not give the court the right to impose consecutive dispositions: *R. v. L. (M.)* (1994), 89 C.C.C. (3d) 264, [1994] R.J.Q. 645, 61 Q.A.C. 69 (C.A.).

**Length of dispositions** – In view of the provisions of subsec. (3), except for orders under subsec. (1)(h) [And now subsec. (1)(k.1)], the combined duration of dispositions made at the same time in respect of the same offence cannot exceed two years where the offence is not punishable by life imprisonment. The reference to para. (1)(k) in subsec. (3) only refers to para. (1)(k)(ii) so that where the offence is punishable by life imprisonment then the combined duration of the dispositions cannot exceed three years. Thus, for a young offender convicted of theft over \$1000, which is not punishable by life imprisonment, the combined duration of an order of custody and probation cannot exceed two years: *R. v. C. (C.)* (1990), 60 C.C.C. (3d) 418, 75 O.R. (2d) 187, 42 O.A.C. 12 (C.A.).

**NOTE:** Enacted 1995, c. 39, s. 179 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

MANDATORY PROHIBITION ORDER / Duration of prohibition order / Discretionary prohibition order / Duration of prohibition order / Definition of “release from imprisonment” / Reasons for the prohibition order / Reasons / Application of Criminal Code / Report.

20. *1(1) Notwithstanding subsection 20(1), where a young person is found guilty of an offence referred to in any of paragraphs 109(1)(a) to (d) of the Criminal Code, the youth court shall, in addition to making any disposition referred to in subsection 20(1), make an order prohibiting the young person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substance during the period specified in the order as determined in accordance with subsection (2).*

*(2) An order made under subsection (1) begins on the day on which the order is made and ends not earlier than two years after the young person’s release from custody after being found guilty of the offence or, if the young person is not then in custody or subject to custody, after the time the young person is found guilty of or discharged from the offence.*

*(3) Notwithstanding subsection 20(1), where a young person is found guilty of an offence referred to in paragraph 110(1)(a) or (b) of the Criminal Code, the youth court shall, in addition to making any disposition referred to in subsection 20(1), consider whether it is desirable, in the interests of the safety of the person or of any other person, to make an order prohibiting the person from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, and where the court decides that it is so desirable, the court shall so order.*

*(4) An order made under subsection (3) against a young person begins on the day on which the order is made and ends not later than two years after the young person’s release from custody or, if the young person is not then in custody or subject to custody, after the time the young person is found guilty of or discharged from the offence.*

*(5) In paragraph (2)(a) and subsection (4), “release from custody” means a release from custody in accordance with this Act, other than a release from custody under subsection 35(1), and includes the commencement of conditional supervision or probation.*

(6) *Where a youth court makes an order under this section, it shall state its reasons for making the order in the record of the case and shall*

(a) *provide or cause to be provided a copy of the order, and*

(b) *on request, provide or cause to be provided a transcript or copy of the reasons for making the order*

*to the young person against whom the order was made, the young person's counsel and parents and the provincial director.*

(7) *Where the youth court does not make an order under subsection (3), or where the youth court does make such an order but does not prohibit the possession of everything referred to in that subsection, the youth court shall include in the record a statement of the youth court's reasons.*

(8) *Sections 113 to 117 of the Criminal Code apply in respect of any order made under this section.*

(9) *Before making any order referred to in section 113 of the Criminal Code in respect of a young person, the youth court may require the provincial director to cause to be prepared, and to submit to the youth court, a report on the young person.*

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**WHERE A FINE OR OTHER PAYMENT IS ORDERED / Fine option program / Rates, crediting and other matters / Representations respecting orders under paras. 20(1)(c) to (f) / Notice of orders under paras. 20(1)(c) to (f) / Consent of person to be compensated / Order for compensation or community service / Duration of order for service / Community service order / Application for further time to complete disposition.**

**21. (1)** The youth court shall, in imposing a fine on a young person under paragraph 20(1)(b) or in making an order against a young person under paragraph 20(1)(c) or (e), have regard to the present and future means of the young person to pay.

(2) A young person against whom a fine is imposed under paragraph 20(1)(b) may discharge the fine in whole or in part by earning credits for work performed in a program established for that purpose

(a) by the Lieutenant Governor in Council of the province in which the fine was imposed; or

(b) by the Lieutenant Governor in Council of the province in which the young person resides, where an appropriate agreement is in effect between the government of that province and the government of the province in which the fine was imposed.

(3) A program referred to in subsection (2) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.

(4) In considering whether to make an order under paragraphs 20(1)(c) to (f), the youth court may consider any representations made by the person who would be compensated or to whom restitution or payment would be made.

(5) Where the youth court makes an order under paragraphs 20(1)(c) to (f), it shall cause notice of the terms of the order to be given to the person who is to be compensated or to whom restitution or payment is to be made.

(6) No order may be made under paragraph 20(1)(f) unless the youth court has secured the consent of the person to be compensated.

(7) No order may be made under paragraph 20(1)(f) or (g) unless the youth court



- (a) is satisfied that the young person against whom the order is made is a suitable candidate for such an order; and
  - (b) is satisfied that the order does not interfere with the normal hours of work or education of the young person.
- (8) No order may be made under paragraph 20(1)(f) or (g) to perform personal or community services unless such services can be completed in two hundred and forty hours or less and within twelve months of the date of the order.
- (9) No order may be made under paragraph 20(1)(g) unless
- (a) the community service to be performed is part of a program that is approved by the provincial director; or
  - (b) the youth court is satisfied that the person or organization for whom the community service is to be performed has agreed to its performance.
- (10) A youth court may, on application by or on behalf of the young person in respect of whom a disposition has been made under paragraphs 20(1)(b) to (g), allow further time for the completion of the disposition subject to any regulations made pursuant to paragraph 67(b) and to any rules made by the youth court pursuant to subsection 68(1). 1980-81-82-83, c. 110, s. 21; R.S.C. 1985, c. 24 (2nd Supp.), s. 15.

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**22. [Repealed. 1995, c. 19, s. 14.]**

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**CONDITIONS THAT MUST APPEAR IN PROBATION ORDERS /** Conditions that may appear in probation orders / Communication of probation order to young person and parent / Copy of probation order to parent / Endorsement of order by young person / Validity of probation order / Commencement of probation order / Notice to appear / Warrant to arrest young person.

**23. (1) The following conditions shall be included in a probation order made under paragraph 20(1)(j):**

- (a) that the young person bound by the probation order shall keep the peace and be of good behaviour; and
  - (b) that the young person appear before the youth court when required by the court to do so.
- (c) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 16(1).]

**(2) A probation order made under paragraph 20(1)(j) may include such of the following conditions as the youth court considers appropriate in the circumstances of the case:**

- (a) that the young person bound by the probation order report to and be under the supervision of the provincial director or a person designated by the youth court;
- (a.1) that the young person notify the clerk of the youth court, the provincial director or the youth worker assigned to his case of any change of address or any change in his place of employment, education or training;
- (b) that the young person remain within the territorial jurisdiction of one or more courts named in the order;
- (c) that the young person make reasonable efforts to obtain and maintain suitable employment;
- (d) that the young person attend school or such other place of learning, training or recreation as is appropriate, if the court is satisfied that a suitable program is available for the young person at that place;
- (e) that the young person reside with a parent, or such other adult as the court considers appropriate, who is willing to provide for the care and maintenance of the young person;

- (f) that the young person reside in such place as the provincial director may specify; and
  - (g) that the young person comply with such other reasonable conditions set out in the order as the court considers desirable, including conditions for securing the good conduct of the young person and for preventing the commission by the young person of other offences.
- (3) Where the youth court makes a probation order under paragraph 20(1)(j), it shall
- (a) cause the order to be read by or to the young person bound by the probation order;
  - (b) explain or cause to be explained to the young person the purpose and effect of the order and ascertain that the young person understands it; and
  - (c) cause a copy of the order to be given to the young person and to a parent of the young person, if the parent is in attendance at the proceedings against the young person.
- (4) Where the youth court makes a probation order under paragraph 20(1)(j), it may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.
- (5) After a probation order has been read by or to a young person and explained to him pursuant to subsection (3), the young person shall endorse the order acknowledging that he has received a copy of the order and acknowledging the fact that it has been explained to him.
- (6) The failure of a young person to endorse a probation order pursuant to subsection (5) does not affect the validity of the order.
- (7) A probation order made under paragraph 20(1)(j) comes into force
- (a) on the date on which the order is made; or
  - (b) where the young person in respect of whom the order is made is committed to continuous custody, on the expiration of the period of custody.
- (8) A young person may be given notice to appear before the youth court pursuant to paragraph (1)(b) orally or in writing.
- (9) If a young person to whom a notice is given in writing to appear before the youth court pursuant to paragraph (1)(b) does not appear at the time and place named in the notice and it is proved that a copy of the notice was served on him, a youth court may issue a warrant to compel the appearance of the young person. 1980-81-82-83, c. 110, s. 23; R.S.C. 1985, c. 24 (2nd Supp.), s. 16; c. 1 (4th Supp.), s. 39.

#### ANNOTATIONS

**Subsec. (2)** – It was held, considering the predecessor to the section, that para. (f) requires that the condition to be imposed is that the offender reside in such a place as the provincial director may specify. The judge could not provide that the offender reside in a foster home approved by his probation officer: *R. v. G. (W.)* (1985), 23 C.C.C. (3d) 93 (B.C.C.A.).

Where it has been made a term of probation that the offender reside where placed by a youth worker, it was open to the youth worker to delegate this decision to the offender's social worker, since the offender was already a ward of the Ministry: *R. v. S. (N.)* (1992), 73 C.C.C. (3d) 59 (B.C.Y.Ct.).

**Subsec. (3)** – The duties under para. (c) may be delegated to the clerk of the court. However, the term “proceedings” in this paragraph is not limited to the actual proceedings before the clerk when the probation order is being drawn up. The term must refer to the proceedings as a whole against the young offender, and not merely the last techni-

cal step in the preparation of the formal probation order. In order to comply with this section as a whole, the youth court must determine, prior to delegating its functions to a court official, whether a parent is entitled to receive a copy of the probation order, as a parent in attendance at the disposition proceedings surely would be, or whether the parent should be given a copy of the order in any event, since the parent, although not in attendance, is taking an active interest in the proceedings and therefore should be provided with a copy of the probation order pursuant to subsec. (4). In delegating its duties, the court must properly inform the clerk of the need, be it mandatory or discretionary, to inform a parent in accordance with subsecs. (3) and (4). Failure to provide the parent with the order as required by subsec. (3) affects the validity of the order and a charge of breach of probation must be dismissed: *R. v. M. (L.A.)* (1994), 92 C.C.C. (3d) 562, 73 O.A.C. 345 (C.A.).

**Subsec. (7)** – The court has no power to make probation orders consecutive to each other: *R. v. L. (T.S.)* (1988), 46 C.C.C. (3d) 126, 87 N.S.R. (2d) 240 (C.A.).

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**CONDITIONS FOR CUSTODY / Factors / Pre-disposition report / Report dispensed with / Reasons.**

**24. (1)** The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person.

**(1.1)** In making a determination under subsection (1), the youth court shall take the following into account:

- (a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures;
- (b) that a young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions whenever appropriate; and
- (c) that custody shall only be imposed when all available alternatives to custody that are reasonable in the circumstances have been considered.

**(2)** Subject to the subsection (3), before making an order of committal to custody, the youth court shall consider a pre-disposition report.

**(3)** The youth court may, with the consent of the prosecutor and the young person or his counsel, dispense with the pre-disposition report required under subsection (2) if the youth court is satisfied, having regard to the circumstances, that the report is unnecessary or that it would not be in the best interests of the young person to require one.

**(4)** Where the youth court makes a disposition in respect of a young person under paragraph 20(1)(k), the youth court shall state the reasons why any other disposition or dispositions under subsection 20(1), without the disposition under paragraph 20(1)(k), would not have been adequate. R.S.C. 1985, c. 24 (2nd Supp.), s. 17; 1995, c. 19, s. 15.

**ANNOTATIONS**

**Subsec. (1)** – A disposition of secure custody, as opposed to open custody, may be imposed for reasons other than merely security reasons and, in particular, may be imposed as a matter of general deterrence. The factors to be taken into account are whether or not secure custody is necessary to prevent escape, further misconduct or violence, the effect upon the rehabilitation of the offender, factors of general and specific



deterrence, and expression of society's abhorrence of certain crimes: *R. v. H. (S.R.)* (1990), 56 C.C.C. (3d) 46, 38 O.A.C. 127 (C.A.).

**Subsec. (2)** – Neither the court's convenience nor concern about the young offender's disruptive influence in the small community warranted the court in proceeding to impose a custodial disposition after consideration of a brief report which did not meet the requirements of a pre-disposition report as set out in s. 14(2): *R. v. I. (R.)* (1985), 17 C.C.C. (3d) 523 (Ont. C.A.).

This subsection imposes a mandatory duty on the judge and his failure to comply with it renders his order of committal to custody a nullity: *R. v. S. (M.S.)* (1985), 23 C.C.C. (3d) 95 (Sask. C.A.).

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**DEFINITIONS / "open custody" / "secure custody" / Youth court to specify type of custody / Provincial director to specify level of custody / Factors.**

**24.1 (1)** In this section and sections 24.2, 24.3, 28 and 29,

"open custody" means custody in

(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or

(b) any other like place or facility

designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;

"secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

(2) Subject to subsection (3), where the youth court commits a young person to custody under paragraph 20(1)(k) or (k.1) or makes an order under subsection 26.1(1) or paragraph 26.6(2)(b), it shall specify in the order whether the custody is to be open custody or secure custody.

(3) In a province in which the Lieutenant Governor in Council has designated the provincial director to determine the level of custody, the provincial director shall, where a young person is committed to custody under paragraph 20(1)(k) or (k.1) or an order is made under subsection 26.1(1) or paragraph 26.6(2)(b), specify whether the young person shall be placed in open custody or secure custody.

(4) In deciding whether a young person shall be placed in open custody or secure custody, the youth court or the provincial director shall take into account the following factors:

(a) that a young person should be placed in a level of custody involving the least degree of containment and restraint, having regard to

(i) the seriousness of the offence in respect of which the young person was committed to custody and the circumstances in which that offence was committed,

(ii) the needs and circumstances of the young person, including proximity to family, school, employment and support services,

(iii) the safety of other young persons in custody, and

(iv) the interests of society;

(b) that the level of custody should allow for the best possible match of programs to the young person's needs and behaviour, having regard to the findings of any assessment in respect of the young person;

(c) the likelihood of escape if the young person is placed in open custody; and

(d) the recommendations, if any, of the youth court or the provincial director, as

the case may be. 1980-81-82-83, c. 110, s. 24; R.S.C. 1985, c. 24 (2nd Supp.), s. 17; 1992, c. 11, s. 4; 1995, c. 19, s. 16.

## ANNOTATIONS

**Subsec. (1)** – In acting under this subsection the Lieutenant Governor in Council is limited to designation of places of open custody to those kinds specified in para. (a) and (b). However, a particular cottage in a youth centre may be validly designated as a place of open custody, even if entrance to and egress from the centre itself is controlled by double-locking doors, which are electronically controlled: *R. v. F* (1984), 16 C.C.C. (3d) 258, [1985] 2 W.W.R. 379 *sub nom. F. (C.) v. R. and Minister of Community Services and Corrections, A.-G. Man., Bock and Bakken* (Man. C.A.).

However, an area of a county jail, used to incarcerate adults, may not be validly designated as a place of open custody. Nor may the same area be designated as both a place of open and secure custody: *R. v. F. (L.H.)* (1985), 24 C.C.C. (3d) 152 (P.E.I.S.C.).

Similarly, it was held that designation of a former county jail as a place of open and secure custody without differentiation and which lacked facilities and programmes for guidance and assistance of offenders was not properly designated as a place of open custody: *R. v. B. (D.)* (1986), 27 C.C.C. (3d) 468 (N.S.S.C.).

**PLACE OF CUSTODY / Warrant of committal / Exception / Young person to be held separate from adults / Subsection 7(2) applies / Transfer / Transfer to open custody—youth court / No transfer to secure custody—youth court / Exception—transfer to secure custody—youth court / Transfer to secure custody—provincial director / Transfer to secure custody / provincial director / Notice / Where application for review is made / Interim custody.**

**24.2 (1)** Subject to this section and sections 24.3 and 24.5, a young person who is committed to custody shall be placed in open custody or secure custody, as specified pursuant to subsection 24.1(2) or (3), at such place or facility as the provincial director may specify.

**(2)** Where a young person is committed to custody, the youth court shall issue or cause to be issued a warrant of committal.

**(3)** A young person who is committed to custody may, in the course of being transferred from custody to the court or from the court to custody, be held under the supervision and control of a peace officer or in such place of temporary detention referred to in subsection 7(1) as the provincial director may specify.

**(4)** Subject to this section and section 24.5, a young person who is committed to custody shall be held separate and apart from any adult who is detained or held in custody.

**(5)** Subsection 7(2) applies, with such modifications as the circumstances require, in respect of a person held in a place of temporary detention pursuant to subsection (3).

**(6)** A young person who is committed to custody may, during the period of custody, be transferred by the provincial director from one place or facility of open custody to another or from one place or facility of secure custody to another.

**(7)** No young person who is committed to secure custody pursuant to subsection 24.1(2) may be transferred to a place or facility of open custody except in accordance with sections 28 to 31.

**(8)** Subject to subsection (9), no young person who is committed to open custody pursuant to subsection 24.1(2) may be transferred to a place or facility of secure custody.

**(9)** Where a young person is placed in open custody pursuant to subsection 24.1(2),

the provincial director may transfer the young person from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if

- (a) the young person escapes or attempts to escape lawful custody; or
- (b) the transfer is, in the opinion of the provincial director, necessary for the safety of the young person or the safety of others in the place or facility of open custody.

(10) The provincial director may transfer a young person from a place or facility of secure custody to a place or facility of open custody when the provincial director is satisfied that the needs of the young person and the interests of society would be better served thereby.

(11) The provincial director may transfer a young person from a place or facility of open custody to a place or facility of secure custody when the provincial director is satisfied that the needs of the young person and the interests of society would be better served thereby

- (a) having considered the factors set out in subsection 24.1(4); and
- (b) having determined that there has been a material change in circumstances since the young person was placed in open custody.

(12) The provincial director shall cause a notice in writing of the decision to transfer a young person under subsection (11) to be given to the young person and the young person's parents and set out in that notice the reasons for the transfer.

(13) Where an application for review under section 28.1 of a transfer under subsection (11) is made to a youth court,

- (a) the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person and the young person's parents; and
- (b) the youth court shall forthwith, after the notice required under paragraph (a) is given, review the transfer.

(14) Where an application for review under section 28.1 of a transfer under subsection (11) is made to a youth court, the young person shall remain in a place or facility of secure custody until the review is heard by the youth court unless the provincial director directs otherwise. 1980-81-82-83, c. 110, s. 24; R.S.C. 1985, c. 24 (2nd Supp.), s. 17; 1995, c. 19, s. 17.

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**CONSECUTIVE DISPOSITIONS OF CUSTODY / Concurrent dispositions of custody.**

24.3 (1) Where a young person is committed to open custody and secure custody pursuant to subsection 24.1(2), any portions of which dispositions are to be served consecutively, the disposition of secure custody shall be served first without regard to the order in which the dispositions were imposed.

(2) Where a young person is committed to open custody and secure custody pursuant to subsection 24.1(2), any portions of which dispositions are to be served concurrently, the concurrent portions of the dispositions shall be served in secure custody. 1980-81-82-83, c. 110, s. 24; R.S.C. 1985, c. 24 (2nd Supp.), s. 17; 1995, c. 19, s. 18.

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**COMMITTAL TO CUSTODY DEEMED CONTINUOUS / Availability of place of intermittent custody.**

24.4 (1) A young person who is committed to custody under paragraph 20(1)(k) shall be deemed to be committed to continuous custody unless the youth court specifies otherwise.



(2) Before making an order of committal to intermittent custody under paragraph 20(1)(k), the youth court shall require the prosecutor to make available to the court for its consideration a report of the provincial director as to the availability of a place of custody in which an order of intermittent custody can be enforced and, where the report discloses that no such place of custody is available, the court shall not make the order. 1980-81-82-83, c. 110, s. 24; R.S.C. 1985, c. 24 (2nd Supp.), s. 17.

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**TRANSFER TO ADULT FACILITY / Where disposition and sentence concurrent.**

24.5 (1) Where a young person is committed to custody under paragraph 20(1)(k) or (k.1), the youth court may, on application of the provincial director made at any time after the young person attains the age of eighteen years, after affording the young person an opportunity to be heard, authorize the provincial director to direct that the young person serve the disposition or the remaining portion thereof in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest, but in that event, the provisions of this Act shall continue to apply in respect of that person.

(2) Where a young person is committed to custody under paragraph 20(1)(k) or (k.1) and is concurrently under sentence of imprisonment imposed in ordinary court, the young person may, in the discretion of the provincial director, serve the disposition and sentence, or any portion thereof, in a place of custody for young persons, in a provincial correctional facility for adults or, where the unexpired portion of the sentence is two years or more, in a penitentiary. 1980-81-82-83, c. 110, s. 24; R.S.C. 1985, c. 24 (2nd Supp.), s. 17; 1992, c. 11, s. 5.

**ANNOTATIONS**

Where the young offender facilities are not adequate to deal with older offenders who commit offences while under the age of 18 years, the preferable solution is for the provincial director to apply under this section, rather than for the youth court to transfer the offender to adult court pursuant to s. 16. Offenders in a provincial institution are less likely to be exposed to the pernicious influences that might come their way in a penitentiary setting: *R. v. D. (G.J.)* (1991), 62 C.C.C. (3d) 433, 112 A.R. 18 (C.A.).

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**TRANSFER OF DISPOSITION / No transfer outside province before appeal completed / Transfer to a province where person is adult.**

25. (1) Where a disposition has been made under paragraphs 20(1)(b) to (g) or paragraph 20(1)(j) or (l) in respect of a young person and the young person or a parent with whom the young person resides is or becomes a resident of a territorial division outside the jurisdiction of the youth court that made the disposition, whether in the same or in another province, a youth court judge in the territorial division in which the disposition was made may, on the application of the Attorney General or an agent of the Attorney General or on the application of the young person or the young person's parent with the consent of the Attorney General or an agent of the Attorney General, transfer the disposition and such portion of the record of the case as is appropriate to a youth court in the other territorial division, and all subsequent proceedings relating to the case shall thereafter be carried out and enforced by that court.

(2) No disposition may be transferred from one province to another under this section until the time for an appeal against the disposition or the finding on which the disposition was based has expired or until all proceedings in respect of any such appeal have been completed.

(3) Where an application is made under subsection (1) to transfer the disposition of a young person to a province in which the young person is an adult, a youth court judge

may, with the consent of the Attorney General, transfer the disposition and the record of the case to the youth court in the province to which the transfer is sought, and the youth court to which the case is transferred shall have full jurisdiction in respect of the disposition as if that court had made the disposition, and the person shall be further dealt with in accordance with this Act. 1980-81-82-83, c. 110, s. 25; R.S.C. 1985, c. 24 (2nd Supp.), s. 18; 1995, c. 19, s. 19.

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**INTERPROVINCIAL ARRANGEMENTS FOR PROBATION OR CUSTODY / Youth court retains jurisdiction / Waiver of jurisdiction.**

25.1 (1) Where a disposition has been made under paragraphs 20(1)(j) to (k.1) in respect of a young person, the disposition in one province may be dealt with in any other province pursuant to any agreement that may have been made between those provinces.

(2) Subject to subsection (3), where a disposition made in respect of a young person is dealt with pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made shall, for all purposes of this Act, retain exclusive jurisdiction over the young person as if the disposition were dealt with within that province, and any warrant or process issued in respect of the young person may be executed or served in any place in Canada outside the province where the disposition was made as if it were executed or served in that province.

(3) Where a disposition made in respect of a young person is dealt with pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made may, with the consent in writing of the Attorney General of that province or his delegate and the young person, waive its jurisdiction, for the purpose of any proceeding under this Act, to the youth court of the province in which the disposition is dealt with, in which case the youth court in the province in which the disposition is so dealt with shall have full jurisdiction in respect of the disposition as if that court had made the disposition. R.S.C. 1985, c. 24 (2nd Supp.), s. 19; 1992, c. 11 s. 6; 1995, c. 19, s. 20.

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**FAILURE TO COMPLY WITH DISPOSITION.**

26. A person who is subject to a disposition made under paragraphs 20(1)(b) to (g) or paragraph 20(1)(j) or (l) and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction. R.S.C. 1985, c. 24 (2nd Supp.), s. 19.

**ANNOTATIONS**

An accused who, following his 18th birthday, fails to comply with a disposition made by the youth court is no longer a young person as defined by s. 2 and is properly tried for this offence in adult court: *R. v. M. (R.E.)* (1988), 46 C.C.C. (3d) 315 (B.C.S.C.).

Further, the disposition provisions of this Act do not apply to such an accused and he is to be sentenced in accordance with the sentencing provisions of the Criminal Code: *R. v. Ellsworth* (1991), 68 C.C.C. (3d) 246 (Nfld. S.C.).

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**CONTINUATION OF CUSTODY / Idem / Factors / Youth court to order appearance of young person / Report / Written or oral report / Provisions apply / Notice of hearing / Statement of right to counsel / Service of notice / Where notice not given / Reasons / Review provisions apply / Where application denied.**

26.1 (1) Where a young person is held in custody pursuant to a disposition made under paragraph 20(1)(k.1) and an application is made to the youth court by the Attorney General, or the Attorney General's agent, within a reasonable time prior to

the expiration of the period of custody, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court and the youth court may, after affording both parties and the parents of the young person an opportunity to be heard and if it is satisfied that there are reasonable grounds to believe that the young person is likely to commit an offence causing the death of or serious harm to another person prior to the expiration of the disposition the young person is then serving, order that the young person remain in custody for a period not exceeding the remainder of the disposition.

(1.1) Where the hearing for an application under subsection (1) cannot be completed before the expiration of the period of custody, the court may order that the young person remain in custody pending the determination of the application if the court is satisfied that the application was made in a reasonable time, having regard to all the circumstances, and that there are compelling reasons for keeping the young person in custody.

(2) For the purpose of determining an application under subsection (1), the youth court shall take into consideration any factor that is relevant to the case of the young person including, without limiting the generality of the foregoing,

- (a) evidence of a pattern of persistent violent behaviour and, in particular,
  - (i) the number of offences committed by the young person that caused physical or psychological harm to any other person,
  - (ii) the young person's difficulties in controlling violent impulses to the point of endangering the safety of any other person,
  - (iii) the use of weapons in the commission of any offence,
  - (iv) explicit threats of violence,
  - (v) behaviour of a brutal nature associated with the commission of any offence, and
  - (vi) a substantial degree of indifference on the part of the young person as to the reasonably foreseeable consequences, to other persons, of the young person's behaviour;
- (b) psychiatric or psychological evidence that a physical or mental illness or disorder of the young person is of such a nature that the young person is likely to commit prior to the expiration of the disposition the young person is then serving, an offence causing the death of or serious harm to another person;
- (c) reliable information that satisfies the youth court that the young person is planning to commit, prior to the expiration of the disposition the young person is then serving, an offence causing the death of or serious harm to another person; and
- (d) the availability of supervision programs in the community that would offer adequate protection to the public from the risk that the young person might otherwise present until the expiration of the disposition the young person is then serving.

(3) Where a provincial director fails to cause a young person to be brought before the youth court under subsection (1), the youth court shall order the provincial director to cause the young person to be brought before the youth court forthwith.

(4) For the purpose of determining an application under subsection (1), the youth court shall require the provincial director to cause to be prepared, and to submit to the youth court, a report setting out any information of which the provincial director is aware with respect to the factors referred to in subsection (2) that may be of assistance to the court.

(5) A report referred to in subsection (4) shall be in writing unless it cannot reasonably be committed to writing, in which case it may, with leave of the youth court, be submitted orally in court.



(6) Subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of a report referred to in subsection (4).

(7) Where an application is made under subsection (1) in respect of a young person, the Attorney General or the Attorney General's agent shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the hearing to be given in writing to the young person and the young person's parents and the provincial director.

(8) Any notice given to a parent under subsection (7) shall include a statement that the young person has the right to be represented by counsel.

(9) A notice under subsection (7) may be served personally or may be sent by registered mail.

(10) Where notice under subsection (7) is not given in accordance with this section, the youth court may

- (a) adjourn the hearing and order that the notice be given in such manner and to such person as it directs; or
- (b) dispense with the giving of the notice where, in the opinion of the youth court, having regard to the circumstances, the giving of the notice may be dispensed with.

(11) Where a youth court makes an order under subsection (1), it shall state its reasons for the order in the record of the case and shall

- (a) provide or cause to be provided a copy of the order, and
- (b) on request, provide or cause to be provided a transcript or copy of the reasons for the order

to the young person in respect of whom the order was made, the counsel and parents of the young person, the Attorney General or the Attorney General's agent, the provincial director and the review board, if any has been established or designated.

(12) Subsections 16(9) to (11) apply, with such modifications as the circumstances require, in respect of an order made, or the refusal to make an order, under subsection (1).

(13) Where an application under subsection (1) is denied, the court may, with the consent of the young person, the Attorney General and the provincial director, proceed as though the young person had been brought before the court as required under subsection 26.2(1). 1992, c. 11, s. 7.

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**CONDITIONAL SUPERVISION / Conditions to be included in order / Other conditions / Temporary conditions / Conditions to be set at first opportunity / Report / Provisions apply / Idem.**

26.2 (1) The provincial director of the province in which a young person is held in custody pursuant to a disposition made under paragraph 20(1)(k.1) or, where applicable, an order made under subsection 26.1 (1), shall cause the young person to be brought before the youth court at least one month prior to the expiration of the period of custody and the court shall, after affording the young person an opportunity to be heard, by order, set the conditions of the young person's conditional supervision.

(2) In setting conditions for the purposes of subsection (1), the youth court shall include in the order the following conditions, namely, that the young person

- (a) keep the peace and be of good behaviour;
- (b) appear before the youth court when required by the court to do so;
- (c) report to the provincial director immediately on release, and thereafter

under the supervision of the provincial director or a person designated by the youth court;

- (d) inform the provincial director immediately on being arrested or questioned by the police;
- (e) report to the police, or any named individual, as instructed by the provincial director;
- (f) advise the provincial director of the young person's address of residence on release and after release report immediately to the clerk of the youth court or the provincial director any change
  - (i) in that address,
  - (ii) in the young person's normal occupation, including employment, vocational or educational training and volunteer work,
  - (iii) in the young person's family or financial situation, and
  - (iv) that may reasonably be expected to affect the young person's ability to comply with the conditions of the order;
- (g) not own, possess or have the control of any weapon, as defined in section 2 of the *Criminal Code*, except as authorized by the order; and

**NOTE:** Subsection (2)(g) replaced 1995, c. 39, s. 180 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (g) *not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized by the order; and*
- (h) *comply with such reasonable instructions as the provincial director considers necessary in respect of any condition of the conditional supervision in order to prevent a breach of that condition or to protect society.*

**3) In setting conditions for the purposes of subsection (1), the youth court may include in the order the following conditions, namely, that the young person**

- (a) on release, travel directly to the young person's place of residence, or to such other place as is noted in the order;
- (b) make reasonable efforts to obtain and maintain suitable employment;
- (c) attend school or such other place of learning, training or recreation as is appropriate, if the court is satisfied that a suitable program is available for the young person at such a place;
- (d) reside with a parent, or such other adult as the court considers appropriate, who is willing to provide for the care and maintenance of the young person;
- (e) reside in such place as the provincial director may specify;
- (f) remain within the territorial jurisdiction of one or more courts named in the order; and
- (g) comply with such other reasonable conditions set out in the order as the court considers desirable, including conditions for securing the good conduct of the young person and for preventing the commission by the young person of other offences.

**4) Where a provincial director is required under subsection (1) to cause a young person to be brought before the youth court but cannot do so for reasons beyond the young person's control, the provincial director shall so advise the youth court and the court shall, by order, set such temporary conditions for the young person's conditional supervision as are appropriate in the circumstances.**

**5) Where an order is made under subsection (4), the provincial director shall bring the young person before the youth court as soon thereafter as the circumstances permit and the court shall then set the conditions of the young person's conditional supervision.**

**6) For the purpose of setting conditions under this section, the youth court shall**

require the provincial director to cause to be prepared, and to submit to the youth court, a report setting out any information that may be of assistance to the court.

(7) Subsections 26.1(3) and (5) to (10) apply, with such modifications as the circumstances require, in respect of any proceedings held pursuant to subsection (1).

(8) Subsections 16(9) to (11) and 23(3) to (9) apply, with such modifications as the circumstances require, in respect of an order made under subsection (1). 1992, c. 11, s. 7.

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#### **SUSPENSION OF CONDITIONAL SUPERVISION.**

26.3 Where the provincial director has reasonable grounds to believe that a young person has breached or is about to breach a condition of an order made under subsection 26.2(1), the provincial director may, in writing,

- (a) suspend the conditional supervision; and
- (b) order that the young person be remanded to such place of custody as the provincial director considers appropriate until a review is conducted under section 26.5 and, if applicable, section 26.6. 1992, c. 11, s. 7.

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#### **APPREHENSION / Warrants / Peace officer may arrest / Requirement to bring before provincial director / Release or remand in custody.**

26.4 (1) Where the conditional supervision of a young person is suspended under section 26.3, the provincial director may issue a warrant in writing, authorizing the apprehension of the young person and, until the young person is apprehended, the young person is deemed not to be continuing to serve the disposition the young person is then serving.

(2) A warrant issued under subsection (1) shall be executed by any peace officer to whom it is given at any place in Canada and has the same force and effect in all parts of Canada as if it had been originally issued or subsequently endorsed by a provincial court judge or other lawful authority having jurisdiction in the place where it is executed.

(3) Where a peace officer believes on reasonable grounds that a warrant issued under subsection (1) is in force in respect of a young person, the peace officer may arrest the young person without the warrant at any place in Canada.

(4) Where a young person is arrested pursuant to subsection (3) and detained, the peace officer making the arrest shall cause the young person to be brought before the provincial director or a person designated by the provincial director

- (a) where the provincial director or the designated person is available within a period of twenty-four hours after the young person is arrested, without unreasonable delay and in any event within that period; and
- (b) where the provincial director or the designated person is not available within the period referred to in paragraph (a), as soon as possible.

(5) Where a young person is brought, pursuant to subsection (4), before the provincial director or a person designated by the provincial director, the provincial director or the designated person

- (a) if not satisfied that there are reasonable grounds to believe that the young person is the young person in respect of whom the warrant referred to in subsection (1) was issued, shall release the young person; or
- (b) if satisfied that there are reasonable grounds to believe that the young person is the young person in respect of whom the warrant referred to in subsection (1) was issued, may remand the young person in custody to await execution of the warrant, but if no warrant for the young person's arrest is executed within



period of six days after the time the young person is remanded in such custody, the person in whose custody the young person then is shall release the young person. 1992, c. 11, s. 7.

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#### REVIEW BY PROVINCIAL DIRECTOR.

26.5 Forthwith after the remand to custody of a young person whose conditional supervision has been suspended under section 26.3, or forthwith after being informed of the arrest of such a young person, the provincial director shall review the case and, within forty-eight hours, cancel the suspension of the conditional supervision or refer the case to the youth court for a review under section 26.6. 1992, c. 11, s. 7.

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#### REVIEW BY YOUTH COURT / Order / Reasons / Provisions apply / Idem.

26.6 (1) Where the case of a young person is referred to the youth court under section 26.5, the provincial director shall, as soon as is practicable, cause the young person to be brought before the youth court, and the youth court shall, after affording the young person an opportunity to be heard,

- (a) if the court is not satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, cancel the suspension of the conditional supervision; or
  - (b) if the court is satisfied on reasonable grounds that the young person has breached or was about to breach a condition of the conditional supervision, review the decision of the provincial director to suspend the conditional supervision and make an order under subsection (2).
- (2) On completion of a review under subsection (1), the youth court shall order
- (a) the cancellation of the suspension of the conditional supervision, and where the court does so, the court may vary the conditions of the conditional supervision or impose new conditions; or
  - (b) the continuation of the suspension of the conditional supervision for such period of time, not to exceed the remainder of the disposition the young person is then serving, as the court considers appropriate, and where the court does so, the court shall order that the young person remain in custody.

(3) Where a youth court makes an order under subsection (2), it shall state its reasons for the order in the record of the case and shall

- (a) provide or cause to be provided a copy of the order, and
- (b) on request, provide or cause to be provided a transcript or copy of the reasons for the order

to the young person in respect of whom the order was made, the counsel and parents of the young person, the Attorney General or the Attorney General's agent, the provincial director and the review board, if any has been established or designated.

(4) Subsections 26.1(3) and (5) to (10) and 26.2(6) apply, with such modifications as the circumstances require, in respect of a review under this section.

(5) Subsections 16(9) to (11) apply, with such modifications as the circumstances require, in respect of an order made under subsection (2). 1992, c. 11, s. 7.

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## APPEALS

APPEALS FOR INDICTABLE OFFENCES / Appeals for summary conviction offences / Appeals where offences are tried jointly / Deemed election / Where the youth court is

a superior court / Where the youth court is a county or district court / Appeal to the Supreme Court of Canada / No appeal from disposition on review.

27. (1) An appeal lies under this Act in respect of an indictable offence or an offence that the Attorney General or his agent elects to proceed with as an indictable offence in accordance with Part XXI of the *Criminal Code*, which Part applies with such modifications as the circumstances requires.

(1.1) An appeal lies under this Act in respect of an offence punishable on summary conviction or an offence that the Attorney General or his agent elects to proceed with as an offence punishable on summary conviction in accordance with Part XXVII of the *Criminal Code*, which Part applies with such modifications as the circumstances require.

(1.2) An appeal involving one or more indictable offences and one or more summary conviction offences that are tried jointly or in respect of which dispositions are jointly made lies under this Act in accordance with Part XXI of the *Criminal Code*, which applies with such modifications as the circumstances require.

(2) For the purpose of appeals under this Act, where no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General or his agent shall be deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

(3) In any province where the youth court is a superior court, an appeal under subsection (1.1) shall be made to the court of appeal of the province.

(4) In any province where the youth court is a county or district court, an appeal under subsection (1.1) shall be made to the superior court of the province.

(5) No appeal lies pursuant to subsection (1) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment of the court of appeal is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

(6) No appeal lies from a disposition under sections 28 to 32. 1980-81-82-83, c. 110, s. 27; R.S.C. 1985, c. 24 (2nd Supp.), s. 20; 1995, c. 19, s. 21.

#### ANNOTATIONS

In view of subsec. (5), no appeal lies as of right to the Supreme Court of Canada in matters governed by the Young Offenders Act. Thus, even if there is a dissent in law in the court of appeal, leave to appeal must be obtained: *R. v. C. (T.L.)*, [1994] 2 S.C.R. 1012, 92 C.C.C. (3d) 444, 32 C.R. (4th) 243.

## REVIEW OF DISPOSITIONS

AUTOMATIC REVIEW OF DISPOSITION INVOLVING CUSTODY / Idem / Optional review of disposition involving custody / Grounds for review under subsection (3) / No review where appeal pending / Youth court may order appearance of young person for review / Progress report / Additional information in progress report / Written or oral report / Provisions of subsections 14(4) to (10) to apply / Notice of review from provincial director / Notice of review from person requesting it / Statement of right to counsel / Service of notice / Notice may be waived / Where notice not given / Decision of the youth court after review.

28. (1) Where a young person is committed to custody pursuant to a disposition made in respect of an offence for a period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the most recent disposition made in respect of the offence, and the youth court shall review the disposition.

(2) Where a young person is committed to custody pursuant to dispositions made in respect of more than one offence for a total period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the earliest disposition made, and the youth court shall review the dispositions.

(3) Where a young person is committed to custody pursuant to a disposition made under subsection 20(1) in respect of an offence, the provincial director may, on the provincial director's own initiative, and shall, on the request of the young person, the young person's parent or the Attorney General or an agent of the Attorney General, on any of the grounds set out in subsection (4), cause the young person to be brought before a youth court

(a) where the committal to custody is for a period not exceeding one year, once at any time after the expiration of the greater of

(i) thirty days after the date of the disposition made under subsection 20(1) in respect of the offence, and

(ii) one third of the period of the disposition made under subsection 20(1) in respect of the offence, and

(b) where the committal to custody is for a period exceeding one year, at any time after six months after the date of the most recent disposition made in respect of the offence,

or, with leave of a youth court judge, at any other time, and where a youth court is satisfied that there are grounds for the review under subsection (4), the court shall review the disposition.

(4) A disposition made in respect of a young person may be reviewed under subsection (3)

(a) on the ground that the young person has made sufficient progress to justify a change in disposition;

(b) on the ground that the circumstances that led to the committal to custody have changed materially;

(c) on the ground that new services or programs are available that were not available at the time of the disposition; or

(c.1) on the ground that the opportunities for rehabilitation are now greater in the community; or

(d) on such other grounds as the youth court considers appropriate.

(5) No review of a disposition in respect of which an appeal has been taken shall be made under this section until all proceedings in respect of any such appeal have been completed.

(6) Where a provincial director is required under subsections (1) to (3) to cause a young person to be brought before the youth court and fails to do so, the youth court may, on application made by the young person, his parent or the Attorney General or his agent, or on its own motion, order the provincial director to cause the young person to be brought before the youth court.

(7) The youth court shall, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared,



and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

(8) A person preparing a progress report in respect of a young person may include in the report such information relating to the personal and family history and present environment of the young person as he considers advisable.

(9) A progress report shall be in writing unless it cannot reasonably be committed to writing, in which case it may, with leave of the youth court, be submitted orally in court.

(10) The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of progress reports.

(11) Where a disposition made in respect of a young person is to be reviewed under subsection (1) or (2), the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

(12) Where a review of a disposition made in respect of a young person is requested under subsection (3), the person requesting the review shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

(13) Any notice given to a parent under subsection (11) or (12) shall include a statement that the young person whose disposition is to be reviewed has the right to be represented by counsel.

(14) A notice under subsection (11) or (12) may be served personally or may be sent by registered mail.

(15) Any of the persons entitled to notice under subsection (11) or (12) may waive the right to such notice.

(16) Where notice under subsection (11) or (12) is not given in accordance with this section, the youth court may

- (a) adjourn the proceedings and order that the notice be given in such manner and to such person as it directs; or
- (b) dispense with the notice where, in the opinion of the court, having regard to the circumstances, notice may be dispensed with.

(17) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parent, the Attorney General or his agent and the provincial director an opportunity to be heard, having regard to the needs of the young person and the interests of society,

- (a) confirm the disposition;
- (b) where the young person is in secure custody pursuant to subsection 24.1(2), by order direct that the young person be placed in open custody; or
- (c) release the young person from custody and place the young person
  - (i) on probation in accordance with section 23 for a period not exceeding the remainder of the period for which the young person was committed to custody, or
  - (ii) under conditional supervision in accordance with the procedure set out in section 26.2, with such modifications as the circumstances require, for a period not exceeding the remainder of the disposition the young person is then serving. 1980-81-82-83, c. 110, s. 28; R.S.C. 1985, c. 24 (2nd Supp.), s. 21; 1992, c. 11, s. 8; 1995, c. 19, s. 22.

(18) [*Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 21(3).*]

## ANNOTATIONS

Except, *semble*, where failure to change the venue of the review under this section would result in inconvenience so great as to result in a denial of justice, the review must take place in the judicial district where the original order of committal was made: *R. v. W. (C.)* (1985), 21 C.C.C. (3d) 365 (Ont. Prov. Ct.).

Subsection (5), which limits the application of this section where an appeal has been taken, does not apply where the appeal is only as to the finding of guilt: *R. v. B. (L.C.)* (1991), 65 C.C.C. (3d) 574 (Ont. Ct. (Prov. Div.)).

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## APPLICATION TO COURT FOR REVIEW OF LEVEL OF CUSTODY / Report / Provisions apply / Decision of the youth court / Decision is final.

28.1 (1) Where a young person is placed in secure custody pursuant to subsection 24.1(3) or transferred to secure custody pursuant to subsection 24.2(11), the youth court shall review the level of custody if an application therefor is made by the young person or the young person's parent.

(2) The youth court shall, before conducting a review under this section, require the provincial director to cause to be prepared, and to submit to the youth court, a report setting out the reasons for the placement or transfer.

(3) The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of the report referred to in subsection (2), and the provisions of subsections 28(11) to (16) apply, with such modifications as the circumstances require, to every review under this section.

(4) Where the youth court conducts a review under this section, it may, after affording the young person, the young person's parents and the provincial director an opportunity to be heard, confirm or alter the level of custody, having regard to the needs of the young person and the interests of society.

(5) A decision of the youth court on a review under this section in respect of any particular placement or transfer is, subject to any subsequent order made pursuant to a review under section 28 or 29, final. 1995, c. 19, s. 23.

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## RECOMMENDATION OF PROVINCIAL DIRECTOR FOR TRANSFER TO OPEN CUSTODY OR FOR PROBATION / Contents of notice / Application to court for review of recommendation / Subsections 28(5), (7) to (10) and (12) to (17) apply / Where no application for review made under subsection (2) / Conditions in probation order / Notice where no direction made / Provincial director may request review / Where the provincial director requests a review.

29. (1) Where a young person is held in custody pursuant to a disposition, the provincial director may, if he is satisfied that the needs of the young person and the interests of society would be better served thereby, cause notice in writing to be given to the young person, his parent and the Attorney General or his agent that he recommends that the young person

- (a) be transferred from a place or facility of secure custody to a place or facility of open custody, where the young person is held in a place or facility or secure custody pursuant to subsection 24.1(2), or
  - (b) be released from custody and placed on probation or, where the young person is in custody pursuant to a disposition made under paragraph 20(1)(k.1), placed under conditional supervision,
- and give a copy of the notice to the youth court.

(1.1) The provincial director shall include in any notice given under subsection (1) the reasons for the recommendation and

- (a) in the case of a recommendation that the young person be placed on probation, the conditions that the provincial director would recommend be attached to a probation order; and
- (b) in the case of a recommendation that the young person be placed under conditional supervision, the conditions that the provincial director would recommend be set pursuant to section 26.2.

(2) Where notice of a recommendation is made under subsection (1) with respect to a disposition made in respect of a young person, the youth court shall, if an application for review is made by the young person, his parent or the Attorney General or his agent within ten days after service of the notice, forthwith review the disposition.

(3) Subject to subsection (4), subsections 28(5), (7) to (10) and (12) to (17) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

(4) A youth court that receives a notice under subsection (1) shall, if no application for a review is made under subsection (2),

- (a) in the case of a recommendation that a young person be transferred from a place or facility of secure custody to a place or facility of open custody, order that the young person be so transferred;
- (b) in the case of a recommendation that a young person be released from custody and placed on probation, release the young person and place him on probation in accordance with section 23;
- (b.1) in the case of a recommendation that a young person be released from custody and placed under conditional supervision, release the young person and place the young person under conditional supervision in accordance with section 26.2, having regard to the recommendations of the provincial director; or
- (c) where the court deems it advisable, make no direction under this subsection;

and, for greater certainty, an order or direction under this subsection may be made without a hearing.

(4.1) Where the youth court places a young person on probation pursuant to paragraph (4)(b), the court shall include in the probation order such conditions referred to in section 23 as it considers advisable, having regard to the recommendations of the provincial director.

(4.2) Where a youth court, pursuant to paragraph (4)(c), makes no direction under subsection (4), it shall forthwith cause a notice of its decision to be given to the provincial director.

(4.3) Where the provincial director is given a notice under subsection (4.2), he may request a review under this section.

(5) Where the provincial director requests a review pursuant to subsection (4.3),

- (a) the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent; and
- (b) the youth court shall forthwith, after the notice required under paragraph (a) is given, review the disposition. 1980-81-82-83, c. 110, s. 29; R.S.C. 1985, c. 24 (2nd Supp.), s. 22; c. 1 (4th Supp.), s. 40; 1992, c. 11, s. 9; 1995, c. 19, s. 24.

(6) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 22(4).]



**REVIEW BOARD / Other duties of review board / Notice under section 29 / Notice of decision of review board / Decision of review board to take effect where no review / Decision respecting release from custody and probation / Decision respecting release from custody and conditional supervision.**

30. (1) Where a review board is established or designated by a province for the purposes of this section, that board shall, subject to this section, carry out in that province the duties and functions of a youth court under sections 28 and 29 other than releasing a young person from custody and placing the young person on probation or under conditional supervision.

(2) Subject to this Act, a review board may carry out any duties or functions that are assigned to it by the province that established or designated it.

(3) Where a review board is established or designated by a province for the purposes of this section, the provincial director shall at the same time as any notice is given under subsection 29(1) cause a copy of the notice to be given to the review board.

(4) A review board shall cause notice of any decision made by it in respect of a young person pursuant to section 28 or 29 to be given forthwith in writing to the young person, his parents, the Attorney General or his agent and the provincial director, and a copy of the notice to be given to the youth court.

(5) Subject to subsection (6), any decision of a review board under this section shall take effect ten days after the decision is made unless an application for review is made under section 31.

(6) Where a review board decides that a young person should be released from custody and placed on probation, it shall so recommend to the youth court and, if no application for a review of the decision is made under section 31, the youth court shall forthwith on the expiration of the ten day period referred to in subsection (5) release the young person from custody and place him on probation in accordance with section 23, and shall include in the probation order such conditions referred to in that section as the court considers advisable having regard to the recommendations of the review board.

(7) Where a review board decides that a young person should be released from custody and placed under conditional supervision, it shall so recommend to the youth court and, if no application for a review of the decision is made under section 31, the youth court shall forthwith, on the expiration of the ten day period referred to in subsection (5), release the young person from custody and place the young person under conditional supervision in accordance with section 26.2, and shall include in the order under that section such conditions as the court considers advisable, having regard to the recommendations of the review board. 1980-81-82-83, c. 110, s. 30; R.S.C. 1985, c. 24 (2nd Supp.), s. 23; 1992, c. 11, s. 10.

**REVIEW BY YOUTH COURT / Subsections 28(5), (7) to (10) and (12) to (18) apply.**

31. (1) Where the review board reviews a disposition under section 30, the youth court shall, on the application of the young person in respect of whom the review was made, his parents, the Attorney General or his agent or the provincial director, made within ten days after the decision of the review board is made, forthwith review the decision.

(2) Subsections 28(5), (7) to (10) and (12) to (17) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director. 1980-81-82-83, c. 110, s. 31; R.S.C. 1985, c. 1 (4th Supp.), s. 41.

REVIEW OF DISPOSITIONS NOT INVOLVING CUSTODY / Grounds for review / Progress report / Subsections 28(8) to (10) apply / Subsections 28(5) and (12) to (16) apply / Compelling appearance of young person / Decision of the youth court after review / New disposition not to be more onerous / Exception.

32. (1) Where a youth court has made a disposition in respect of a young person, other than or in addition to a disposition under paragraph 20(1)(k), and other than a disposition under paragraph 20(1)(k.1), the youth court shall, on the application of the young person, the young person's parents, the Attorney General or the Attorney General's agent or the provincial director, made at any time after six months from the date of the disposition or, with leave of a youth court judge, at any earlier time, review the disposition if the court is satisfied that there are grounds for a review under subsection (2).

**NOTE:** Subsection (1) replaced 1995, c. 39, s. 181 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

REVIEW OF OTHER DISPOSITIONS.

32. (1) *Where a youth court has made a disposition in respect of a young person, other than a disposition under paragraph 20(1)(k) or (k.1) or section 20.1, the youth court shall, on the application of the young person, the young person's parents, the Attorney General or the Attorney General's agent or the provincial director, made at any time after six months from the date of the disposition or, with leave of a youth court judge, at any earlier time, review the disposition if the court is satisfied that there are grounds for a review under subsection (2).*

(2) A review of a disposition may be made under this section

- (a) on the ground that the circumstances that led to the disposition have changed materially;
- (b) on the ground that the young person in respect of whom the review is to be made is unable to comply with or is experiencing serious difficulty in complying with the terms of the disposition;
- (c) on the ground that the terms of the disposition are adversely affecting the opportunities available to the young person to obtain services, education or employment; or
- (d) on such other grounds as the youth court considers appropriate.

(3) The youth court may, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

(4) Subsections 28(8) to (10) apply, with such modifications as the circumstances require, in respect of any progress report required under subsection (3).

(5) Subsections 28(5) and (12) to (16) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

(6) The youth court may, by summons or warrant, compel a young person in respect of whom a review is to be made under this section to appear before the youth court for the purposes of the review.

(7) Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parent, the Attorney General or his agent and the provincial director an opportunity to be heard,

- (a) confirm the disposition;
- (b) terminate the disposition and discharge the young person from any further obligation of the disposition; or

- (c) vary the disposition or make such new disposition listed in section 20, other than a committal to custody, for such period of time, not exceeding the remainder of the period of the earlier disposition, as the court deems appropriate in the circumstances of the case.
- (8) Subject to subsection (9), where a disposition made in respect of a young person is reviewed under this section, no disposition made under subsection (7) shall, without the consent of the young person, be more onerous than the remaining portion of the disposition reviewed.
- (9) A youth court may under this section extend the time within which a disposition made under paragraphs 20(1)(b) to (g) is to be complied with by a young person where the court is satisfied that the young person requires more time to comply with the disposition, but in no case shall the extension be for a period of time that expires more than twelve months after the date the disposition would otherwise have expired. 1980-81-82-83, c. 110, s. 32; R.S.C. 1985, c. 24 (2nd Supp.), s. 24; 1992, c. 11, s. 11.
- (10) [*Repealed.* R.S.C. 1985, c. 24 (2nd Supp.), s. 24(3).]
- (11) [*Repealed.* R.S.C. 1985, c. 24 (2nd Supp.), s. 24(3).]

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33. (old provision) [*Repealed.* R.S.C. 1985, c. 24 (2nd Supp.), s. 25.]

#### Transitional provision

**NOTE:** R.S.C. 1985, c. 24 (2nd Supp.), s. 50 provides as follows:

50. Any proceedings commenced under section 33 of the *Young Offenders Act* before the coming into force of section 24 of this Act shall be continued and completed as if this Act had not been enacted.

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**NOTE:** Enacted 1995, c. 39, s. 182 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

REVIEW OF ORDER MADE UNDER S. 20.1 / Grounds / Decision of review / New order not to be more onerous / Application of provisions.

33. (1) *A youth court or other court may, on application, review an order made under section 20.1 at any time after the circumstances set out in subsection 45(1) are realized in respect of any record in relation to the offence that resulted in the order being made.*

(2) *In conducting a review under this section, the youth court or other court shall take into account*

- (a) *the nature and circumstances of the offence in respect of which the order was made; and*
- (b) *the safety of the young person and of other persons.*

(3) *Where a youth court or other court conducts a review under this section, it may, after affording the young person, one of the young person's parents, the Attorney General or an agent of the Attorney General and the provincial director an opportunity to be heard,*

- (a) *confirm the order;*
- (b) *revoke the order; or*
- (c) *vary the order as it considers appropriate in the circumstances of the case.*

(4) *No variation of an order made under paragraph (3)(c) may be more onerous than the order being reviewed.*

(5) *Subsections 32(3) to (5) apply, with such modifications as the circumstances require, in respect of a review under this section.*



**SECTIONS 20 to 26 APPLY TO DISPOSITIONS ON REVIEW / Orders are dispositions.**

34. (1) Subject to sections 28 to 32, subsections 20(2) to (8) and sections 21 to 25.1 apply, with such modifications as the circumstances require, in respect of dispositions made under sections 28 to 32.

(2) Orders under subsections 26.1(1) and 26.2(1) and paragraph 26.6(2)(b) are deemed to be dispositions for the purposes of section 28. 1980-81-82-83, c. 110, s. 34; R.S.C. 1985, c. 24 (2nd Supp.), s. 25; 1992, c. 11, s. 12.

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## **TEMPORARY RELEASE FROM CUSTODY**

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**TEMPORARY ABSENCE OR DAY RELEASE / Limitation / Revocation of authorization for release / Arrest and return to custody / Prohibition.**

35. (1) The provincial director of a province may, subject to any terms or conditions that he considers desirable, authorize a young person committed to custody in the province pursuant to a disposition made under this Act

- (a) to be temporarily released for a period not exceeding fifteen days where, in his opinion, it is necessary or desirable that the young person be absent, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or re-integrating him into the community; or
- (b) to be released from custody on such days and during such hours as he specifies in order that the young person may
  - (i) attend school or any other educational or training institution,
  - (ii) obtain or continue employment or perform domestic or other duties required by the young person's family,
  - (iii) participate in a program specified by him that, in his opinion, will enable the young person to better carry out his employment or improve his education or training, or
  - (iv) attend on out-patient treatment program or other program that provides services that are suitable to addressing the young person's needs.

(2) A young person who is released from custody pursuant to subsection (1) shall be released only for such periods of time as are necessary to attain the purpose for which the young person is released.

(3) The provincial director of a province may, at any time, revoke an authorization made under subsection (1).

(4) Where the provincial director revokes an authorization for a young person to be released from custody under subsection (3) or where a young person fails to comply with any term or condition of release from custody under this section, the young person may be arrested without warrant and returned to custody.

(5) A young person who has been committed to custody under this Act shall not be released from custody before the expiration of the period of his custody except in accordance with subsection (1) unless the release is ordered under sections 28 to 31 or otherwise according to law by a court of competent jurisdiction. 1980-81-82-83, c. 110, s. 35; R.S.C. 1985, c. 24 (2nd Supp.), s. 26; c. 1 (4th Supp.), s. 42; 1995, c. 19, s. 25.

## EFFECT OF TERMINATION OF DISPOSITION

### EFFECT OF ABSOLUTE DISCHARGE OR TERMINATION OF DISPOSITIONS /

Disqualifications removed / Applications for employment / Punishment / Finding of guilt not a previous conviction.

36. (1) Subject to section 12 of the *Canada Evidence Act*, where a young person is found guilty of an offence, and

- (a) a youth court directs under paragraph 20(1)(a) that the young person be discharged absolutely, or
- (b) all the dispositions made under this Act in respect of the offence, and all terms of those dispositions, have ceased to have effect,

**NOTE:** Subsection (1)(b) replaced 1995, c. 39, s. 183(1) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *all the dispositions made under subsection 20(1) in respect of the offence have ceased to have effect,*

**NOTE:** Subsection (1)(b) replaced 1995, c. 39, s. 189(a) (to come into force when 1995, c. 39, s. 179 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *all the dispositions made under subsection 20(1) in respect of the offence, and all terms of those dispositions, have ceased to have effect,*

the young person shall be deemed not to have been found guilty or convicted of the offence except that,

- (c) the young person may plead *autrefois convict* in respect of any subsequent charge relating to the offence,
- (d) a youth court may consider the finding of guilt in considering an application for a transfer to ordinary court under section 16,
- (e) any court or justice may consider the finding of guilt in considering an application for judicial interim release or in considering what dispositions to make or sentence to impose for any offence, and
- (f) the National Parole Board or any provincial parole board may consider the finding of guilt in considering an application for parole or pardon.

(2) For greater certainty and without restricting the generality of subsection (1), an absolute discharge under paragraph 20(1)(a) or the termination of all dispositions in respect of an offence for which a young person is found guilty removes any disqualification in respect of the offence to which the young person is subject pursuant to any Act of Parliament by reason of a conviction.

(3) No application form for or relating to

- (a) employment in any department, as defined in section 2 of the *Financial Administration Act*,
- (b) employment by any Crown corporation as defined in section 83 of the *Financial Administration Act*,
- (c) enrolment in the Canadian Forces, or
- (d) employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of Parliament,

shall contain any question that by its terms requires the applicant to disclose that he has been charged with or found guilty of an offence in respect of which he has, under this Act, been discharged absolutely or has completed all the dispositions.

**NOTE:** Subsection (3) amended 1995, c. 39, s. 183(2) by replacing the portion after

para. (d) (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*shall contain any question that by its terms requires the applicant to disclose that the applicant has been charged with or found guilty of an offence in respect of which the applicant has, under this Act, been discharged absolutely or has completed all the dispositions made under subsection 20(1).*

(4) Any person who uses or authorizes the use of an application form in contravention of subsection (3) is guilty of an offence punishable on summary conviction.

(5) A finding of guilt under this Act is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is prescribed by reason of previous convictions. 1980-81-82-83, c. 110, s. 36; 1984, c. 31, s. 14; R.S.C. 1985, c. 24 (2nd Supp.), s. 27; 1995, c. 19, s. 26.

## ANNOTATIONS

It was held in *R. v. Morris* (1978), 43 C.C.C. (2d) 129, 91 D.L.R. (3d) 161, [1979] 1 S.C.R. 405 (5:4), that delinquencies under the Juvenile Delinquents Act for acts which if committed by an adult would have been punishable under the Criminal Code, can be the subject of cross-examination under s. 12 of the Canada Evidence Act. On the other hand, it has been held that a discharge under s. 736 of the Criminal Code is not a "conviction" for the purposes of s. 12: *R. v. Danson* (1982), 66 C.C.C. (2d) 369, 35 O.R. (2d) 777 (C.A.). Thus, the effect of the proviso in subsec. (1) is unclear. Reference should also be made to s. 45(4), *infra*.

## YOUTH WORKERS

### DUTIES OF YOUTH WORKER.

37. The duties and functions of a youth worker in respect of a young person whose case has been assigned to him by the provincial director include

- (a) where the young person is bound by a probation order that requires him to be under supervision, supervising the young person in complying with the conditions of the probation order or in carrying out any other disposition made together with it;
- (a.1) where the young person is placed under conditional supervision pursuant to an order made under section 26.2, supervising the young person in complying with the conditions of the order;
- (b) where the young person is found guilty of any offence, giving such assistance to him as he considers appropriate up to the time the young person is discharged or the disposition of his case terminates;
- (c) attending court when he considers it advisable or when required by the youth court to be present;
- (d) preparing, at the request of the provincial director, a pre-disposition report or a progress report; and
- (e) performing such other duties and functions as the provincial director requires. 1980-81-82-83, c. 110, s. 37; R.S.C. 1985, c. 24 (2nd Supp.), s. 28; 1992, c. 11, s. 13.

## PROTECTION OF PRIVACY OF YOUNG PERSONS

IDENTITY NOT TO BE PUBLISHED / Limitation / Preparation of reports / No subsequent disclosure / Schools and others / No subsequent disclosure / Information to



be kept separate / *Ex parte* application for leave to publish / Order ceases to have effect / Application for leave to publish / Disclosure with court order / Opportunity to be heard / *Ex parte* application / Time limit / Contravention / Provincial court judge has absolute jurisdiction on indictment.

38. (1) Subject to this section, no person shall publish by any means any report

- (a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or
- (b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence

in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

(1.1) Subsection (1) does not apply in respect of the disclosure of information in the course of the administration of justice where it is not the purpose of the disclosure to make the information known in the community.

**NOTE:** Subsection (1.1) replaced 1995, c. 39, s. 184 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:  
*Limitation.*

*(1.1) Subsection (1) does not apply in respect of the disclosure of information in the course of the administration of justice including, for greater certainty, the disclosure of information for the purposes of the Firearms Act and Part III of the Criminal Code, where it is not the purpose of the disclosure to make the information known in the community.*

(1.11) Subsection (1) does not apply in respect of the disclosure of information by the provincial director or a youth worker where the disclosure is necessary for procuring information that relates to the preparation of any report required by this Act.

(1.12) No person to whom information is disclosed pursuant to subsection (1.11) shall disclose that information to any other person unless the disclosure is necessary for the purpose of preparing the report for which the information was disclosed.

(1.13) Subsection (1) does not apply in respect of the disclosure of information to any professional or other person engaged in the supervision or care of a young person, including the representative of any school board or school or any other educational or training institution, by the provincial director, a youth worker, a peace officer or any other person engaged in the provision of services to young persons where the disclosure is necessary

- (a) to ensure compliance by the young person with an authorization pursuant to section 35 or an order of any court concerning bail, probation or conditional supervision; or
- (b) to ensure the safety of staff, students or other persons, as the case may be.

(1.14) No person to whom information is disclosed pursuant to subsection (1.13) shall disclose that information to any other person unless the disclosure is necessary for a purpose referred to in that subsection.

(1.15) Any person to whom information is disclosed pursuant to subsections (1.13) and (1.14) shall

- (a) keep the information separate from any other record of the young person to whom the information relates;
- (b) subject to subsection (1.14), ensure that no other person has access to the information; and

- (c) destroy the information when the information is no longer required for the purpose for which it was disclosed.
- (1.2) A youth court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish a report described in subsection (1) that contains the name of a young person, or information serving to identify a young person, who has committed or is alleged to have committed an indictable offence, if the judge is satisfied that
  - (a) there is reason to believe that the young person is dangerous to others; and
  - (b) publication of the report is necessary to assist in apprehending the young person.
- (1.3) An order made under subsection (1.2) shall cease to have effect two days after it is made.
- (1.4) The youth court may, on the application of any person referred to in subsection (1), make an order permitting any person to publish a report in which the name of that person, or information serving to identify that person, would be disclosed, if the court is satisfied that the publication of the report would not be contrary to the best interests of that person.
- (1.5) The youth court may, on the application of the provincial director, the Attorney General or an agent of the Attorney General or a peace officer, make an order permitting the applicant to disclose to such person or persons as are specified by the court such information about a young person as is specified if the court is satisfied that the disclosure is necessary, having regard to the following:
  - (a) the young person has been found guilty of an offence involving serious personal injury;
  - (b) the young person poses a risk of serious harm to persons; and
  - (c) the disclosure of the information is relevant to the avoidance of that risk.
- (1.6) Subject to subsection (1.7), before making an order under subsection (1.5), the youth court shall afford the young person, the young person's parents, the Attorney General or an agent of the Attorney General an opportunity to be heard.
- (1.7) An application under subsection (1.5) may be made *ex parte* by the Attorney General or an agent of the Attorney General where the youth court is satisfied that reasonable efforts have been made to locate the young person and that those efforts have not been successful.
- (1.8) No information may be disclosed pursuant to subsection (1.5) after the record to which the information relates ceases to be available for inspection under subsection 45(1).
- (2) Every one who contravenes subsection (1), (1.12), (1.14) or (1.15)
  - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) is guilty of an offence punishable on summary conviction.
- (3) Where an accused is charged with an offence under paragraph (2)(a), a provincial court judge has absolute jurisdiction to try the case and his jurisdiction does not depend on the consent of the accused. 1980-81-82-83, c. 110, s. 38; R.S.C. 1985, c. 24 (2nd Supp.), s. 29; 1995, c. 19, s. 27.

#### ANNOTATIONS

**Subsec. (1)** – This subsection is not an unconstitutional infringement of the guarantee of freedom of expression in s. 2(b) of the Charter of Rights and Freedoms: *R. v. Southam Inc.* (1984), 16 C.C.C. (3d) 262, 42 C.R. (3d) 336, 14 D.L.R. (4th) 683 (Ont. H.C.J.),

affd 25 C.C.C. (3d) 119, 50 C.R. (3d) 241, 26 D.L.R. (4th) 479 (Ont. C.A.), leave to appeal to S.C.C. refused C.C.C., D.L.R. *loc. cit.*

This subsection does not prevent the cross-examination of a youthful witness on his prior record for convictions under this Act or the Juvenile Delinquents Act. Such cross-examination during the trial of an adult accused is not a publication within the meaning of this subsection: *R. v. Scott* (1984), 16 C.C.C. (3d) 17 (Ont. Gen. Sess.).

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**EXCLUSION FROM HEARING / Exception / Exclusion after adjudication or during review / Exception.**

**39. (1) Subject to subsection (2), where a court or justice before whom proceedings are carried out under this Act is of the opinion**

- (a) that any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to**
  - (i) the young person who is being dealt with in the proceedings,**
  - (ii) a child or young person who is a witness in the proceedings,**
  - (iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings, or**
- (b) that it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room,**

the court or justice may exclude any person from all or part of the proceedings if the court or justice deems that person's presence to be unnecessary to the conduct of the proceedings.

**(2) Subject to section 650 of the *Criminal Code* and except where it is necessary for the purposes of subsection 13(6) of this Act, a court or justice may not, pursuant to subsection (1), exclude from proceedings under this Act**

- (a) the prosecutor;**
  - (b) the young person who is being dealt with in the proceedings, his parent, his counsel or any adult assisting him pursuant to subsection 11(7);**
  - (c) the provincial director or his agent; or**
  - (d) the youth worker to whom the young person's case has been assigned.**
- (3) The youth court, after it has found a young person guilty of an offence, or the youth court or the review board, during a review of a disposition under sections 28 to 32, may, in its discretion, exclude from the court or from a hearing of the review board, as the case may be, any person other than**
- (a) the young person or his counsel,**
  - (b) the provincial director or his agent,**
  - (c) the youth worker to whom the young person's case has been assigned, and**
  - (d) the Attorney General or his agent,**

when any information is being presented to the court or the review board the knowledge of which might, in the opinion of the court or review board, be seriously injurious or seriously prejudicial to the young person.

**(4) The exception set out in paragraph (3)(a) is subject to subsection 13(6) of this Act and section 650 of the *Criminal Code*. 1980-81-82-83, c. 110, s. 39; R.S.C. 1985, c. 24 (2nd Supp.), s. 30.**

**ANNOTATIONS**

This section is not an unconstitutional infringement on the right of access to the Courts as included in the guarantee to freedom of expression in s. 2(b) of the Charter of Rights and Freedoms: *R. v. Southam Inc.* (1984), 16 C.C.C. (3d) 262, 48 O.R. (2d) 678 (H.C.J.), affd 53 O.R. (2d) 663 (C.A.).



## MAINTENANCE AND USE OF RECORDS

### *Records that may be Kept*

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#### YOUTH COURT, REVIEW BOARD AND OTHER COURTS / Exception.

40. (1) A youth court, review board or any court dealing with matters arising out of proceedings under this Act may keep a record of any case arising under this Act that comes before it.

(2) For greater certainty, this section does not apply in respect of proceedings held in ordinary court pursuant to an order under section 16. 1980-81-82-83, c. 110, s. 40; R.S.C. 1985, c. 24 (2nd Supp.), s. 31.

**NOTE:** Subsections (3) and (4) enacted 1995, c. 39, s. 185 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Records of offences that result in order under s. 20.1 / Disclosure.*

(3) *Notwithstanding anything in this Act, where a young person is found guilty of an offence that results in an order under section 20.1 being made against the young person, the youth court may keep a record of the conviction and the order until the expiration of the order.*

(4) *Any record that is kept under subsection (3) may be disclosed only to establish the existence of the order in any offence involving a breach of the order.*

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#### RECORDS IN CENTRAL REPOSITORY / Police force may provide record / Police force shall provide record.

41. (1) A record of any offence that a young person has been charged with having committed may, where the offence is an offence in respect of which an adult may be subjected to any measurement, process or operation referred to in the *Identification of Criminals Act*, be kept in such central repository as the Commissioner of the Royal Canadian Mounted Police may, from time to time, designate for the purpose of keeping criminal history files or records on offenders or keeping records for the identification of offenders.

(2) Where a young person is charged with having committed an offence referred to in subsection (1), the police force responsible for the investigation of the offence may provide a record of the offence, including the original or a copy of any fingerprints, palmprints or photographs and any other measurement, process or operation referred to in the *Identification of Criminals Act* taken of, or applied in respect of, the young person by or on behalf of the police force, for inclusion in any central repository designated pursuant to subsection (1).

(3) Where a young person is found guilty of an offence referred to in subsection (1), the police force responsible for the investigation of the offence shall provide a record of the offence, including the original or a copy of any fingerprints, palmprints or photographs and any other measurement, process or operation referred to in the *Identification of Criminals Act* taken of, or applied in respect of, the young person by or on behalf of the police force, for inclusion in any central repository designated pursuant to subsection (1). 1980-81-82-83, c. 110, s. 41; R.S.C. 1985, c. 24 (2nd Supp.), s. 31; 1995, c. 19, s. 28.

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#### POLICE RECORDS.

42. A record relating to any offence alleged to have been committed by a young per-

son, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for, or participating in, the investigation of the offence. 1980-81-82-83, c. 110, s. 42; R.S.C. 1985, c. 24 (2nd Supp.), s. 31.

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#### GOVERNMENT RECORDS / Private records.

43. (1) A department or agency of any government in Canada may keep records containing information obtained by the department or agency

- (a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
- (b) for use in proceedings against a young person under this Act;
- (c) for the purpose of administering a disposition;
- (d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act against a young person, to use alternative measures to deal with the young person; or
- (e) as a result of the use of alternative measures to deal with a young person.

(2) Any person or organization may keep records containing information obtained by the person or organization

- (a) as a result of the use of alternative measures to deal with a young person alleged to have committed an offence; or
- (b) for the purpose of administering or participating in the administration of a disposition. 1980-81-82-83, c. 110, s. 43; R.S.C. 1985, c. 24 (2nd Supp.), s. 32.

(3) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 32(2).]

(4) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 32(2).]

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### *Fingerprints and Photographs*

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#### IDENTIFICATION OF CRIMINALS ACT APPLIES / Limitation.

44. (1) Subject to this section, the *Identification of Criminals Act* applies in respect of young persons.

(2) No fingerprints, palmprints or photograph or any other measurement, process or operation referred to in the *Identification of Criminals Act* shall be taken of, or applied in respect of, a young person who is charged with having committed an offence except in the circumstances in which an adult may, under that Act, be subjected to the measurements, processes and operations referred to in that Act. 1980-81-82-83, c. 110, s. 44; R.S.C. 1985, c. 24 (2nd Supp.), s. 33; 1995, c. 19, s. 29.

(3) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 33.]

(4) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 33.]

(5) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 33.]

#### ANNOTATIONS

A 13-year-old child charged under this Act with a Crown option offence is charged with an indictable offence for the purposes of s. 2 of the *Identification of Criminals Act*, notwithstanding that by reason of his age the child cannot be tried in the ordinary courts: *R. v. H. (M.)* (1984), 14 C.C.C. (3d) 210, [1984] 5 W.W.R. 722 (Alta. Q.B.).

The requirement that a young offender attend for fingerprinting is not a breach of ss. 7, 8 or 9 of the Canadian Charter of Rights and Freedoms. Further, this section on its face does not authorize cruel and unusual punishment in violation of s. 12 of the Char-

ter. However, it may be that in a rare case it could be shown that the effect of the fingerprinting process would bring it with s. 12: *R. v. M. (H.)* (No. 2) (1984), 17 C.C.C. (3d) 443, [1985] 2 W.W.R. 444, *sub nom. Lunney v. M.H.* (Alta. Q.B.), affd 21 C.C.C. (3d) 384n, 21 D.L.R. (4th) 767n (Alta. C.A.), leave to appeal to S.C.C. granted C.C.C. and D.L.R. *loc. cit.* Also, now see *R. v. Beare*; *R. v. Higgins* (1988), 45 C.C.C. (3d) 57, [1989] 1 W.W.R. 97 (S.C.C.) noted under Criminal Code s. 509, *supra*.

## Disclosure of Records

**RECORDS MADE AVAILABLE / Exception / Records of forensic DNA analysis of bodily substances / Introduction into evidence / Disclosures for research or statistical purposes / Record made available to victim / Disclosure of information and copies of records.**

**44.1** (1) Subject to subsections (2) and (2.1), any record that is kept pursuant to section 40 shall, and any record that is kept pursuant to sections 41 to 43 may, on request, be made available for inspection to

- (a) the young person to whom the record relates;
- (b) counsel acting on behalf of the young person, or any representative of that counsel;
- (c) the Attorney General or his agent;
- (d) a parent of the young person or any adult assisting the young person pursuant to subsection 11(7), during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any disposition made in respect of the offence;
- (e) any judge, court or review board, for any purpose relating to proceedings relating to the young person under this Act or to proceedings in ordinary court in respect of offences committed or alleged to have been committed by the young person, whether as a young person or an adult;
- (f) any peace officer,
  - (i) for the purpose of investigating any offence that the young person is suspected on reasonable grounds of having committed, or in respect of which the young person has been arrested or charged, whether as a young person or an adult;
  - (ii) for any purpose related to the administration of the case to which the record relates during the course of proceedings against the young person or the term of any disposition;
  - (iii) for the purpose of investigating any offence that another person is suspected on reasonable grounds of having committed against the young person while the young person is, or was, serving a disposition, or
  - (iv) for any other law enforcement purpose;
- (g) any member of a department or agency of a government in Canada, or any agent thereof, that is
  - (i) engaged in the administration of alternative measures in respect of the young person,
  - (ii) preparing a report in respect of the young person pursuant to this Act or for the purpose of assisting a court in sentencing the young person after he becomes an adult or is transferred to ordinary court pursuant to section 16,
  - (iii) engaged in the supervision or care of the young person, whether as a young person or an adult, or in the administration of a disposition or a sentence in respect of the young person, whether as a young person or an adult, or



- (iv) considering an application for parole or pardon made by the young person after he becomes an adult;
- (h) any person, or person within a class of persons, designated by the Governor in Council, or the Lieutenant Governor in Council of a province, for a purpose and to the extent specified by the Governor in Council or the Lieutenant Governor in Council, as the case may be;
- (i) any person, for the purpose of determining whether to grant security clearances required by the Government of Canada or the government of a province or a municipality for purposes of employment or the performance of services;

**NOTE:** Subsection (1)(i.1) enacted 1995, c. 39, s. 186 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (i.1) *any person for the purposes of the Firearms Act;*
- (j) any employee or agent of the Government of Canada, for statistical purposes pursuant to the *Statistics Act*; and
- (k) any other person who is deemed, or any person within a class of persons that is deemed, by a youth court judge to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is
  - (i) desirable in the public interest for research or statistical purposes, or
  - (ii) desirable in the interest of the proper administration of justice.

(2) Where a youth court has withheld the whole or a part of a report from any person pursuant to subsection 13(6) or 14(7), the report or part thereof shall not be made available to that person for inspection under subsection (1).

(2.1) Notwithstanding subsections (1) and (5), any record that is kept pursuant to any of sections 40 to 43 and that is a record of the results of forensic DNA analysis of a bodily substance taken from a young person in execution of a warrant issued under section 487.05 of the *Criminal Code* may be made available for inspection under this section only under paragraph (1)(a), (b), (c), (d), (e), (f), (h) or subparagraph (1)(k)(ii).

(3) Nothing in paragraph (1)(e) authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

(4) Where a record is made available for inspection to any person under paragraph (1)(j) or subparagraph (1)(k)(i), that person may subsequently disclose information contained in the record, but may not disclose the information in any form that would reasonably be expected to identify the young person to whom it relates.

(5) Any record that is kept pursuant to sections 40 to 43 may, on request, be made available for inspection to the victim of the offence to which the record relates.

(6) Any person to whom a record is required or authorized to be made available for inspection under this section may be given any information contained in the record and may be given a copy of any part of the record. R.S.C. 1985, c. 24 (2nd Supp.), s. 34; 1992, c. 1, s. 143; 1995, c. 19, s. 30; 1995, c. 27, s. 2.

## ANNOTATIONS

**Subsec. (1)** – The victim of an offence, committed by the offender, and her insurers have a valid interest within the meaning of para. (k) to warrant making of the order disclosing the record of the case so as to permit them to commence civil proceedings against the young offender. Further, for that purpose the identity of the offender may be disclosed in the documents of the civil case: *Smith v. Clerk of Youth Court* (1986), 31 C.C.C. (3d) 27, 57 O.R. (2d) 524 (Unified Fam. Ct.).

The media is a class of persons with a valid interest in a youth court record for the purposes of subsec. (1)(k) when that record is a tape recording or transcript of the proceed-

ing in open court. Since such a record is kept pursuant to s. 40 it must be made available to the media: *R. v. S. (R.D.)* (1995), 98 C.C.C. (3d) 235, 142 N.S.R. (2d) 321 (S.C.).

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**DISCLOSURE BY PEACE OFFICER DURING INVESTIGATION / Disclosure to insurance company.**

44.2 (1) A peace officer may disclose to any person any information in a record kept pursuant to section 42 that it is necessary to disclose in the conduct of the investigation of an offence.

(2) A peace officer may disclose to an insurance company information in any record that is kept pursuant to section 42 for the purpose of investigating any claim arising out of an offence committed or alleged to have been committed by the young person to whom the record relates. R.S.C. 1985, c. 24 (2nd Supp.), s. 34.

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## *Non-Disclosure and Destruction of Records*

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**NON-DISCLOSURE / Destruction of record / Transfer of records relating to serious offences / Transfer of fingerprints / Meaning of "destroy".**

45. (1) Subject to sections 45.01, 45.1 and 45.2, records kept pursuant to sections 40 to 43 may not be made available for inspection under section 44.1 or 44.2 in the following circumstances:

- (a) where the young person to whom the record relates is charged with the offence to which the record relates and is acquitted otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, on the expiration of two months after the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, on the expiration of three months after all proceedings in respect of the appeal have been completed;
- (b) where the charge against the young person is dismissed for any reason other than acquittal or withdrawn, on the expiration of one year after the dismissal or withdrawal;
- (c) where the charge against the young person is stayed, with no proceedings being taken against the young person for a period of one year, on the expiration of the one year;
- (d) where alternative measures are used to deal with the young person, on the expiration of two years after the young person consents to participate in the alternative measures in accordance with paragraph 4(1)(c);
- (d.1) where the young person is found guilty of the offence and the disposition is an absolute discharge, on the expiration of one year after the young person is found guilty;
- (d.2) where the young person is found guilty of the offence and the disposition is a conditional discharge, on the expiration of three years after the young person is found guilty;
- (e) subject to paragraph (g), where the young person is found guilty of the offence and it is a summary conviction offence, on the expiration of three years after all dispositions made in respect of that offence;
- (f) subject to paragraph (g), where the young person is found guilty of the offence and it is an indictable offence, on the expiration of five years after all dispositions made in respect of that offence; and
- (g) where, before the expiration of the period referred to in paragraph (e) or (f), the young person is, as a young person, found guilty of
  - (i) a subsequent summary conviction offence, on the expiration of three years

after all dispositions made in respect of that offence have been completed, and

- (ii) a subsequent indictable offence, five years after all dispositions made in respect of that offence have been completed.

### Transitional provision

**NOTE:** 1995, c. 19, s. 31(4) provides as follows:

(4) Paragraphs 45(1)(d.1) to (e) of the Act, as enacted by subsection (2), apply in respect of a record relating to a finding of guilt made before the coming into force of that subsection only if the person to whom the record relates applies, after the coming into force of that subsection, to the Royal Canadian Mounted Police to have those paragraphs apply.

(2) Subject to subsections (2.1) and (2.2) when the circumstances set out in subsection (1) are realized in respect of any record kept pursuant to section 41, the record shall be destroyed forthwith.

(2.1) Where a special records repository has been established pursuant to subsection 45.02(1), all records in the central repository referred to in subsection 41(1) that relate to a conviction for first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code* or an offence referred to in the schedule shall, when the circumstances set out in subsection (1) are realized in respect of the records, be transferred to that special records repository.

**NOTE:** Subsection (2.1) replaced 1995, c. 39, s. 189(b) (to come into force when 1995, c. 39, s. 185 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Transfer of records relating to serious offences.*

(2.1) *Where a special records repository has been established pursuant to subsection 45.02(1), all records in the central repository referred to in subsection 41(1) that relate to*

- (a) a conviction for first degree murder or second degree murder within the meaning of section 231 of the Criminal Code,*
- (b) an offence referred to in the schedule, or*
- (c) an order made under section 20.1,*

*shall, when the circumstances set out in subsection (1) are realized in respect of the records, be transferred to that special records repository.*

(2.2) Where a special fingerprints repository has been established pursuant to subsection 45.03(1), all fingerprints and any information necessary to identify the person to whom the fingerprints belong that are in the central repository referred to in subsection 41(1) shall, when the circumstances set out in subsection (1) are realized in respect of the records, be transferred to that special fingerprints repository.

(2.3) For the purposes of subsection (2), “destroy”, in respect of a record, means

- (a) to shred, burn or otherwise physically destroy the record, in the case of a record other than a record in electronic form; and
- (b) to delete, write over or otherwise render the record inaccessible, in the case of a record in electronic form.

(3) Any record kept pursuant to sections 40 to 43 may, in the discretion of the person or body keeping the record, be destroyed at any time before or after the circumstances set out in subsection (1) are realized in respect of that record.

(4) A young person shall be deemed not to have committed any offence to which a record kept pursuant to sections 40 to 43 relates when the circumstances set out in paragraphs (1)(d), (e) or (f) are realized in respect of that record.



(5) For the purposes of paragraphs (1)(e) and (f), where no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General or his agent shall be deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

**NOTE:** Subsection (5.1) enacted 1995, c. 39, s. 187 (to come into force by order of the Governor in Council). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Orders made under s. 20.1 not included.*

*(5.1) For the purposes of this Act, orders made under section 20.1 shall not be taken into account in determining any time period referred to in subsection (1).*

(6) This section applies, with such modifications as the circumstances require, in respect of records relating to the offence of delinquency under the *Juvenile Delinquents Act*, chapter J-3 of the Revised Statutes of Canada, 1970, as it read immediately prior to April 2, 1984. 1980-81-82-83, c. 110, s. 45; R.S.C. 1985, c. 24 (2nd Supp.), s. 35; 1991, c. 43, s. 34; 1995, c. 19, s. 31.

#### **Transitional provision**

**NOTE:** R.S.C. 1985, c. 24 (2nd Supp.), s. 51 provides as follows:

51. No person is guilty of an offence by reason only of a failure to comply with subsection 45(1), (2) or (4) of the *Young Offenders Act* as it read immediately prior to the coming into force of section 34 of this Act.

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## **Retention of Records**

1995, c. 19, s. 32.

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### **RETENTION OF RECORDS.**

45.01 (1) Where, before the expiration of the period referred to in paragraph 45(1)(e) or (f) or subparagraph 45(1)(g)(i) or (ii), the young person is found guilty of a subsequent offence as an adult, records kept pursuant to sections 40 to 43 shall be available for inspection under section 44.1 or 44.2 and the provisions applicable to criminal records of adults shall apply. 1995, c. 19, s. 32.

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## **Special Records Repository**

1995, c. 19, s. 32.

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**SPECIAL RECORDS REPOSITORY /** Records relating to murder / Records relating to other serious offences / Disclosure.

45.02 (1) The Commissioner of the Royal Canadian Mounted Police may establish a special records repository for records transferred pursuant to subsection 45(2.1).

(2) A record that relates to a conviction for the offence of first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code* or an offence referred to in any of paragraphs 16(1.01)(b) to (d) may be kept indefinitely in the special records repository.

(3) A record that relates to a conviction for an offence referred to in the schedule shall be kept in the special records repository for a period of five years and shall be destroyed forthwith at the expiration of that five year period, unless the young person

to whom the record relates is subsequently found guilty of any offence referred to in the schedule, in which case the record shall be dealt with as the record of an adult.

(4) A record kept in the special records repository shall be made available for inspection to the following persons at the following times or in the following circumstances:

- (a) at any time, to the young person to whom the record relates and to counsel acting on behalf of the young person, or any representative of that counsel;
- (b) where the young person has subsequently been charged with the commission of first degree murder or second degree murder within the meaning of section 231 of the Criminal Code or an offence referred to in the schedule, to any peace officer for the purpose of investigating any offence that the young person is suspected of having committed, or in respect of which the young person has been arrested or charged, whether as a young person or as an adult;
- (c) where the young person has subsequently been convicted of an offence referred to in the schedule,
  - (i) to the Attorney General or an agent of the Attorney General,
  - (ii) to a parent of the young person or any adult assisting the young person,
  - (iii) to any judge, court or review board, for any purpose relating to proceedings relating to the young person under this Act or to proceedings in ordinary court in respect of offences committed or alleged to have been committed by the young person, whether as a young person or as an adult, or
  - (iv) to any member of a department or agency of a government in Canada, or any agent thereof, that is
    - (A) engaged in the administration of alternative measures in respect of the young person,
    - (B) preparing a report in respect of the young person pursuant to this Act or for the purpose of assisting a court in sentencing the young person after the young person becomes an adult or is transferred to ordinary court pursuant to section 16,
    - (C) engaged in the supervision or care of the young person, whether as a young person or as an adult, or in the administration of a disposition or a sentence in respect of the young person, whether as a young person or as an adult, or
    - (D) considering an application for parole or pardon made by the young person after the young person becomes an adult;

**NOTE:** Subsection (4)(c.1) and (c.2) enacted 1995, c. 39, s. 189(d) (to come into force when 1995, c. 39, s. 185 comes into force). The text, which is not yet in force and therefore printed in *lightface italics*, reads as follows:

- (c.1) *to establish the existence of the order in any offence involving a breach of the order;*
- (c.2) *for the purposes of the Firearms Act;*
- (d) at any time, to any employee or agent of the Government of Canada, for statistical purposes pursuant to the *Statistics Act*; or
- (e) at any time, to any other person who is deemed, or any person within a class of persons that is deemed, by a youth court judge to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is desirable in the public interest for research or statistical purposes. 1995, c. 19, s. 32.

## Special Fingerprints Repository

1995, c. 19, s. 32.

**SPECIAL FINGERPRINTS REPOSITORY** / Disclosure for identification purposes / Destruction.

**45.03 (1)** The Commissioner of the Royal Canadian Mounted Police may establish a

special fingerprints repository for fingerprints and any related information transferred pursuant to subsection 45(2.2).

(2) Fingerprints and any related information may be kept in the special fingerprints repository for a period of five years following the date of their receipt and, during that time, the name, date of birth and last known address of the young person to whom the fingerprints belong may be disclosed for identification purposes if a fingerprint identified as that of the young person is found during the investigation of a crime or during an attempt to identify a deceased person or a person suffering from amnesia:

(3) Fingerprints and any related information in the special fingerprints repository shall be destroyed five years after the date of their receipt in the repository. 1995, c. 19, s. 32.

**NOTE:** Subsection (3.1) enacted 1995, c. 39, s. 189(c) (to come into force when 1995, c. 39, s. 185 comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

*Records of orders made under s. 20.1.*

*(3.1) A record that relates to an order made under section 20.1 shall be kept in the special records repository until the expiration of the order and shall be destroyed forthwith at that time.*

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## **Disclosure in Special Circumstances**

1995, c. 19, s. 33.

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**WHERE RECORDS MAY BE MADE AVAILABLE / Records / Notice / Where notice not required / Use of record.**

**45.1 (1)** Subject to subsection (1.1), a youth court judge may, on application by any person, order that any record to which subsection 45(1) applies, or any part thereof, be made available for inspection to that person or a copy of the record or part thereof be given to that person, if a youth court judge is satisfied that

- (a) that person has a valid and substantial interest in the record or part thereof;
- (b) it is necessary for the record, part thereof or copy thereof to be made available in the interest of the proper administration of justice; and
- (c) disclosure of the record or part thereof or information is not prohibited under any other Act of Parliament or the legislature of a province.

(1.1) Subsection (1) applies in respect of any record relating to a particular young person or to any record relating to a class of young persons where the identity of young persons in the class at the time of the making of the application referred to in that subsection cannot reasonably be ascertained and the disclosure of the record is necessary for the purpose of investigating any offence that a person is suspected on reasonable grounds of having committed against a young person while the young person is, or was, serving a disposition.

(2) Subject to subsection (2.1), an application under subsection (1) in respect of a record shall not be heard unless the person who makes the application has given the young person to whom the record relates and the person or body that has possession of the record at least five days notice in writing of the application and the young person and the person or body that has possession has had a reasonable opportunity to be heard.

(2.1) A youth court judge may waive the requirement in subsection (2) to give notice to a young person where the youth court is of the opinion that

- (a) to insist on the giving of the notice would frustrate the application; or



(b) reasonable efforts have not been successful in finding the young person.

(3) In any order under subsection (1), the youth court judge shall set out the purposes for which the record may be used. R.S.C. 1985, c. 24 (2nd Supp.), s. 35; 1995, c. 19, s. 34.

#### ANNOTATIONS

The accused was entitled to an order under this section for disclosure of the youth record of an alleged accomplice who was a witness for the Crown, even though the witness had entered the non-disclosure period as set out in s. 45: *R. v. Strain* (1994), 91 C.C.C. (3d) 568, 25 C.R.R. (2d) 180 (Ont. Ct. (Gen. Div.)).

#### RECORDS IN THE CUSTODY, ETC., OF ARCHIVISTS.

45.2 Where records originally kept pursuant to section 40, 42 or 43 are under the custody or control of the National Archivist of Canada or the archivist for any province, that person may disclose any information contained in the records to any other person if

- (a) the Attorney General or his agent is satisfied that the disclosure is desirable in the public interest for research or statistical purposes; and
- (b) the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates. R.S.C. 1985, c. 24 (2nd Supp.), s. 35, c. 1 (3rd Supp.), s. 12(5).

#### Offence

PROHIBITION AGAINST DISCLOSURE / Exception for employees / Prohibition against use / Exception for employees / Offence / Absolute jurisdiction of provincial court judge.

46. (1) Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act.

(2) No person who is employed in keeping or maintaining records referred to in subsection (1) is restricted from doing anything prohibited under subsection (1) with respect to any other person so employed.

(3) Subject to section 45.1, no record kept pursuant to sections 40 to 43, and no copy, print or negative thereof, may be used for any purpose that would serve to identify the young person to whom the record relates as a young person dealt with under this Act after the circumstances set out in subsection 45(1) are realized in respect of that record.

(4) Any person who fails to comply with this section or subsection 45(2)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
- (b) is guilty of an offence punishable on summary conviction.

(5) The jurisdiction of a provincial court judge to try an accused is absolute and does not depend on the consent of the accused where the accused is charged with an offence under paragraph (4)(a). 1980-81-82-83, c. 110, s. 46; R.S.C. 1985, c. 24 (2nd Supp.), s. 36.

## CONTEMPT OF COURT

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**CONTEMPT AGAINST YOUTH COURT / Exclusive jurisdiction of youth court / Concurrent jurisdiction of youth court / Dispositions / Section 708 of *Criminal Code* applies in respect of adults / Appeals.**

47. (1) Every youth court has the same power, jurisdiction and authority to deal with and impose punishment for contempt against the court as may be exercised by the superior court of criminal jurisdiction of the province in which the court is situated.

(2) The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.

(3) The youth court has jurisdiction in respect of every contempt of court committed by a young person against any other court in the face of that court and every contempt of court committed by an adult against the youth court in the face of the youth court, but nothing in this subsection affects the power, jurisdiction or authority of any other court to deal with or impose punishment for contempt of court.

(4) Where a youth court or any other court finds a young person guilty of contempt of court, it may make any one of the dispositions set out in section 20, or any number thereof that are not inconsistent with each other, but no other disposition or sentence.

(5) Section 708 of the *Criminal Code* applies in respect of proceedings under this section in youth court against adults, with such modifications as the circumstances require.

(6) A finding of guilt under this section for contempt of court or a disposition or sentence made in respect thereof may be appealed as if the finding were a conviction or the disposition or sentence were a sentence in a prosecution by indictment in ordinary court. 1980-81-82-83, c. 110, s. 47.

### ANNOTATIONS

It is permissible to grant youth courts the power to determine contempt of court. Subsec. (2) is unconstitutional, however, to the extent that it purports to oust the jurisdiction of superior courts to punish for contempt by granting youth courts exclusive jurisdiction with respect to such proceedings for young persons. It is for the superior courts to elect to hold contempt proceedings against a youth or to defer to the youth court: *MacMillan Bloedel Ltd. v. Simpson* (1995), 103 C.C.C. (3d) 225, [1996] 2 W.W.R. 1, 130 D.L.R. (4th) 385 (S.C.C.).

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## FORFEITURE OF RECOGNIZANCES

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### APPLICATIONS FOR FORFEITURE OF RECOGNIZANCES.

48. Applications for the forfeiture of recognizances of young persons shall be made to the youth court. 1980-81-82-83, c. 110, s. 48.

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**PROCEEDINGS IN CASE OF DEFAULT / Order for forfeiture of recognizance / Judgment debtors of the Crown / Order may be filed / Where a deposit has been made / Subsections 770(2) and (4) of *Criminal Code* do not apply / Sections 772 and 773 of *Criminal Code* apply.**

49. (1) Where a recognizance binding a young person has been endorsed with a certificate pursuant to subsection 770(1) of the *Criminal Code*, a youth court judge shall,

- (a) on the request of the Attorney General or his agent, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and
- (b) after fixing a time and place for the hearing, cause to be sent by registered mail, not less than ten days before the time so fixed, to each principal and surety named in the recognizance, directed to him at his latest known address, a notice requiring him to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) Where subsection (1) is complied with, the youth court judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) Where, pursuant to subsection (2), a youth court judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

(4) An order made under subsection (2) may be filed with the clerk of the superior court or, in the province of Quebec, the prothonotary and, where an order is filed, the clerk or the prothonotary shall issue a writ of *fieri facias* in Form 34 set out in the *Criminal Code* and deliver it to the sheriff of each of the territorial divisions in which any of the principal and his sureties resides, carries on business or has property.

(5) Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

(6) Subsections 770(2) and (4) of the *Criminal Code* do not apply in respect of proceedings under this Act.

(7) Sections 772 and 773 of the *Criminal Code* apply in respect of writs of *fieri facias* issued pursuant to this section as if they were issued pursuant to section 771 of the *Criminal Code*. 1980-81-82-83, c. 110, s. 49.

## INTERFERENCE WITH DISPOSITIONS

INDUCING A YOUNG PERSON, ETC. / Absolute jurisdiction of provincial court judge.

50. (1) Every one who

- (a) induces or assists a young person to leave unlawfully a place of custody or other place in which the young person has been placed pursuant to a disposition,
- (b) unlawfully removes a young person from a place referred to in paragraph (a),
- (c) knowingly harbours or conceals a young person who has unlawfully left a place referred to in paragraph (a),
- (d) wilfully induces or assists a young person to breach or disobey a term or condition of a disposition, or
- (e) wilfully prevents or interferes with the performance by a young person of a term or condition of a disposition

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years or is guilty of an offence punishable on summary conviction.



(2) The jurisdiction of a provincial court judge to try an adult accused of an indictable offence under this section is absolute and does not depend on the consent of the accused. 1980-81-82-83, c. 110, s. 50; R.S.C. 1985, c. 24 (2nd Supp.), s. 37.

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## APPLICATION OF THE CRIMINAL CODE

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### APPLICATION OF *Criminal Code*.

51. Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the *Criminal Code* apply, with such modifications as the circumstances require, in respect of offences alleged to have been committed by young persons. 1980-81-82-83, c. 110, s. 51.

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## PROCEDURE

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### PART XXVII AND SUMMARY CONVICTION TRIAL PROVISIONS OF *CRIMINAL CODE* TO APPLY / Indictable offences / Attendance of young person / Limitation period / Costs.

52. (1) Subject to this section and except to the extent that they are inconsistent with this Act,

- (a) the provisions of Part XXVII of the *Criminal Code*, and
- (b) any other provisions of the *Criminal Code* that apply in respect of summary conviction offences and relate to trial proceedings

apply to proceedings under this Act

- (c) in respect of a summary conviction offence, and
- (d) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

(2) For greater certainty and notwithstanding subsection (1) or any other provision of this Act, an indictable offence committed by a young person is, for the purposes of this Act or any other Act, an indictable offence.

(3) Section 650 of the *Criminal Code* applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

(4) In proceedings under this Act, subsection 786(2) of the *Criminal Code* does not apply in respect of an indictable offence.

(5) Section 809 of the *Criminal Code* does not apply in respect of proceedings under this Act. 1980-81-82-83, c. 110, s. 52.

### ANNOTATIONS

Where the Crown fails to make its election as to mode of proceeding with respect to a Crown option offence, the offence is to be treated as a summary conviction offence for the purposes of penalty and appeal: *R. v. W. (W.W.)* (1985), 20 C.C.C. (3d) 214, [1985] 5 W.W.R. 147 (Man. C.A.).

The lack of availability of a preliminary inquiry for an offence tried in youth court does not offend the equality rights under s. 1(b) of the Canadian Bill of Rights, although an adult charged with the same offence could elect to have a preliminary inquiry: *R. v. G. (K.)* (1986), 31 C.C.C. (3d) 81, [1987] 1 W.W.R. 457 (Alta. C.A.).

Although the effect of this provision is to deprive an offender tried in youth court of a jury trial, there is no infringement of ss. 11(f) or 15 of the Canadian Charter of Rights

and Freedoms notwithstanding an adult tried in the ordinary courts for the same offence could elect trial by jury: *R. v. L. (R.)* (1986), 26 C.C.C. (3d) 417, 52 C.R. (3d) 209 (Ont. C.A.).

The Charter of Rights guarantee in s. 11(f) to a jury trial has no application to proceedings under this Act. Further, an offender's complaint that he was denied his equality rights, as guaranteed by s. 15 of the Charter, by reason of denial of a jury trial is premature where the offender has brought no application under s. 16 to have the case tried in the ordinary courts where he could elect trial by judge and jury: *R. v. B. (S.)* (1989), 50 C.C.C. (3d) 34, 72 C.R. (3d) 117, [1989] 5 W.W.R. 621 (C.A.).

The Crown may appeal against a disposition on the basis that a period of open custody ought to have been secure custody. It is not limited to appealing simply against the length of the period of custody: *R. v. H. (S.R.)* (1990), 56 C.C.C. (3d) 46, 38 O.A.C. 127 (Ont. C.A.).

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### COUNTS CHARGED IN INFORMATION.

**53. Indictable offences and offences punishable on summary conviction may under this Act be charged in the same information and tried jointly. 1980-81-82-83, c. 110, s. 53.**

### ANNOTATIONS

There is nothing precluding inclusion in a single information, counts charging a Criminal Code indictable offence and a summary conviction provincial offence: *R. v. S* (1986), 26 C.C.C. (3d) 30 (Alta. Q.B.).

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### ISSUE OF SUBPOENA / Service of subpoena.

**54. (1) Where a person is required to attend to give evidence before a youth court, the subpoena directed to that person may be issued by a youth court judge, whether or not the person whose attendance is required is within the same province as the youth court.**

**(2) A subpoena issued by a youth court and directed to a person who is not within the same province as the youth court shall be served personally on the person to whom it is directed. 1980-81-82-83, c./110, s. 54.**

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### WARRANT.

**55. A warrant that is issued out of a youth court may be executed anywhere in Canada. 1980-81-82-83, c. 110, s. 55.**

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## EVIDENCE

**GENERAL LAW ON ADMISSIBILITY OF STATEMENTS TO APPLY / When statements are admissible / Exception in certain cases for oral statements / Waiver of right to consult / Statements given under duress are inadmissible / Misrepresentation of age / Parent, etc. not a person in authority.**

**56. (1) Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.**

**(2) No oral or written statement given by a young person to a peace officer or to any other person who is, in law, a person in authority on the arrest or detention of the young person or in circumstances where the peace officer or other person has rea-**

sonable grounds for believing that the young person has committed an offence is admissible against the young person unless

- (a) the statement was voluntary;
- (b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that
  - (i) the young person is under no obligation to give a statement,
  - (ii) any statement given by him may be used as evidence in proceedings against him,
  - (iii) the young person has the right to consult counsel and a parent or other person in accordance with paragraph (c), and
  - (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted in accordance with paragraph (c), if any, unless the young person desires otherwise;
- (c) the young person has, before the statement was made, been given a reasonable opportunity to consult
  - (i) with counsel, and
  - (ii) a parent, or in the absence of a parent, an adult relative, or in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and
- (d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) The requirements set out in paragraphs (2)(b), (c) and (d) do not apply in respect of oral statements where they are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

(4) A young person may waive the rights under paragraph (2)(c) or (d) but any such waiver shall be videotaped or be in writing, and where it is in writing it shall contain a statement signed by the young person that the young person has been apprised of the right being waived.

(5) A youth court judge may rule inadmissible in any proceedings under this Act a statement given by the young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.

(5.1) A youth court judge may in any proceedings under this Act rule admissible any statement or waiver by a young person where, at the time of the making of the statement or waiver,

- (a) the young person held himself or herself to be eighteen years of age or older;
- (b) the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person was eighteen years of age or older; and
- (c) in all other circumstances the statement or waiver would otherwise be admissible.

(6) For the purpose of this section, an adult consulted pursuant to paragraph 56(2)(c) shall, in the absence of evidence to the contrary, be deemed not to be a person in authority. 1980-81-82-83, c. 110, s. 56; R.S.C. 1985, c. 24 (2nd Supp.), s. 38.

## ANNOTATIONS

**Application of provision** – While para. (2)(b) would appear to lay down certain rigorous standards for admission of statements of young people, the Courts have always given special consideration to confessions by juveniles. It may be that this extensive case law is



still relevant in view of subsec. (1) and para (2)(a). In fact, many of the guidelines set out in that case law are now a matter of law under para. (2)(b). See: *R. v. Jacques* (1958), 29 C.R. 249 (Que. S.W.C.); *R. v. Wilson* (1970), 1 C.C.C. (2d) 14, 11 C.R.N.S. 11, 74 W.W.R. 207 (B.C.C.A.); *R. v. M. (D.) and P. (J.)* (1980), 58 C.C.C. (2d) 373 (Ont. Prov. Ct.). However, one aspect of the caution which is not included in para. (2)(b) is the requirement of warning the young person, if over age 14, of the possibility of a transfer to adult Court. Formerly, this was considered an important aspect on the question of voluntariness of the statement where it was tendered in adult Court following a transfer order: *R. v. Yensen* (1961), 130 C.C.C. 353, 29 D.L.R. (2d) 314, [1961] O.R. 703 (H.C.J.). More recently this has also been held to be an important consideration even where the statement was only adduced in juvenile Court: *R. v. A* (1975), 23 C.C.C. (2d) 537, [1975] 5 W.W.R. 425 (Alta. S.C.T.D.); *R. v. M. (D.) and P. (J.)*, *supra*.

In view of the amendment to s. 11 making it clear that the young offender can personally exercise the right to retain and instruct counsel, he can also waive such right without intervention of a parent or guardian: *R. v. M. (C.J.)* (1986), 29 C.C.C. (3d) 569 (Man. Q.B.).

The special conditions prescribed by subsec. (2) do not apply to the taking of a statement from an accused who is 18 years or older, although the investigation relates to an offence committed by the accused when he was 16 years of age: *R. v. Z. (D.A.)* (1992), 76 C.C.C. (3d) 97, [1992] 2 S.C.R. 1025, 16 C.R. (4th) 133 (S.C.C.). [Also now see subsec. (5.1).]

There is no requirement under this section that the offender be advised of the possibility that the offender may be raised to adult court. The presence or absence of such a warning is merely an aspect of determining whether or not the statement was voluntary and if the offender waives his right to consult counsel without being aware of the possibility, where it exists, of being raised to adult court, then the waiver will be invalid: *R. v. I. (L.R.)*, [1993] 4 S.C.R. 504, 86 C.C.C. (3d) 289, 26 C.R. (4th) 119.

**Compliance with subsec. (2)** – Subsection (2) has not been complied with where, although the officer has read to the offender a form setting out his choices under that subsection, there has been no clear explanation to the offender, and the offender, who had a profound learning disability, did not know what to do nor appreciate the consequences of the choices he was making. The duty under this subsection is different than the obligation imposed on a police officer under s. 10(b) of the Charter of Rights in the case of an adult where it has been held that, absent special circumstances, there is no duty to probe into the suspect's degree of understanding of his right to counsel: *R. v. M. (M.A.)* (1986), 32 C.C.C. (3d) 566 (B.C.C.A.).

This section is to protect all young people and thus the requirements of this section must be complied with no matter how street-smart or worldly-wise the young person may appear. Where the statutory pre-conditions have not been complied with then the statement is inadmissible, although the offender's trial is subsequently transferred to adult court. With respect to the requirements in subsec. (2)(b)(iii) and (iv), although the offender has been advised of his right to consult with an adult relative or counsel and has availed himself of that opportunity, if the police intend to continue the questioning, they must again advise him of his right to counsel and his right to have either an adult relative or counsel present: *R. v. J. (J.T.)* (1990), 59 C.C.C. (3d) 1, [1990] 2 S.C.R. 3, 79 C.R. (3d) 219, (6:1).

In *R. v. J. (J.T.)*, *supra*, the court found that subsec. (2)(b)(iii) and (iv) had not been complied with in respect of the taking of statements of the offender at the police station. The Crown, however, sought to tender gestures and verbal responses that the offender subsequently made at the scene of the offence. The verbal responses, however, were clearly inadmissible as there had been no compliance with subsec. (2) and it was not possible to separate the gestures from the verbal statement. The gestures and verbal responses were all an integral part of the final statement given in response to continued police questioning and were also inadmissible.

To be consistent with s. 10(b) of the Charter and s. 11 of this Act, this section must be interpreted so that a parent is not an alternative to counsel unless the right to counsel is waived. Moreover, there cannot be a valid waiver if the offender is not aware of the consequences of waiving his right. The phenomenal difference in potential consequences faced by a young person in youth court as opposed to adult court mandates that young person be aware of the possibility, where it exists, that he will be elevated to adult court, and the potential result of this in terms of stigma and penalty: *R. v. I. (L.R.)*, *supra*. [Note: Amendments to subsec. (2), as a result of S.C. 1995, c. 19, would now appear to clearly conform with the holding in this case.]

**Spontaneous statement [subsec. (3)]** – Even if a statement is made spontaneously by virtue of para. (2)(c), and notwithstanding subsec. (3), it is not admissible if a reasonable opportunity to consult an adult has not been given to the young person, the person in authority to whom the statement was made having had a reasonable opportunity to give the young person the opportunity to do so. Thus, in this case, the officers had a reasonable opportunity when the mother of the offender was present at the police station. For, while the offender's mother was asked if she would like to see her son but declined, there was no evidence that the offender was asked at that time if he would like to see his mother. A young person is entitled to the advice of a parent before he is even questioned by the police if the opportunity for him to have the benefit of that advice is reasonably available, as it was in this case: *R. v. W. (B.C.)* (1986), 27 C.C.C. (3d) 481, 52 C.R. (3d) 201, [1986] 4 W.W.R. 521 (Man. C.A.).

A statement is not spontaneous within the meaning of subsec. (3) where it is clear that the offender was a suspect at the time, had been questioned at length and the statement is made in response to an allegation by the police that he had lied: *R. v. J. (J.T.)*, *supra*.

**Waiver [subsec. (4)]** – The validity of the form of waiver will have to be considered in relation to the circumstances of the particular case. However, a waiver which informed the offender that he was not obliged to say anything, but that anything he did say may be given in evidence sufficiently complied with para. (2)(b)(ii) where the offender was found to be mature and “street wise”: *R. v. G* (1985), 20 C.C.C. (3d) 289 (B.C.C.A.).

To be valid, a waiver under subsec. (4) must not only be in writing but also made with full comprehension of what is being waived and the consequences of doing so: *R. v. W. (B.C.)*, *supra*.

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#### TESTIMONY OF A PARENT / Evidence of age by certificate or record / Other evidence / When age may be inferred.

57. (1) In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he is a parent is admissible as evidence of the age of that person.

(2) In any proceedings under this Act,

- (a) a birth or baptismal certificate or a copy thereof purporting to be certified under the hand of the person in whose custody those records are held is evidence of the age of the person named in the certificate or copy; and
- (b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

(3) In the absence, before the youth court, of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of any such certificate, copy, entry or record, the youth court may receive and act on any other information relating to age that it considers reliable.

(4) In any proceedings under this Act, the youth court may draw inferences as to the

age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination. 1980-81-82-83, c. 110, s. 57.

#### ADMISSIONS / Other party may adduce evidence.

58. (1) A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof thereof, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.

(2) Nothing in this section precludes a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party. 1980-81-82-83, c. 110, s. 58.

#### MATERIAL EVIDENCE.

59. Any evidence material to proceedings under this Act that would not but for this section be admissible in evidence may, with the consent of the parties to the proceedings and where the young person is represented by counsel, be given in such proceedings. 1980-81-82-83, c. 110, s. 59.

#### EVIDENCE OF A CHILD OR YOUNG PERSON.

60. In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has

(a) in all cases, if the witness is a child, and

(b) where he deems it necessary, if the witness is a young person, instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so. 1980-81-82-83, c. 110, s. 60; R.S.C. 1985, c. 24 (2nd Supp.) s. 39.

(2) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 39(2).]

(3) [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 39(2).]

#### ANNOTATIONS

Compliance with this section is mandatory where it applies and requires the judge to instruct the child on the duty to tell the truth, not merely ask the child whether she understands that duty: *R. v. B. (M.)* (1986), 1 W.C.B. (2d) 96 (Sask. C.A.).

61. [Repealed. R.S.C. 1985, c. 24 (2nd Supp.), s. 40.]

#### PROOF OF SERVICE / Proof of signature and official character unnecessary.

62. (1) For the purposes of this Act, service of any document may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by mail.

(2) Where proof of service of any document is offered by affidavit or statutory declaration, it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face thereof. 1980-81-82-83, c. 110, s. 62.

#### SEAL NOT REQUIRED.

63. It is not necessary to the validity of any information, summons, warrant, minute, disposition, conviction, order or other process or document laid, issued, filed or entered in any proceedings under this Act that any seal be attached or affixed thereto. 1980-81-82-83, c. 110, s. 63.



## SUBSTITUTION OF JUDGES

POWERS OF SUBSTITUTE YOUTH COURT JUDGE / Transcript of evidence already given.

64. (1) A youth court judge who acts in the place of another youth court judge pursuant to subsection 669.2(1) of the *Criminal Code* shall,

- (a) if an adjudication has been made, proceed with the disposition of the case or make the order that, in the circumstances, is authorized by law; or
- (b) if no adjudication has been made, recommence the trial as if no evidence had been taken.

(2) Where a youth court judge recommences a trial under paragraph (1)(b), he may, if the parties consent, admit into evidence a transcript of any evidence already given in the case. 1980-81-82-83, c. 110, s. 64; R.S.C. 1985, c. 27 (1st Supp.), s. 187.

## FUNCTIONS OF CLERKS OF COURTS

POWERS OF CLERKS.

65. In addition to any powers conferred on a clerk of a court by the *Criminal Code*, a clerk of the youth court may exercise such powers as are ordinarily exercised by a clerk of a court, and, in particular, may

- (a) administer oaths or affirmations in all matters relating to the business of the youth court; and
- (b) in the absence of a youth court judge, exercise all the powers of a youth court judge relating to adjournment. 1980-81-82-83, c. 110, s. 65.

## FORMS, REGULATIONS AND RULES OF COURT

FORMS / Where forms not prescribed.

66. (1) The forms prescribed under section 67, varied to suit the case, or forms to the like effect, are valid and sufficient in the circumstances for which they are provided.

(2) In any case for which forms are not prescribed under section 67, the forms set out in Part XXVIII of the *Criminal Code*, with such modifications as the circumstances require, or other appropriate forms, may be used. 1980-81-82-83, c. 110, s. 66; R.S.C. 1985, c. 1 (4th Supp.), s. 43.

REGULATIONS.

67. The Governor in Council may make regulations

- (a) prescribing forms that may be used for the purposes of this Act;
- (b) establishing uniform rules of court for youth courts across Canada, including rules regulating the practice and procedure to be followed by youth courts; and
- (c) generally for carrying out the purposes and provisions of this Act. 1980-81-82-83, c. 110, s. 67; R.S.C. 1985, c. 24 (2nd Supp.), s. 41.

YOUTH COURT MAY MAKE RULES / Rules of court / Publication of rules.

68. (1) Every youth court for a province may, at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose and subject

to the approval of the Lieutenant Governor in Council, establish rules of court not inconsistent with this or any other Act of Parliament or with any regulations made pursuant to section 67 regulating proceedings within the jurisdiction of the youth court.

(2) Rules under subsection (1) may be made

- (a) generally to regulate the duties of the officers of the youth court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of this Act;
- (b) subject to any regulations made under paragraph 67(b), to regulate the practice and procedure in the youth court; and
- (c) to prescribe forms to be used in the youth court where not otherwise provided for by or pursuant to this Act.

(3) Rules of court that are made under the authority of this section shall be published in the appropriate provincial gazette. 1980-81-82-83, c. 110, s. 68.

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## YOUTH JUSTICE COMMITTEES

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### YOUTH JUSTICE COMMITTEES.

69. The Attorney General of a province or such other Minister as the Lieutenant Governor in Council of the province may designate, or a delegate thereof, may establish one or more committees of citizens, to be known as youth justice committees, to assist without remuneration in any aspect of the administration of this Act or in any programs or services for young offenders and may specify the method of appointment of committee members and the functions of the committees. 1980-81-82-83, c. 110, s. 69.

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## AGREEMENTS WITH PROVINCES

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### AGREEMENTS WITH PROVINCES.

70. Any minister of the Crown may, with the approval of the Governor in Council, enter into an agreement with the government of any province providing for payments by Canada to the province in respect of costs incurred by the province or a municipality for care of and services provided to young persons dealt with under this Act. 1980-81-82-83, c. 110, s. 70; R.S.C. 1985, c. 24 (2nd Supp.), s. 42.

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### SCHEDULE (old provision)

[*Repealed.* R.S.C. 1985, c. 24 (2nd Supp.), s. 43.]

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### SCHEDULE

(*Subsections 45(2.1) and 45.02(3) and (4)*)

1. An offence under any of the following provisions of the *Criminal Code*:

- (a) paragraph 81(2)(a) (causing injury with intent);
- (b) section 85 (use of firearm during commission of offence);

**NOTE:** Paragraph (b) replaced 1995, c. 39, s. 189(e) (to come into force when s. 85(1) of the *Criminal Code*, as enacted by 1995, c. 39, s. 139, comes into force). The text, which is not yet in force and therefor printed in *lightface italics*, reads as follows:

- (b) *subsection 85(1) (using firearm in commission of offence);*
- (c) **section 151 (sexual interference);**

- (d) section 152 (invitation to sexual touching);
- (e) section 153 (sexual exploitation);
- (f) section 155 (incest);
- (g) section 159 (anal intercourse);
- (h) section 170 (parent or guardian procuring sexual activity by child);
- (i) subsection 212(2) (living off the avails of prostitution by a child);
- (j) subsection 212(4) (obtaining sexual services of a child);
- (k) section 236 (manslaughter);
- (l) section 239 (attempt to commit murder);
- (m) section 267 (assault with a weapon or causing bodily harm);
- (n) section 268 (aggravated assault);
- (o) section 269 (unlawfully causing bodily harm);
- (p) section 271 (sexual assault);
- (q) section 272 (sexual assault with a weapon, threats to a third party or causing bodily harm);
- (r) section 273 (aggravated sexual assault);
- (s) section 279 (kidnapping);
- (t) section 344 (robbery);
- (u) section 433 (arson—disregard for human life);
- (v) section 434.1 (arson—own property);
- (w) section 436 (arson by negligence); and
- (x) paragraph 465(1)(a) (conspiracy to commit murder).

2. An offence under any of the following provisions of the *Criminal Code*, as they read immediately before July 1, 1990:

- (a) section 433 (arson);
- (b) section 434 (setting fire to other substance); and
- (c) section 436 (setting fire by negligence).

3. An offence under any of the following provisions of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as they read immediately before January 4, 1983:

- (a) section 144 (rape);
- (b) section 145 (attempt to commit rape);
- (c) section 149 (indecent assault on female);
- (d) section 156 (indecent assault on male); and
- (e) section 246 (assault with intent).

4. An offence under any of the following provisions of the *Narcotic Control Act*:

- (a) section 4 (trafficking); and
- (b) section 5 (importing and exporting). 1995, c. 19, s. 36.

**NOTE:** 1995, c. 19, s. 42, provides as follows:

42. If Bill C-7, introduced during the first session of the thirty-fifth Parliament and entitled *An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof* is assented to, then, on the later of the day on which sections 6 and 7 of that Act come into force, item 4 of the schedule to the *Young Offenders Act* is replaced by the following:

4. An offence under any of the following provisions of the *Controlled Drugs and Substances Act*:

- (a) section 6 (trafficking); and
- (b) section 7 (importing and exporting).

**Editor's Note:** Pursuant to para. 67(a) of the *Young Offenders Act*, the following Regulations prescribing the forms that may be used for the purposes of the Act have been enacted by SOR/86-818, *Can. Gaz. Part II*, at p. 3187.



# REGULATIONS PRESCRIBING THE FORMS THAT MAY BE USED FOR THE PURPOSES OF THE YOUNG OFFENDERS ACT

## SHORT TITLE

1. These Regulations may be cited as the *Young Offenders Act Forms Regulations*.

## DEFINITION

2. In these Regulations, “Act” means the *Young Offenders Act*. (Loi)

## FORMS

### 3. For the purposes of

- (a) paragraph 7.1(2)(a) of the Act, an undertaking by a responsible person may be in the form set out in Form 1 of the schedule;
- (b) paragraph 7.1(2)(b) of the Act, an undertaking by a young person may be in the form set out in Form 2 of the schedule;
- (c) paragraph 7.1(4)(a), an order by a youth court judge or justice may be in the form set out in Form 3 of the schedule;
- (d) paragraph 7.1(4)(b), a warrant for arrest may be in the form set out in Form 4 of the schedule;
- (e) subsections 9(1) and (2) of the Act, a notice to a parent may be in the form set out in Form 5 of the schedule;
- (f) subsection 9(3) of the Act, a notice to an adult relative or other adult may be in the form set out in Form 6 of the schedule;
- (g) subsection 10(1) of the Act, an order for the attendance of a parent may be in the form set out in Form 7 of the schedule;
- (h) subsection 10(5) of the Act, a warrant to compel the attendance of a parent may be in the form set out in Form 8 of the schedule;
- (i) subsection 13(1) of the Act, an order for an examination and report may be in the form set out in Form 9 of the schedule;
- (j) subsection 16(1) of the Act, an order that a young person be proceeded against in ordinary court may be in the form set out in Form 10 of the schedule;
- (k) subsection 20(1), an order of disposition may be in the form set out in Form 11 of the schedule;
- (l) paragraphs 20(1)(j) and 29(4)(a) of the Act, a probation order may be in the form set out in Form 12 of the schedule;
- (m) subsection 23(8) of the Act, a notice to appear before the youth court pursuant to a probation order may be in the form set out in Form 13 of the schedule;
- (n) subsection 24.2(2) of the Act, a warrant of committal to custody may be in the form set out in Form 14 of the schedule;
- (o) subsections 28(11) and (12), 29(1), 31(2) and 32(5) of the Act, a notice to a young person may be in the form set out in Form 15 of the schedule;
- (p) subsections 28(11) and (12), 29(1), 31(2) and 32(5) of the Act, a notice to a parent or other person may be in the form set out in Form 16 of the schedule;
- (q) subsections 28(17), 29(3), 30(4), 31(2) and 32(7) of the Act, a disposition on review may be in the form set out in Form 17 of the schedule;
- (r) subsection 29(1) of the Act, a notice of intention to release a young person from custody or transfer a young person from secure custody to open custody may be in the form set out in Form 18 of the schedule;

- (s) subsection 30(4) of the Act, a notice of decision by the review board may be in the form set out in Form 19 of the schedule;
  - (t) subsection 32(6) of the Act, a summons for appearance on review may be in the form set out in Form 20 of the schedule; and
  - (u) subsection 32(6) of the Act, a warrant to compel appearance on review may be in the form set out in Form 21 of the schedule.
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## SCHEDULE

### FORM 1

*(Paragraph 3(a))*

#### YOUNG OFFENDERS ACT

*(paragraph 7.1(2)(a))*

IN THE YOUTH COURT FOR *(province)*

#### UNDERTAKING BY RESPONSIBLE PERSON

I, A.B. of....., a responsible person referred to in subsection 7.1(1) of the *Young Offenders Act*, undertake to take care of and to be responsible for the attendance in court when required of C.D., a young person within the meaning of the Act.

I also undertake to

(a) (condition)

(b) (condition)

(c) (condition)

I understand that my willful failure to comply with the terms of this undertaking constitutes an offence punishable on summary conviction under section 7.2 of the Act.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
Signature of responsible person

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### FORM 2

*(Paragraph 3(b))*

#### YOUNG OFFENDERS ACT

*(Paragraph 7.1(2)(b))*

IN THE YOUTH COURT FOR *(province)*

#### UNDERTAKING BY RESPONSIBLE PERSON

I, C.D. of....., a young person within the meaning of the *Young Offenders*

*Act*, undertake to remain in the custody of A.B., a responsible person referred to in subsection 7.1(1) of the Act instead of being detained in custody.

I further undertake to

(a) (condition)

(b) (condition)

(c) (condition)

I understand that my willful failure to comply with the terms of this undertaking is an offence punishable on summary conviction under section 7.2 of the Act.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
Signature of young person

### FORM 3

(Paragraph 3(c))

### YOUNG OFFENDERS ACT

(Paragraph 7.1(4)(a))

IN THE YOUTH COURT FOR (province)

### ORDER

Whereas A.B., of....., a responsible person referred to in subsection 7.1(1) of the *Young Offenders Act*, entered into an undertaking pursuant to subsection 7.1(2) on the.....day of.....19.....;

And whereas C.D., of....., a young person within the meaning of the *Young Offenders Act* entered into an undertaking pursuant to paragraph 7.1(2)(b) of that Act on the.....day of.....19.....;

And whereas I am satisfied that C.D., should no longer remain in the custody of A.B., in whose care he/she has been since the.....day of.....19.....;

I,....., Judge of the Youth Court in and for (territorial division), hereby order that A.B. and C.D. are relieved from the obligations listed in their respective undertakings dated the.....day of....., 1986 and the.....day of....., 19.....

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court



**FORM 4**

*(Paragraph 3(d))*

**YOUNG OFFENDERS ACT**

*(paragraph 7.1(4)(b))*

**IN THE YOUTH COURT FOR (province)**

**WARRANT FOR ARREST**

Canada,  
Province of ..... ,  
*(territorial division)*.

To the peace officers in the said *(territorial division)*:

This warrant is issued for the arrest of C.D. of....., a young person within the meaning of the *Young Offenders Act*, hereinafter called the accused.

Whereas the accused has been charged with (set out briefly the offence in respect of which the accused is charged):

And whereas:

(a) an order has been made relieving A.B. of....., of the obligations undertaken pursuant to paragraph 7.1(2)(a) of the *Young Offenders Act*, and

(b) an order has been made relieving C.D. of....., of the obligations undertaken pursuant to paragraph 7.1(2)(b) of the *Young Offenders Act*; and

This is therefore to command you forthwith to arrest C.D. and bring him/her before (state name of court and judge) to be dealt with in accordance with the *Young Offenders Act*.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

---

**FORM 5**

*(Paragraph 3(e))*

**YOUNG OFFENDERS ACT**

*(subsections 9(1) and (2))*

**IN THE YOUTH COURT FOR (province)**

**NOTICE TO PARENT**

Canada,  
Province of ..... ,  
*(territorial division)*.

To A.B. *(add any other name as required)* of.....:

Whereas it is alleged that you are a parent, within the meaning of the *Young Offenders Act*, of C.D. of....., a young person within the meaning of the *Young Offenders Act*;

This is therefore to notify you that

an appearance notice has been issued *(or a promise to appear has been given or a*

recognizance has been entered into) in which it is alleged that C.D. (*state offence as described in appearance notice, promise to appear or recognizance*) and C.D. is required to appear

or

an information has been received in the Youth Court wherein it is alleged that C.D. (*state offence as described in information*) and that a summons has been issued to C.D. commanding him/her to appear (or C.D. has been arrested in respect of the said offence and detained in (*state place of detention*) and is to appear)

before the Youth Court at (*state address of court*) on....., the ..... day of ....., 19....., at ..... o'clock in the .....noon, to answer to the information and to be dealt with according to the *Young Offenders Act*;

And this is also to notify you that C.D. has the right to be represented by counsel;

And this is also to notify you that you or any other person who is a parent, within the meaning of the *Young Offenders Act*, of C.D. may attend with him/her at the time and place mentioned above.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court, or

A Justice of the Peace in and for the Province of ..... or

A peace officer for .....

## FORM 6

(Paragraph 3(f))

### YOUNG OFFENDERS ACT

(subsection 9(3))

### IN THE YOUTH COURT FOR (*province*)

### NOTICE TO RELATIVE OR FRIEND

Canada,  
Province of .....,  
(*territorial division*).

To A.B. of.....:

Whereas it is alleged that you are an adult relative of C.D., being (*state relationship if known*) (or an adult who is known to and likely to assist C.D.), of....., a young person within the meaning of the *Young Offenders Act*;

This is therefore to notify you that

an appearance notice has been issued (or a promise to appear has been given or a recognizance has been entered into) in which it is alleged that C.D. (*state offence as described in appearance notice, promise to appear or recognizance*) and C.D. is required to appear

or

an information has been received in the Youth Court wherein it is alleged that C.D. (*state offence as described in information*) and that a summons has been issued to C.D. commanding her to appear (or C.D. has been arrested in respect of the said offence and detained in custody in (*state place of detention*) and C.D. is to appear

before the Youth Court at (*state address of court*) on....., the .....day  
of....., 19....., at ..... o'clock in the ..... noon, to answer to the  
information and to be dealt with according to the *Young Offenders Act*;

And this is also to notify you that C.D. has the right to be represented by counsel;

And this is also to notify you that you may, if you wish to do so, attend with C.D. at the  
time and place mentioned above.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court, *or*

A Justice of the Peace in and for the Province of ..... *or*

A peace officer for .....

---

**FORM 7**

(*Paragraph 3(g)*)

**YOUNG OFFENDERS ACT**

(*Subsection 10(1)*)

**IN THE YOUTH COURT FOR (*province*)**

**ORDER FOR ATTENDANCE OF PARENT**

Canada,

Province of .....,

(*territorial division*).

To A.B. of .....

Whereas C.D. of ....., a young person within the meaning of the  
*Young Offenders Act*, has been charged with (*or found guilty of*) the following offence(s):

(*state offence(s) as in the information*);

And whereas it is alleged that you are a parent, within the meaning of the *Young  
Offenders Act*, of C.D.;

And whereas it has been made to appear that your presence at the proceedings against  
C.D. is necessary or in the best interest of C.D.;

This is therefore to command you to attend before the Youth Court at (*state address of  
court*) on ....., the ..... day of ....., 19....., at .....  
o'clock in the ..... noon and to remain in attendance, unless excused by the Youth  
Court, during the conduct of proceedings against C.D., and your failure without reason-  
able excuse to appear may constitute contempt of court and be punishable by the penalty  
provided for in the *Criminal Code* for a summary conviction offence;

And further take notice that if you do not attend at the time and place stated herein a  
warrant may be issued to compel your attendance.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

---



**FORM 8**

*(Paragraph 3(h))*

**YOUNG OFFENDERS ACT**

*(Subsection 10(5))*

**IN THE YOUTH COURT FOR (province)**

**WARRANT TO COMPEL ATTENDANCE OF PARENT**

Canada,

Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division):

Whereas it is alleged that A.B. of ..... is a parent, within the meaning of the *Young Offenders Act*, of C.D. of ..... , a young person within the meaning of the *Young Offenders Act*;

And whereas C.D. has been charged with (or found guilty of) the following offence(s):  
(state offence(s) as in the information);

And whereas it has been made to appear that the presence of A.B. at the proceedings against C.D. is necessary or in the best interest of C.D.;

And whereas A.B. has been duly served with an Order for Attendance of Parent and has neglected or failed (to attend at the time and place appointed therein or to remain in attendance at the proceedings);

This is therefore to command you forthwith to arrest A.B. and to bring him/her before the Youth Court at (state address of court) to be dealt with in accordance with the *Young Offenders Act*.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

**FORM 9**

*(Paragraph 3(i))*

**YOUNG OFFENDERS ACT**

*(Subsection 13(1))*

**IN THE YOUTH COURT FOR (province)**

**ORDER FOR EXAMINATION AND REPORT**

Canada,

Province of ..... ,  
(territorial division).

To A.B. of (address), (designation), being a qualified person within the meaning of the *Young Offenders Act*:

Whereas C.D. of ..... , a young person within the meaning of the *Young Offenders Act*, has been charged with (or found guilty of) the following offence(s):

(state offence(s) as in the information);

And whereas C.D. and the prosecutor have consented to an examination and report;

or

And whereas there exist reasonable grounds to believe that C.D. may be suffering from a physical or mental illness or disorder (or an emotional disturbance or a learning disability or mental retardation);

And whereas it has been made to appear that a medical (or psychological or psychiatric) report would be helpful in the determination of these proceedings;

This is therefore to command you to conduct a medical or psychiatric examination (or a psychological examination or assessment) of C.D. and to report the results thereof in writing to the Youth Court;

And you, C.D., are hereby ordered to attend and make yourself available as required by A.B. for the purposes of the examination or assessment.

or

To the peace officers in the (territorial division) and the person in charge of the hereinafter mentioned place of custody:

You are hereby commanded to take C.D. and convey him/her safely to the following place, namely (specify) and there to deliver him/her to the person in charge thereof, together with the following precept:

And you, the person in charge of the said place, are hereby commanded to receive C.D. into your custody and to detain him/her safely there until his/her return to the Youth Court on the ..... day of ....., 19....., at ..... o'clock in the .. noon and meanwhile to make him/her available as required for the purposes of the examination or assessment, and for so doing, this is a sufficient warrant.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

---

FORM 10

(Paragraph 3(j))

YOUNG OFFENDERS ACT

(Subsection 16(1))

IN THE YOUTH COURT FOR (province)

ORDER OF TRANSFER TO ORDINARY COURT

Canada,  
Province of .....,  
(territorial division).

Whereas C.D. of ....., being a young person within the meaning of the *Young Offenders Act* and having attained the age of fourteen years, is alleged, in an information sworn on the ..... day of ....., 19....., to have committed the following offence:

(state offence(s) as in the information);

And whereas that offence is an indictable offence other than an offence referred to in section 483 of the *Criminal Code*;

And whereas it would appear that, having regard to the needs of C.D. and the interests of society, C.D. should be proceeded against in ordinary court;

I, ....., Judge of the Youth Court in and for (*territorial division*), hereby order that C.D. be proceeded with before the court that would, except for the *Young Offenders Act*, have jurisdiction in respect of that offence.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

### FORM 11

(*Paragraph 3(k)*)

### YOUNG OFFENDERS ACT

(*Subsection 20(1)*)

IN THE YOUTH COURT FOR (*province*)

### ORDER OF DISPOSITION

Canada,  
Province of .....,  
(*territorial division*).

Whereas on the ..... day of ....., 19....., in the Youth Court at (*state address of court*), C.D. of ....., a young person within the meaning of the *Young Offenders Act*, was on his/her own admission (*or was tried and*) found guilty of having committed the following offence(s):

(*state offence(s)*);

(*Insert whichever of the provisions set out below is or are applicable*)

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

(i)

(*Paragraph 20(1)(a)*)

### ABSOLUTE DISCHARGE

Be it remembered that on the ..... day of ..... 19....., I ....., Judge of the Youth Court in and for (*territorial division*), ordered that C.D. be discharged absolutely.

(ii)

(*Paragraph 20(1)(b)*)

### IMPOSITION OF FINE

Be it remembered that on the ..... day of ..... 19....., I



....., Judge of the Youth Court in and for (*territorial division*), imposed on C.D. a fine in the sum of ..... dollars to be paid as follows: (*state time of payment and terms*).

(iii)

(*Paragraph 20(1)(c)*)

### COMPENSATION ORDER

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to pay to E.F., of ....., the sum of ..... dollars by way of compensation for (*describe loss, damage or injury*) suffered by E.F. as a result of the commission of the offence(s) by C.D., such sum to be paid at (*address of the Youth Court if payment is to be made through the court or any other appropriate address*) in the following manner:

(*state time of payment and terms*).

(iv)

(*Paragraph 20(1)(d)*)

### RESTITUTION ORDER

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to make restitution to E.F., of ....., of (*describe property*) which C.D. obtained as a result of the commission of the offence(s), such property to be returned to E.F. on or before the ..... day of ..... 19.....

(v)

(*Paragraph 20(1)(e)*)

### ORDER FOR COMPENSATION TO PURCHASER

And whereas C.D., as a result of the commission of the offence(s), obtained from G.H., of ..... (*describe property*) and sold the same to E.F., of, for the sum of ..... dollars, and the property has been or will be returned to G.H.;

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to pay E.F. the sum of ..... dollars by way of compensation for the loss suffered by E.F., such sum to be paid at (*address of the Youth Court if payment is to be made through the court or any other appropriate address*) in the following manner:

(*state time of payment and terms*).

(vi)

(*Paragraph 20(1)(f) and section 21*)

### ORDER FOR COMPENSATION IN KIND OR FOR PERSONAL SERVICES

And whereas E.F., of ....., has suffered (*describe loss, damage or injury*) as a result of the commission of the offence(s);

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to compensate E.F. for the loss, damage or injury by donating or transferring

(describe property) owned by C.D., such property to be delivered to E.F. on or before the ..... day of ..... 19.....

or

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to compensate E.F. for the loss, damage or injury by the performance of (*describe nature of personal services*), such services to be performed in the following manner: (*state time of performance and terms*).

I, E.F., hereby consent to this order and accept the said property or services in full or partial (*specify*) compensation for the loss, damage or injury suffered to myself.

.....  
(signature of E.F.)

(vii)

(Paragraph 20(1)(g) and section 21)

### COMMUNITY SERVICE ORDER

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered C.D. to perform the following community service:  
(*describe nature of community service and beneficiary and state time of performance and terms*).

(viii)

(Paragraph 20(1)(i) and section 22)

### TREATMENT ORDER

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), ordered that C.D. be detained for treatment at (*specify hospital or other place of treatment and address*) for a period of ..... commencing on the ..... day of ..... 19....., on the conditions hereinafter prescribed;  
(*set out conditions*)

I, C.D. of ....., hereby agree to comply with this order.

.....  
(signature of C.D.)

I, A.B. (*add any other name as required*) of ....., being a parent of C.D., hereby consent to this order.

.....  
(signature of A.B.)

.....  
(additional signature)

(ix)

(Paragraph 20(1)(k))

### COMMITTAL TO CUSTODY

Be it remembered that on the ..... day of ..... 19....., I ..... Judge of the Youth Court in and for (*territorial division*), commit-

ted C.D. to (*specify open or secure*) custody in (*specify place of custody*) for a period of commencing on the ..... day of ..... 19.....

or

to be served intermittently in the following manner:  
(*describe dates and time*).

---

**FORM 12**

(*Paragraph 3(l)*)

**YOUNG OFFENDERS ACT**

(*Paragraphs 20(1)(j) and 29(4)(a))*)

**IN THE YOUTH COURT FOR (*province*)**

**PROBATION ORDER**

Canada,  
Province of .....,  
(*territorial division*).

Whereas on the ..... day of ....., 19....., in the Youth Court (*state address of court*), C.D. of ....., a young person within the meaning of the *Young Offenders Act*, was on his/her own admission (*or was tried and*) found guilty of the following offence(s):

(*state offence(s)*);

And whereas on the ..... day of ....., 19....., the Youth Court placed C.D. on probation on the conditions hereinafter prescribed;

or

imposed on C.D. a fine in the sum of ..... dollars to be paid as follows:  
(*state time of payment and terms*)

and, in addition thereto, placed C.D. on probation on the conditions hereinafter prescribed;

or

committed C.D. to custody in (*specify place of custody*) for a period of ..... to be served continuously commencing on the ..... day of ....., 19.....;

or

to be served intermittently in the following manner: (*describe dates and time*);  
and, in addition thereto, placed C.D. on probation on the conditions hereinafter prescribed;

or

(*describe any other combined disposition*);

Now, therefore, C.D., in this order called the young person, shall, for the period of ..... from the date of this order (*or, where a committal to continuous custody has been ordered*, from the date of his/her release from custody following the expiration of this committal), comply with the following conditions:



- (a) that the young person shall keep the peace and be of good behaviour;  
 (b) that the young person appear before the Youth Court when required by the court to do so;  
 (c) (set out any additional conditions prescribed pursuant to subsection 23(2) of the *Young Offenders Act*.)

.....  
 A Judge of the Youth Court

(Endorsement)

I, C.D. of ....., being the young person referred to in this probation order, hereby acknowledge that I have read the order (or have had the order read to me), that the order has been explained to me and that I have received a copy of the order.

.....  
 Signature of young person

FORM 13

(Paragraph 3(m))

YOUNG OFFENDERS ACT

(Subsection 23(8))

IN THE YOUTH COURT FOR (province)

NOTICE TO APPEAR BEFORE YOUTH COURT PURSUANT TO PROBATION  
 ORDER

Canada,  
 Province of .....,  
 (territorial division).

To C.D. of ....., a young person within the meaning of the *Young Offenders Act*:

Whereas by order dated the ..... day of ....., 19....., you were placed on probation for the period of ..... commencing on the date of the order (or your release from custody following the expiration of your committal);

And whereas pursuant to the conditions of the probation order you are bound to appear before the Youth Court when required by the Youth Court to do so;

This is therefore to require you to appear before the Youth Court judge sitting at (state address of court) on ....., the ..... day of ....., 19....., at ..... o'clock in the ..... noon, to be dealt with in accordance with the *Young Offenders Act*;

And, further this is to notify you that if you do not attend at the time and place stated herein, a warrant may be issued for your arrest.

Dated this ..... day of ..... 19.....,  
 at ..... in the Province of .....

.....  
 A Judge of the Youth Court

FORM 14

(Paragraph 3(n))

YOUNG OFFENDERS ACT

(Subsection 24.2(2))

IN THE YOUTH COURT FOR (province)

WARRANT OF COMMITTAL TO CUSTODY

Canada,

Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division) and to the person in charge of the place of custody specified herein:

Whereas C.D. of ..... , a young person within the meaning of the *Young Offenders Act*, was, on the ..... day of ..... , 19....., found guilty of the following offence(s):

(state offence(s));

And whereas C.D. was committed to custody in (specify place of custody) for a period of ..... to be served continuously commencing on the ..... day of ..... , 19.....;

or

to be served intermittently in the following manner:  
(describe dates and time);

This is therefore to command you to take C.D. and safely convey him/her to such place of custody and to deliver him/her to the person in charge thereof, together with the following precept:

This is to command you, the person in charge of the said place of custody, to receive C.D. into your custody and to keep him/her there safely in accordance with the order committing him/her to custody, and for so doing this is a sufficient warrant.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

---

FORM 15

(Paragraph 3(o))

YOUNG OFFENDERS ACT

(Subsections 28(11) and (12), 29(1), 31(2) and 32(5))

IN THE YOUTH COURT FOR (province)

NOTICE TO YOUNG PERSON OF REVIEW OF DISPOSITION

Canada,

Province of ..... ,  
(territorial division).

To C.D. of ....., a young person within the meaning of the *Young Offenders Act*:

Whereas on the ..... day of ....., 19....., you were found guilty of the following offence(s):

(state offence(s));

And whereas by disposition dated the ..... day of ....., 19....., it was ordered (state disposition as contained in order);

And whereas a review of the disposition is required pursuant to subsection 28(1) of the *Young Offenders Act*;

or

And whereas an application has been made by (state applicant) for a review of the disposition;

or

And whereas the disposition has been reviewed by a review board established or designated for the purposes of section 30 of the *Young Offenders Act* and the board made the following decision:

(state decision);

And whereas an application has been made to the Youth Court by (state applicant) for a review of the decision of the review board;

This is therefore to notify you that the review will be heard before the Youth Court at (state address of court) on ..... the ..... day of ....., 19....., at ..... o'clock in the ..... noon;

or

(in the case of a review before a review board)

This is therefore to notify you that the review will be heard before (specify the review board by name) at (address of the review board) on ....., the ..... day of ....., 19....., at ..... o'clock in the ..... noon;

And this is to notify you that you have the right to be represented by counsel.

Dated this ..... day of ..... 19....., at ..... in the Province of .....

.....  
A Judge of the Youth Court

## FORM 16

(Paragraph 3(p))

### YOUNG OFFENDERS ACT

(Subsections 28(11) and (12), 29(1), 31(2) and 32(5))

IN THE YOUTH COURT FOR (province)

NOTICE OF REVIEW OF DISPOSITION

Canada,  
Province of .....,  
(territorial division).



To A.B. of ....., being a parent, within the meaning of the *Young Offenders Act*, of C.D. of ..... (or the Attorney General or an agent of the Attorney General or the provincial director):

Whereas on the ..... day of ....., 19....., C.D., a young person within the meaning of the *Young Offenders Act*, was found guilty of the following offence(s):

(state offence(s));

And whereas by disposition dated the ..... day of ....., 19....., it was ordered (*state disposition as contained in order*);

And whereas a review of the disposition is required pursuant to subsection 28(1) of the *Young Offenders Act*;

or

And whereas an application has been made by (*state applicant*) for a review of the disposition;

or

And whereas the disposition has been reviewed by a review board established or designated for the purposes of section 30 of the *Young Offenders Act* and the board made the following decision:

(state decision);

And whereas an application has been made to the Youth Court by (*state applicant*) for a review of the decision of the review board;

This is therefore to notify you that the review will be heard before the Youth Court at (*state address of Youth Court*) on ....., the ..... day of ....., 19....., at ..... o'clock in the ..... noon;

or

(in the case of a review before a review board)

This is therefore to notify you that the review will be heard before (*specify the review board by name*) at (*state address of the Review Board*) on ....., the ..... day of ....., 19....., at ..... o'clock in the ..... noon;

\*And this is to notify you that C.D. has the right to be represented by counsel;

\*And this is also to notify you that you or any other person who is a parent, within the meaning of the Act, of C.D. may appear at the hearing and will be given an opportunity to be heard.

Dated this ..... day of ....., 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

\*This paragraph applies only for a notice of review of disposition to a parent.

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## FORM 17

(Paragraph 3(q))

## YOUNG OFFENDERS ACT

(Subsections 28(17), 29(3), 30(4), 31(2) and 32(7))

IN THE YOUTH COURT FOR (province)

## DISPOSITION ON REVIEW

Canada,  
 Province of ..... ,  
 (territorial division).

Whereas on the ..... day of ....., 19....., C.D. of ....., a  
 young person within the meaning of the *Young Offenders Act*, was found guilty of the fol-  
 lowing offence(s);  
 (state offence(s));

And whereas by disposition dated the ..... day of ....., 19....., it  
 was ordered (state disposition as contained in order);

And whereas a review of the disposition has been heard by the Youth Court;

or

And whereas a review of the disposition has been heard by the review board estab-  
 lished or designated for the purposes of section 30 of the *Young Offenders Act* and the  
 Youth Court has reviewed the decision of the review board;

Be it remembered that on the ..... day of ....., 19....., I  
 ....., Judge of the Youth Court, following the review, ordered that:  
 (describe disposition and, where applicable, insert whichever of the provisions of Form 11  
 or 12 that are applicable).

Dated this ..... day of ..... 19.....,  
 at ..... in the Province of .....

.....  
 A Judge of the Youth Court

## FORM 18

(Paragraph 3(r))

## YOUNG OFFENDERS ACT

(Subsection 29(1))

IN THE YOUTH COURT FOR (province)

NOTICE BY PROVINCIAL DIRECTOR OF INTENTION TO RELEASE YOUNG  
 PERSON FROM CUSTODY OR TRANSFER YOUNG PERSON FROM SECURE  
 CUSTODY TO OPEN CUSTODY

Canada,  
 Province of ..... ,  
 (territorial division).

To C.D. of ....., being a young person (or A.B., a parent of the young person, or the Attorney General or an agent of the Attorney General);

Whereas on the ..... day of ....., 19....., C.D. of ....., a young person within the meaning of the *Young Offenders Act*, was found guilty of the following offence(s):

(state offence(s));

And whereas by disposition dated the ..... day of ....., 19....., it was ordered that C.D. be committed to continuous custody for a period of ....., commencing on the ..... day of ....., 19.....;

And whereas it appears that the needs of C.D. and the interests of society would be best served if C.D. were released from custody and placed on probation for the remainder of the disposition or that C.D. be transferred from a place or facility of secure custody to a place or facility of open custody;

This is therefore to notify you that I recommend that C.D. be released from custody and placed on probation by the Youth Court or be transferred from a place or facility of secure custody to a place or facility of open custody;

And this is also to notify you that unless you or any other party entitled to apply to the Youth Court or the review board established or designated for the purposes of section 30 of the *Young Offenders Act*, if any, for a review of the disposition so applies within a period of ten days from the date of service of this notice, C.D. will in accordance with subsection 29(4) of the *Young Offenders Act* be placed on probation by the Youth Court at the expiry of that period or be transferred from a place or facility of secure custody to a place or facility of open custody;

And this is also to notify you that I recommend that C.D. be placed on probation for the following reasons:

(specify reasons);

And this is also to notify you that I recommend that the following conditions be attached to C.D.'s probation order:

(specify conditions);

And this is also to notify you that I recommend that C.D. be transferred from secure to open custody for the following reasons:

(specify reasons);

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
Provincial Director

---



## FORM 19

(Paragraph 3(s))

## YOUNG OFFENDERS ACT

(Subsection 30(4))

IN THE YOUTH COURT FOR (province)

## NOTICE OF DECISION BY REVIEW BOARD

Canada,  
Province of ..... ,  
(territorial division).

To C.D. of ..... , being a young person (or A.B. a parent of the young person, or the Attorney General or an agent of the Attorney General or the provincial director):

Whereas on the ..... day of ..... , 19....., C.D. of ..... , a young person within the meaning of the *Young Offenders Act*, was found guilty of having committed the following offence(s):

(state offence(s));

And whereas by disposition dated the ..... day of ..... , 19....., it was ordered that C.D. be committed to custody for a period of ..... commencing on the ..... day of ..... , 19.....;

or

to be served intermittently in the following manner:  
(describe dates and time);

And whereas a review of the disposition has been heard by this review board;

And whereas on the ..... day of ..... , 19....., the review board ordered: (indicate the review board's decision);

This is therefore to notify you that, unless you or any other party entitled thereto applies to the Youth Court for a review of the decision within ten days after the date of the decision, the order of the review board will take effect on the expiration of the ten days or, where C.D. is to be placed on probation, on the endorsement by the Youth Court of the Review Board's decision.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
Chairman,

.....  
(specify the Review Board by name)

FORM 20

(Paragraph 3(t))

YOUNG OFFENDERS ACT

(Subsection 32(6))

IN THE YOUTH COURT FOR (province)

SUMMONS FOR APPEARANCE ON REVIEW

Canada,  
Province of ..... ,  
(territorial division).

To C.D. of ..... , a young person within the meaning of the *Young Offenders Act*:

Whereas on the ..... day of ..... , 19....., you were found guilty of having committed the following offence(s):  
(state offence(s));

And whereas by disposition dated the ..... day of ..... , 19....., it was ordered (state disposition as contained in order);

And whereas an application has been made to the Youth Court by (state applicant) for a review of the disposition;

This is therefore to command you to appear before the Youth Court at (state address of Youth Court), on ..... , the ..... day of ..... , 19....., at ..... o'clock in the ..... noon, for the purpose of this review and to be dealt with according to the *Young Offenders Act*.

You have the right to be represented by counsel on your appearance.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court

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FORM 21

(Paragraph 3(u))

YOUNG OFFENDERS ACT

(Subsection 32(6))

IN THE YOUTH COURT FOR (province)

WARRANT TO COMPEL APPEARANCE ON REVIEW

Canada,  
Province of ..... ,  
(territorial division).

To the peace officers in the (territorial division):

Whereas on the ..... day of ..... , 19....., C.D. of ..... , a young person within the meaning of the *Young Offenders Act*, was found guilty of having committed the following offence(s):

(*state offence(s)*);

And whereas of disposition dated the ..... day of ....., 19....., it was ordered (*state disposition as contained in order*);

And whereas an application has been made to the Youth Court by (*state applicant*) for a review of the disposition;

This is therefore to command you forthwith to arrest C.D. and to bring him/her before the Youth Court at (*state address of Youth Court*) for the purpose of this review and to be dealt with according to the *Young Offenders Act*;

And you are also required, on arresting C.D., to inform him/her that he/she has the right to be represented by counsel at his/her appearance.

Dated this ..... day of ..... 19.....,  
at ..... in the Province of .....

.....  
A Judge of the Youth Court





# CANADIAN CHARTER OF RIGHTS AND FREEDOMS

## Being Part I of the Constitution Act, 1982

Enacted by the Canada Act 1982 (U.K.) c. 11; proclaimed in force April 17, 1982

Amended by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984

Amended by the Constitution Amendment, 1993 (New Brunswick), SI/93-54, *Can. Gaz., Part II*, April 7, 1993, effective March 12, 1993

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

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## *Guarantee of Rights and Freedoms*

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### RIGHTS AND FREEDOMS IN CANADA.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

### ANNOTATIONS

**Interpretation** – In seeking to justify legislation within the meaning of this section it is not open to the government to rely on a purpose which is outside its legislative jurisdiction. Thus, in the case of the *Lords Day Act*, R.S.C. 1970, Chapter L-13, Parliament's jurisdiction to enact this legislation depended on its characterization as legislation directed to the preservation of the sanctity of the Christian Sabbath and was therefore a matter within the criminal law power. It was then not open to the government to attempt to justify the legislation under this section against an attack based on the guarantee of freedom of religion in s. 2(a), on the basis that the legislation's true purpose was a secular one: *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

This section has two functions. It constitutionally guarantees the rights and freedoms set out in the following provisions and states explicitly the exclusive justificatory criteria against which limitations on those rights and freedoms must be measured. Accordingly, any inquiry under this section is premised on an understanding that the impugned limit violates the constitutional rights and freedoms which are part of the supreme law of Canada. To establish that a limit is justified under this section two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, and secondly, the party invoking this section must show that the means chosen are reasonable and demonstrably justified. The first criterion requires at a minimum that an objective relate to concerns which are pressing and substantial in a free and democratic society. The second requirement involves a form of proportionality test and while the nature of this test will vary, depending on the circumstances, in each case the courts will be required to balance the interests of society with those of the individual and of groups. There are three important components of the proportionality test. First, the measures adopted must be carefully designed

to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations but rather must be rationally connected to the objective. Second, the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question, and finally, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society: *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.

A reasonable limit within the meaning of this section is one which it was reasonable for the legislature to impose. Courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line. It is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy. Further, legislative choices regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny: *R. v. Edwards Books & Art Ltd.*; *R. v. Nortown Foods Ltd* (1986), 30 C.C.C. (3d) 385, [1986] 2 S.C.R. 713, 55 C.R. (3d) 193.

The various sections of the Charter must not be read in isolation from each other. The Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada. Each section must be interpreted in light of the value structure sought to be protected by the Charter as a whole and in light of a content of the other specific rights and freedoms which it embodies: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1.

Legislation may meet the requirement under this section of having been enacted to meet a pressing and substantial objective, notwithstanding the legislation is not confined to protecting the most clearly vulnerable group. In enacting protective legislation, the legislature is required only to exercise a reasonable judgment in specifying the vulnerable group. Whether the means chosen impair the right or freedom in question as little as possible will depend on the government objective and on the means available to achieve it. In matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how the balance is best struck. The choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. As courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. Less certainty may be possible when the government is mediating between different groups than when the government itself is the antagonist of the individual whose right has been infringed. The court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must, nevertheless, be a sound evidentiary basis for the government's conclusions: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2.

**Prescribed by law** – Limitations on rights cannot be left to the unfettered discretion of administrative bodies: *Reference re: Education Act of Ontario and Minority Language Education Rights* (1984), 10 D.L.R. (4th) 491, 47 O.R. (2d) 1, 11 C.R.R. 17, 27 M.P.L.R. 1 (C.A.).

The term "law" in this section includes common law as well as statute law: *R. v. Canadian Newspapers Company Ltd.* (1984), 16 C.C.C. (3d) 495, 31 Man. R. (2d) 187, 13 C.R.R. 43 (C.A.).

A limit will be prescribed by law within the meaning of this section if it is expressly provided for by statute or regulation, or results by necessary implication from the terms



of a statute or regulation or from its operating requirements. The limit may also result from the application of a common law rule: *R. v. Therens* (1985), 18 C.C.C. (3d) 481, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97.

The test to be applied to determine whether a statute is prescribed by law is whether the law provides an intelligible standard according to which the judiciary must do its work. In determining whether a law does prescribe an intelligible standard, consideration must be given to the manner in which the provision has been judicially interpreted: *R. v. Butler* (1992), 70 C.C.C. (3d) 129, 11 C.R. (4th) 137, [1992] 1 S.C.R. 452.

**Burden of proof** – The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. While the standard of proof under this section is the civil standard, this test must be applied rigorously and where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and made clear to the court the consequences of imposing or not imposing a limit. The court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. It may be however that there will be cases where certain elements of the analysis under this section are obvious or self-evident: *R. v. Oakes*, *supra*.

**Evidence** – It is open to the Court of Appeal to receive evidence in the form of statistical and other statements of social and economic facts, which are the kind of evidence of which the court may take judicial notice in considering the application of this section, notwithstanding that the evidence had not been adduced by the Crown and the courts below. Provided that the other party is given notice of the materials and given an opportunity to reply, the court should take judicial notice of relevant matters of social and economic facts, whether or not they have been available to the trial judge. In this case, the court also noted that it may soon be that judicial notice can be taken of the special problem posed by the drinking driver without materials being adduced before the court: *R. v. Bonin* (1989), 47 C.C.C. (3d) 230, 11 M.V.R. (2d) 31 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi, 102 N.R. 400n.

Where the basis for legislation is not obvious, the government must, in order to meet its burden under this section, bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified. In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert *post facto* a purpose which did not animate the legislation in the first place. However, in proving that the original objective remains pressing and substantial, the government can and should draw upon the best evidence currently available. Studies subsequent to the enactment of the legislation can be used for the purpose, as well as for the purpose of establishing that the measure is proportional to its objective: *Irwin Toy Ltd. v. Quebec Attorney General*, *supra*.

## Fundamental Freedoms

### FUNDAMENTAL FREEDOMS.

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

## ANNOTATIONS

**Section 2(a): Freedom of religion** – The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination. The freedom guaranteed by s. 2(a) also includes protection against governmental coercion in matters of conscience and religion. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, but also indirect forms of control which determine or limit alternative courses of conduct subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his belief or his conscience. Whatever else freedom of conscience and religion may mean, it means at the very least that the government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. The Charter protects not only the right to hold and manifest beliefs, but also the right to express and manifest religious non-belief and to refuse to participate in religious practice: *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

Legislation with a secular inspiration does not abridge the freedom from conformity to religious dogma merely because statutory provisions coincide with the tenets of a religion: *Edwards Books & Art Ltd. v. The Queen*; *R. v. Nortown Foods Ltd.* (1986), 30 C.C.C. (3d) 385, [1986] 2 S.C.R. 713, 55 C.R. (3d) 193.

Not every effect of legislation on religious beliefs or practices is offensive to the guarantee provided by s. 2(a). That paragraph does not require that the legislature refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not a breach of freedom of religion: *Jones v. The Queen* (1986), 28 C.C.C. (3d) 513, [1986] 2 S.C.R. 284, 31 D.L.R. (4th) 569.

Religious communications are not *prima facie* privileged. However, in a particular case, the court could exclude evidence where the communication between the accused and a religious adviser met the so-called “Wigmore” criteria: (1) the communication must originate in a confidence that it will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation. However, the fact that the communication was not made to an ordained priest or minister or that it did not constitute a formal confession, will not bar the possibility of the communication being excluded: *R. v. Gruenke*, [1991] 3 S.C.R. 263, 67 C.C.C. (3d) 289, [1991] 6 W.W.R. 673.

**Section 2(b): Freedom of expression / Interpretation** – Section 2(b) protects all forms of expression, whether oral, written, pictorial, sculpture, music, dance or film. The freedom of expression referred to, moreover, extends to those engaged in expression for profit and those who wish to express the ideas of others, and to the recipients as well as to the originators of communication: *Re Ontario Film and Video Appreciation Society and Ontario Board of Censors* (1983), 34 C.R. (3d) 73, 147 D.L.R. (3d) 58, 41 O.R. (2d) 583 (Div. Ct.), affd 38 C.R. (3d) 271, 5 D.L.R. (4th) 766n, 45 O.R. (2d) 80n, 7 C.R.R. 129 (C.A.). Similarly: *R. v. Videoflicks Ltd.* (1984), 15 C.C.C. (3d) 353, 14 D.L.R. (4th) 10, 48 O.R. (2d) 395 (C.A.) affd on other grounds 30 C.C.C. (3d) 385, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, *sub nom. R. v. Edwards Books & Art Ltd.*

Where government action is challenged under s. 2(b), the first step which the court must take is to ascertain whether the activity which the person challenging the government action wishes to pursue may properly be characterized as falling within freedom of expression. Where an activity conveys or attempts to convey a meaning, it has expressive



content and *prima facie* falls within the scope of the guarantee. Freedom of expression was entrenched in the Charter to ensure that everyone can manifest thoughts, opinions, beliefs and indeed all expressions of the heart and mind however unpopular, distasteful or contrary to the mainstream. Human activity cannot therefore be excluded from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Once it is determined that the activity in issue comes within the scope of freedom of expression, the next step is to determine whether the purpose or effect of the government action is to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where however it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. Even if the government's purpose is not to control or restrict attempts to convey a meaning, the court must still decide whether the effect of a government action is to restrict free expression. The burden is on the person challenging government action to demonstrate the existence of such an effect, and to show that the activity in issue promotes at least one of the principles and values underlying the freedom. Those principles and values are: that seeking and attaining the truth is an inherently good activity; that participation in social and political decision-making is to be fostered and encouraged; and that diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant and welcoming environment, not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed: *Irwin Toy Ltd. v. Quebec (Attorney General)* (1989), [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2.

There is no sound basis on which commercial expression can be excluded from the protection of s. 2(b). The guarantee in this paragraph is intended to protect both listeners as well as speakers, and is not confined to political expression. Over and above its intrinsic value as expression, commercial expression plays a significant role in enabling individuals to form economic choices, an important aspect of individual self-fulfillment and personal autonomy: *Ford v. Quebec (Attorney General)* (1988), [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577, 19 Q.A.C. 69, *sub nom. Chaussure Brown's Inc. v. Quebec (Attorney General)*.

Freedom of expression as guaranteed by s. 2(b) includes the freedom to express oneself in the language of one's choice. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice: *Ford v. Quebec (Attorney General)*, *supra*.

Activities cannot be excluded from the scope of the guarantee in this paragraph on the basis of the content or meaning conveyed and, thus, the prohibition on communication for the purpose of prostitution or of obtaining the services of a prostitute is a violation of this paragraph. However, eradication of the various forms of social nuisance arising from the public display of the sale of sex is an objective of sufficient importance to warrant a limitation of the freedom of expression and the means chosen by Parliament in s. 212(1)(c) of the Criminal Code is a proportional response and, thus, a reasonable limit within the meaning of s. 1: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1123, [1990] 4 W.W.R. 481 (4:2).

The term "expression" embraces all content of expression irrespective of the particular meaning or message sought to be conveyed and no matter how invidious and obnoxious the message. While the court has held that expression which is communicated in a physically violent form may not be protected, communications such as hate propaganda cannot be considered as violence nor as analogous to violence so as to fall outside the protection of this subsection. Moreover, even threats of violence fall within the protection of this subsection and their suppression must be justified under s. 1. Further, it would be inappropriate to attenuate the freedom of expression guarantee by attempting to balance it against other protected rights and freedoms such as those in ss. 15 and 27 dealing with



equality and multiculturalism. The preferable course is to weigh the various contextual values and factors in the s. 1 analysis: *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1, [1991] 2 W.W.R. 1, 77 Alta. L.R. (2d) 193 (S.C.C.) (4:3).

This paragraph does not import any new or additional requirements for the issuance of search warrants at media premises. However, this paragraph does provide a backdrop against which the reasonableness of such a search may be evaluated and there must be a careful consideration as to whether the warrant should issue and also the conditions which might be imposed. Ordinarily, the information to obtain the warrant should disclose whether there are alternative sources from which the information may reasonably be obtained and if there is an alternative source, that it has been investigated and all reasonable efforts to obtain the information have been exhausted. If a search will impede the media from fulfilling its functions of news gatherer and news disseminator, then a warrant should only be issued where a compelling state interest is demonstrated. The fact that the information sought has already been disseminated, in whole or in part, to the public by the media will ordinarily favour the granting of the warrant: *C.B.C. v. New Brunswick (Attorney General)* (1991), 67 C.C.C. (3d) 544, 85 D.L.R. (4th) 57, 130 N.R. 362 (S.C.C.) (6:1); *C.B.C. v. Lessard* (1991), 67 C.C.C. (3d) 517, 130 N.R. 321 (S.C.C.) (6:1).

**Access to Judicial Proceedings** – While public accessibility to the courts is not explicitly guaranteed by the Charter, such access, having regard to its historical origin and necessary purpose, is an integral and implicit part of the guarantee to everyone of freedom of opinion and expression including freedom of the press. The rule of openness in courts fosters the necessary public confidence in the integrity of the court system and an understanding of the administration of justice: *Re Southam Inc. and The Queen (No. 1)* (1983), 3 C.C.C. (3d) 515, 146 D.L.R. (3d) 408, 41 O.R. (2d) 113 (C.A.).

**Restrictions on picketing** – In any form of picketing there is at least some element of expression. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of picketing and that it solicits the assistance of the public in honouring picket lines. While action on the part of the picketers will always accompany the expression, picketing is therefore entitled to protection under this paragraph unless it is accompanied by a form of action, such as threats of violence, disruption of property, assault or other clearly unlawful conduct, that alters the nature of the whole transaction and removes it from Charter protection. Picketing intended to bring about economic pressure and induce a breach of contract nonetheless comes within s. 2(b). It is however necessary in the general social interest that picketing be regulated and sometimes limited. However, by virtue of s. 32, the Charter only applies to the legislative, executive and administrative branches of government. It will apply to them whenever their action is invoked in public or private litigation, and whether their action relies on statutory authority or on the authority or justification of a rule of the common law. The Charter will apply to the common law, however, only in so far as it is the basis of some government action alleged to infringe a guaranteed right or freedom. A court order such as an injunction sought to restrict picketing is not an element of government intervention sufficient to invoke the Charter, for otherwise the Charter would apply to all private litigation. The Charter will therefore not apply in an action by one private party relying on the common law of inducing breach of contract to obtain an injunction restraining secondary picketing by another private party: *Retail, Wholesale & Department Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174, [1987] 1 W.W.R. 577.

**Freedom of the Press** – Even assuming that s. 2(b) enshrines the right to gather news, the witness in this case had not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. Accordingly the witness had failed to demonstrate any breach of

her right under this section: *Moyss v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572, 60 D.L.R. (4th) 1, [1989] 4 W.W.R. 596.

While the communications media may have no general privilege immunizing them from having to disclose on discovery or at trial the identity of their sources, the special position of the press, including the guarantee of a free press conferred by s. 2(b) requires that in each instance the interest in a free press be weighed and balanced against the party's right to disclosure: *Citizen (The) v. Coates* (1986), 29 D.L.R. (4th) 523, 11 C.P.C. (2d) 96 (N.S.C.A.).

Freedom of the press is not absolute save for s. 1 limitations: it is circumscribed by the rights of others, inherent in the concept of a democratic freedom. The reconciliation of freedom of the press and the right of the individual to a fair trial does not infringe either right. The press will be free to publish the information after the case has been tried. The accused can have a fair trial only if the trial is not debated publicly, before a verdict is rendered. To the extent that freedom of expression is hindered by the law of contempt, the hindrance is a corollary of the competing right of an accused person to a fair trial. The requirement that the press await the outcome of a trial before publishing information prejudicial to the accused does not infringe the freedom of expression guaranteed by the Charter: *Attorney General for Manitoba v. Groupe Quebecor Inc.* (1987), 37 C.C.C. (3d) 421, 59 C.R. (3d) 1, 45 D.L.R. (4th) 80 (Man. C.A.).

A newspaper article concerning accused facing trials is protected by s. 2(b), notwithstanding that the publication of the article offends the *sub judice* rule. However the offence of criminal contempt *sub judice* constitutes a reasonable limit within the meaning of s. 1. While freedom of expression including freedom of the press and other media of communication are vital in a democratic society, the accused also have a right to a fair trial as guaranteed by s. 11(d): *R. v. Robinson-Blackmore Printing & Publishing Co. Ltd.* (1989), 47 C.C.C. (3d) 366, 73 Nfld. & P.E.I.R. 46 (Nfld. S.C.).

**Section 2(c): Freedom of assembly** – The courts should require that the Crown show a compelling reason why basic rights of an individual to do what is lawful should be curtailed. Thus, a condition of release pending trial that the accused not attend at a demonstration or demonstrate or in any way cause a disturbance within half a mile of a particular factory should not have been imposed upon the accused following his release on bail pending trial on a charge of obstructing police. The rights of an accused cannot be restricted on a speculative concern of danger: *R. v. Collins* (1982), 31 C.R. (3d) 283 (Ont. Co. Ct.).

**Section 2(d): Freedom of association** – The right to strike does not come within the freedom of association as guaranteed by s. 2(d). The purpose of freedom of association is to guarantee that activities and goals may be pursued in common. What s. 2(d) protects is the exercise in association of such rights as have Charter protection when exercised by the individual, together with the freedom to associate for the purpose of activities which are lawful when performed alone: *Reference re Public Service Employees Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161, [1987] 3 W.W.R. 577.

The target of s. 212(1)(c) of the Criminal Code, which prohibits communication in public for the purpose of prostitution, is expressive conduct of a commercial nature and does not attack conduct of an associational nature. Further, the mere fact that an impugned legislative provision limits the possibility of commercial activities or agreements is not sufficient to show a *prima facie* interference with this paragraph. The constitutionality of the provisions was therefore to be determined on the basis of s. 2(b) rather than this paragraph. The court, having found that s. 212(1)(c) is a reasonable limit on the s. 2(b) guarantee, held that provision was valid: *R. v. Skinner* (1990), 56 C.C.C. (3d) 1 (S.C.C.) (4:2).



## Democratic Rights

### DEMOCRATIC RIGHTS OF CITIZENS.

**3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.**

#### ANNOTATIONS

Since proclamation of the Charter, the courts have had to consider whether limitations on the rights of inmates to vote in provincial and federal elections infringe this section and if so, whether they constitute reasonable limits within the meaning of s. 1. In *Re Maltby and Attorney General of Saskatchewan* (1982), 2 C.C.C. (3d) 153, 143 D.L.R. (3d) 649, 20 Sask. R. 366 (Q.B.) [appeal dismissed as moot appeal 13 C.C.C. (3d) 308, 10 D.L.R. (4th) 745 (C.A.)] it was held that prison inmates on remand were entitled to a declaration that they were entitled to vote in provincial elections. Under the provincial legislation such inmates are not disqualified from voting but have been prevented from exercising their right to vote by reason of an administrative practice within the prison. In *Badger v. Attorney General of Manitoba* (1986), 27 C.C.C. (3d) 158, 51 C.R. (3d) 163, 30 D.L.R. (4th) 108 (Man. Q.B.) [appeal to the Court of Appeal 29 C.C.C. (3d) 92, 32 D.L.R. (4th) 310, 39 Man. R. (2d) 230, dismissed due to shortness of time until election] it was held that a provision of the Provincial Elections Act disqualifying from voting in a provincial election persons who are in jails, prisons or places of detention serving a sentence infringes this section and cannot be saved by s. 1. However, in view of the uncertain state of the law, the government was not seriously remiss in failing to reconcile the provincial law with the Charter. The applicants had asserted their right to vote belatedly and therefore, while entitled to a declaration that the provision of the Elections Act was invalid, it would not be appropriate or just to order that the prisoners' names be placed on the voters list or that any other steps be taken to enable convicted prisoners to participate in the impending election. In *Grondin v. Ontario (Attorney General)* (1988), 65 O.R. (2d) 427 (H.C.J.) it was held that a provision of the Election Act (Ont.) disqualifying from voting in a provincial election every person who is an inmate in a penal or correctional institution infringes this section and cannot be justified under s. 1.

A provision of the Election Act (B.C.), which denies to any person who has been convicted of treason or an indictable offence the right to vote in a provincial election unless he has been pardoned or has served the sentence imposed for the offence, is inconsistent with s. 3 and of no force and effect to the extent that it prohibits from voting persons serving a term of probation: *Re Reynolds and Attorney General of British Columbia* (1982), 143 D.L.R. (3d) 365, [1983] 2 W.W.R. 413 (B.C.S.C.); affd 40 C.R. (3d) 393, 11 D.L.R. (4th) 380, [1984] 5 W.W.R. 270 (C.A.).

Section 51(e) of the Canada Elections Act, R.S.C. 1985, c. E-2, which disqualifies from voting in a federal election every person undergoing punishment as an inmate in any penal institution for the commission of any offence violates this section and is not a reasonable limit. The provision is therefore of no force and effect: *Belczowski v. Canada* (1992), 12 C.R. (4th) 219, 90 D.L.R. (4th) 330, 50 F.T.R. 240n (C.A.); *Sauvé v. Canada (Attorney-General)* (1992), 89 D.L.R. (4th) 644, 7 O.R. (3d) 481 (C.A.). *Contra: Badger v. Canada (Attorney-General)* (1988), 55 D.L.R. (4th) 177 (Man. C.A.); *Re Jolivet and Barker and the Queen* (1983), 1 D.L.R. (4th) 604, 7 C.C.C. (3d) 431 (B.C.S.C.).

#### MAXIMUM DURATION OF LEGISLATIVE BODIES / Continuation in special circumstances.

**4. (1) No House of Commons and no legislative assembly shall continue for longer**



than five years from the date fixed for the return of the writs at a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

#### ANNUAL SITTING OF LEGISLATIVE BODIES.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

### *Mobility Rights*

**MOBILITY OF CITIZENS / Rights to move and gain livelihood / Limitation / Affirmative action programs.**

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

#### ANNOTATIONS

**Interpretation** – Subsection (2)(b) does not create a separate and distinct right to work divorced from the mobility provisions in which it is found. The rights in paragraphs (a) and (b) both relate to movement into another province, either to take up residence or to work without establishing residence: *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, [1984] 1 S.C.R. 357, 9 D.L.R. (4th) 161.

Section 6 extends to citizens and permanent residents alike the right inherent in citizenship, to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard for provincial boundaries. Like other individual rights guaranteed by the Charter, it must be interpreted generously to achieve its purpose: to protect the right of citizens and permanent residents to move about the country, to reside where they wish and to pursue their livelihood without regard to provincial boundaries. While the provinces may regulate these rights, they may not do so, subject to the exceptions in this section and s. 1, in terms of provincial boundaries. Section 6(2)(b) guarantees not simply the right to pursue a livelihood, but the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents. The right to pursue the livelihood of choice must remain a viable right and cannot be rendered practically ineffective and illusory by provincial regulation. The right to pursue the gaining of a livelihood in

the province does not depend on physical movement of the individual to the province. A person can pursue a living in a province without being there personally. This section guarantees the right to offer one's services anywhere in Canada regardless of one's place of residence: *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317, [1989] 4 W.W.R. 1.

**Extradition** – While extradition infringes s. 6, the infringement lies at the outer edges of the core values sought to be protected by this provision and extradition constitutes a reasonable limit within the meaning of s. 1. Even where the accused were Canadian citizens and the acts for which their extradition was sought were committed in Canada, their extradition on drug trafficking and importing charges was valid. The extradition of the accused was rationally connected with the objectives sought to be obtained. It would not be appropriate to consider the propriety of extradition on a case by case basis. A general exception from extradition for Canadian citizen who could be charged in Canada would interfere unduly with the objectives of the system of extradition. Moreover, the fact that the Attorney General has a discretion to determine whether a Canadian should be prosecuted in Canada or abroad does not mean that extradition is not a reasonable limit. The authorities must give due weight to the constitutional right of a citizen to remain in Canada and they must in good faith direct their minds to whether prosecution would be equally effective in Canada, given the existing domestic laws in international arrangements. They have an obligation flowing from this section to assure themselves that prosecution in Canada is not a realistic option and if, in a particular case, it was established that the discretion was exercised for improper or arbitrary motives a remedy would lie: *United States of America v. Cotroni* (1989), 48 C.C.C. (3d) 193, [1989] 1 S.C.R. 1469, 23 Q.A.C. 182.

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## Legal Rights

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### LIFE, LIBERTY AND SECURITY OF PERSON.

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**7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.**

#### ANNOTATIONS

**Interpretation** – The phrase “principles of fundamental justice” does not describe a protected right itself but rather qualifies the protected right not to be deprived of life, liberty and security of the person. The meaning of the principles of fundamental justice was to be determined having regard to the purpose of the section and its context in the Charter. Thus ss. 8 to 14 of the Charter address specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of this section. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person. The term “fundamental justice” was not synonymous merely with natural justice. The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process, but also of the other components of the legal system. While many of the principles of fundamental justice are procedural in nature, they are not limited solely to procedural guarantees. Whether any given principle might be said to be a principle of fundamental justice within the meaning of this section will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in the legal system as it evolves: *Reference re Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289.

It was not open to a witness, the former manager of a bank in the Bahamas, to allege an infringement of his rights under s. 7 because he was required to testify in Canada

about affairs in the Bahamas, in possible violation of Bahamian legislation. Any infringement of the witness's liberty or security did not result from the operation of Canadian law but solely from the operation of Bahamian law in the Bahamas: *Spencer v. The Queen* (1985), 21 C.C.C. (3d) 385, [1985] 2 S.C.R. 278, 21 D.L.R. (4th) 756.

Section 7 does not apply retrospectively and thus an accused charged with an offence allegedly committed prior to the proclamation of the Charter cannot argue that the provision violated his rights as guaranteed by this section because in effect it imposed absolute liability in the circumstances where he was liable to imprisonment: *R. v. Stevens* (1988), 41 C.C.C. (3d) 193, [1988] 1 S.C.R. 1153, 64 C.R. (3d) 297.

There was no retrospective application of s. 7 in a case where the accused alleged a continuing violation of her liberty interest which was not in accordance with the principles of fundamental justice because of an error made at her pre-Charter trial convicting her of murder, which error affected her period of parole ineligibility. While her claim required the courts to consider pre-Charter history to the extent it explained or contributed to what was alleged to be a current Charter violation, in the circumstances of the case, the court was not being asked to apply s. 7 retrospectively. The crucial issue was to identify the event alleged to be in contravention of s. 7 and the point in time which the event depriving the accused of her liberty occurred. In this case it was the current application of the condition of the accused's sentence that she not be eligible for parole for 25 years which infringed her residual liberty interest: *R. v. Gamble* (1988), 45 C.C.C. (3d) 204, [1988] 2 S.C.R. 595, 66 C.R. (3d) 193.

A corporation cannot avail itself of the protection afforded by this section. A corporation cannot be deprived of life or security of the person. Nor, having regard to the exclusion from this section of a guarantee of a right to property, can the section be regarded as encompassing the economic rights of a corporation so as to protect a corporation against deprivations of economic liberty: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2. [However see notes under s. 52 as to circumstances in which a corporation may allege a violation of this section or other fundamental freedoms when charged with an offence.]

In the criminal context, where a person's liberty is at stake, it is imperative that persons be capable of knowing in advance, with a high degree of certainty, what conduct is prohibited and what is not and, thus, vagueness should be recognized as contrary to the principles of fundamental justice. However, the void for vagueness doctrine is not to be applied to the bare words of the statute, but rather to the provision as interpreted and applied in judicial decisions. In addition, the fact that a particular term is open to varying interpretations by the courts is not fatal. The question is whether the impugned term can be or has been given sensible meaning by the courts: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65, [1990] 1 S.C.R. 1123, [1990] 4 W.W.R. 481 (4:2).

The doctrine of vagueness is a principle of fundamental justice under this section and is also part of the s. 1 analysis in that a law may be so vague as to not meet the requirement of "prescribed by law". Vagueness as a principle of fundamental justice is based on the requirements of fair notice to the citizen and limitation on law enforcement discretion. The concept of fair notice includes a formal aspect, that is acquaintance with the actual text of a statute, and a substantive content, that is an understanding that certain conduct is the subject of legal restrictions. The concept of a limitation on law enforcement discretion is based on the principle that a law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Legal rules reach the point of certainty only in particular cases where the law is determined by a competent authority. In the meanwhile, conduct is guided by approximation. Legal dispositions, therefore, delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances. A provision is unconstitutionally vague, therefore, where it does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not suffi-



ciently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. The courts must, however, be wary of using the doctrine of vagueness to prevent or impede state action and furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject matter does not lend itself: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1.

Vagueness must not be considered in the abstract but must be assessed within the larger interpretative context developed through an analysis of considerations such as the purpose, subject matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision. Only after a court has exhausted its interpretative role will it then be in a position to determine whether the provision affords sufficient guidance for legal debate. While it is open to an accused to argue that a statute is unconstitutionally vague even where its conduct clearly falls within the core of the prohibition, reasonable hypotheticals have no place in the vagueness analysis. It would seem, however, that reasonable hypotheticals may be used in an analysis of whether a provision is unconstitutionally overboard: *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1028, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147.

This section does not protect economic rights *per se* and thus provisions of the Highway Traffic Act (Man.), allowing for the seizure of a vehicle driven by a person who was disqualified or prohibited from driving, did not violate this section: *R. v. Werhun*, [1991] 2 W.W.R. 344 (Man. C.A.).

A non-citizen does not have an unqualified right to enter or remain in Canada and it is open to Parliament to prescribe conditions for them to enter or remain. The removal of a non-citizen who has deliberately violated an essential condition by reason of his conviction for a serious criminal offence does not result in a denial of fundamental justice. Further, the procedure followed by the Security Intelligence Review Committee which was determining whether there were grounds to believe the person was involved in organized crime, in providing the person with a summary of police evidence but barring him from being present while the evidence itself was presented, was in accordance with the principles of fundamental justice. The scope of principles of fundamental justice will vary with the context and the interests at stake: *Chiarelli v. Canada (Minister of Employment and Immigration)* (1992), 72 C.C.C. (3d) 214, [1992] 1 S.C.R. 711, 90 D.L.R. (4th) 289 (S.C.C.).

**Self-incrimination** – A statutory compulsion to testify engages the witness' liberty interest under this section. However, the liberty interest is affected in accordance with the principles of fundamental justice, since not only is the witness protected from use of his testimony in subsequent proceedings (except for perjury or the giving of contradictory evidence) by virtue of s. 13 of the Charter, but derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of the witness ought generally to be excluded under this section at the witness' subsequent trial, since its admission would tend to affect the fairness of the trial: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1, 36 C.R. (4th) 1.

Although separately charged as an accused, a witness appearing in another person's criminal trial will ordinarily be compellable in that trial, unless it is established that the predominant purpose in compelling the testimony is incrimination of the witness. A similar test should be applied where the evidence is sought at a preliminary inquiry: *R. v. Primeau*, [1995] 2 S.C.R. 60, 97 C.C.C. (3d) 1, 38 C.R. (4th) 189. Similar considerations apply where the witness is a suspect in the same offence but has not yet been charged: *R. v. Jobin*, [1995] 2 S.C.R. 78, 97 C.C.C. (3d) 97, 97 W.A.C. 23.

In addition to use immunity guaranteed by s. 13 and limited derivative use immunity guaranteed by this section, in some circumstances the witness cannot be compelled to testify. The test to be applied in determining whether or not the witness can be compelled to testify is whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate

public purpose. In the context of a criminal or quasi-criminal prosecution, to qualify as a valid public purpose the compelled testimony must be for the purpose of obtaining evidence in furtherance of that prosecution. If it is established that the predominant purpose is not to obtain relevant evidence for the purpose of the instant proceeding, but rather to incriminate the witness, the party seeking to compel the witness must justify the potential prejudice to the right of the witness against self-incrimination. If it is shown that the only prejudice is the possible subsequent derivative use of the testimony, then the compulsion to testify will occasion no prejudice since the witness will be protected against such use. If, however, the witness can show any other significant prejudice that may arise from the testimony such that his right to a fair trial will be jeopardized, the witness should not be compellable: *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, 97 C.C.C. (3d) 505, 38 C.R. (4th) 133.

The right to remain silent is protected as a principle of fundamental justice and is broader than the common law confession rule and the rule against self-incrimination. The measure of the right to silence resides in the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself, but rather has the right to choose whether to speak or to remain silent. Once it is established that a detained suspect subjectively possesses an operating mind, then the issue is whether the conduct of the authorities, considered on an objective basis, effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities. Thus, when the police use subterfuge to interrogate an accused after he has advised them that he does not wish to speak to them, they are improperly eliciting information that they are unable to obtain by respecting his constitutional right to silence. However, in the absence of eliciting behaviour on the part of the police, there is no violation of the accused's right. The right as well only applies to a detainee and does not affect the use of undercover police officers prior to detention: *R. v. Hebert* (1990), 57 C.C.C. (3d) 1, [1990] 2 S.C.R. 151, 77 C.R. (3d) 145, [1990] 5 W.W.R. 1.

Questioning of a suspect who was not under arrest, although he has indicated that on the basis of legal advice he does not wish to make a statement, does not violate the right to silence as guaranteed by this section: *R. v. Hicks* (1990), 54 C.C.C. (3d) 575, 73 C.R. (3d) 204, [1990] 1 S.C.R. 120 (7:0), affg 42 C.C.C. (3d) 394, 64 C.R. (3d) 68, 8 M.V.R. (2d) 191 (Ont. C.A.).

The right to silence may be violated not only by the conduct of an undercover police officer, but by any agent of the state such as a prisoner acting as a police informer. In determining who is an agent of the state, the test to be applied is whether the exchange or contact between the accused and the informer would have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents. If the informer was an agent of the state, there will be a violation of this section if the agent elicited the information. Evidence has been elicited if there is a causal link between the conduct of the state agent and the making of the statement by the accused. This in turn requires consideration of two sets of factors, namely, factors relating to the nature of the exchange between the accused and the agent and factors concerning the nature of the relationship between the agent and the accused: *R. v. Broyles* (1991), 68 C.C.C. (3d) 308, [1992] 1 W.W.R. 289, 84 Alta. L.R. (2d) 1 (S.C.C.) (7:0).

Failure to advise an accused of his right to remain silent is not a violation of this section of the Charter: *R. v. Van Den Meerssche* (1989), 53 C.C.C. (3d) 449, 74 C.R. (3d) 161 (B.C.C.A.).

The accused has the right to remain silent at the investigation stage as well as at the trial. This right to silence would, however, be a snare and a delusion if it were open to the Crown to nevertheless put in evidence that the accused remained silent in the face of a question which suggested his guilt. Unless the Crown can establish a real relevance and a proper basis for their admission, neither the questions by investigating officers nor evidence as to the ensuing silence of the accused should be admitted at trial: *R. v. Chambers* (1990), 59 C.C.C. (3d) 321, [1990] 2 S.C.R. 1293, 80 C.R. (3d) 235.



An accused who testifies against a co-accused must accept that his credibility can be fully attacked by the latter. The accused who has incriminated a co-accused by his testimony cannot therefore rely on the right to silence to deprive the accused who is implicated by his testimony of the right to challenge that testimony by a full attack on the credibility of the former including reference to his pre-trial silence. He cannot, however, go further and ask the trier of fact to consider the evidence of the testifying accused's silence as positive evidence of guilt on which the Crown can rely to convict. The accused implicated by the evidence of the co-accused has the right to attack the credibility of the co-accused by reference to the testifying accused's failure to disclose the evidence to the investigating authorities. The jury must, however, be instructed that the evidence could be used as one factor in determining whether the evidence of the co-accused is to be believed: *R. v. Crawford*, [1995] 1 S.C.R. 858, 96 C.C.C. (3d) 481, 37 C.R. (4th) 197.

There is no principle of fundamental justice that requires a trial judge to direct a jury that they are not entitled to draw an adverse inference from the failure of the accused to testify at his trial. Section 4(6) of the Canada Evidence Act, in preventing comment by the trial judge on the failure of the accused to testify, does not infringe s. 7 of the Charter: *R. v. Boss* (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123, 30 O.A.C. 184.

An aspect of the common law confession rule requires that the accused have an operating mind. The operating mind test includes a limited mental component which requires that the accused has sufficient cognitive capacity to understand what he is saying and what is said. This includes the ability to understand a caution that the evidence can be used against the accused. The same standard applies with respect to the right of silence as guaranteed by this section in determining whether a mentally ill accused has the mental capacity to make an active choice: *R. v. Whittle*, [1994] 2 S.C.R. 914, 92 C.C.C. (3d) 11, 32 C.R. (4th) 1.

The general principle against self-incrimination, as applied in the regulatory context, did not require the accused to be granted immunity against Crown use of statutorily compelled reports. In this case, reports which were statutorily compelled pursuant to the Fisheries Act, R.S.C. 1985, c. F-14 were held to be admissible in relation to charges under the Fisheries Act. The two fundamental purposes behind the principle against self-incrimination are to protect against unreliable confessions and to protect against the abuse of power by the state. Neither of these two rationales was threatened in the circumstances of this case. Little expectation of privacy attached to the documents, since they were produced precisely to be read and relied upon by state officials. Furthermore, the documents were not "compelled" as when an individual decides to participate in a regulated industry, the obligation to submit reports was not an obligation imposed through the denial of free and informed consent: *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, 102 C.C.C. (3d) 144, 43 C.R. (4th) 343.

**Right to counsel** – While the Constitution has not expressly constitutionalized the right of an indigent accused to be provided with counsel, in cases not falling within the provincial legal aid plans, ss. 7 and 11(d) of the Charter require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. Where a trial judge is confronted with a case where legal aid has been refused to an indigent accused in circumstances where representation by counsel is essential, then the judge may stay proceedings until the necessary funding of counsel is available. An accused, however, who has the means to pay the costs of her defence but refuses to retain counsel may properly be considered to have chosen to defend herself and there would be no breach of the Charter if the trial proceeded without counsel being appointed: *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 63 C.R. (3d) 113, 35 C.R.R. 207 (Ont. C.A.).

The duty on a trial judge to ensure that an accused has a fair hearing will generally cast upon the judge an obligation to point out to the accused that he would be at a distinct disadvantage in proceeding without the assistance of competent counsel and that the accused is entitled to have such counsel. Where the accused expressly desires counsel, it



is clear that unless the accused has deliberately failed to retain counsel or has discharged counsel with the intent of delaying the process of the court, the trial judge should afford the accused an opportunity to retain counsel either at his expense or through the services of Legal Aid: *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334, 31 O.A.C. 10 (C.A.).

The placing of limits on the number of hours of preparation for which counsel retained through the provincial legal aid plan will be paid does not infringe the accused's right to counsel. There is no constitutional right to require provision of unlimited funding for defence of a case, even a murder case: *R. v. Munroe* (1990), 57 C.C.C. (3d) 421, 97 N.S.R. (2d) 361 (S.C.), affd 59 C.C.C. (3d) 446, 98 N.S.R. (2d) 174 (C.A.).

**Delay in taking proceedings** – The principles of fundamental justice are not limited to the right to a fair hearing in accordance with the principles of natural justice. Rather, there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community sense of fair play and decency, and to prevent the abuse of the court's process through oppressive or vexatious proceedings. It is a power, however, of special application which can only be exercised in the clearest of cases. Thus, specifically with respect to an allegation of delay in the institution of the proceedings, absent any finding that the delay was for the ulterior purpose of depriving an accused of the opportunity of making full answer and defence, delay in itself, even delay resulting in the impairment of the ability to make full answer and defence is not a basis for a stay of proceedings. The courts cannot undertake the supervision of the operation or the efficiency of the police department, and to compel the police or the Crown to institute proceedings before they have reason to believe they will be able to establish the accused's guilt beyond a reasonable doubt, could have a deleterious effect upon the rights of the accused and upon the ability of society to protect itself. However, a distinction is to be drawn between the situation in which the institution of the proceedings is valid and the only issue is delay prejudicial to the accused and that in which the executive acts in leading to the institution of the proceedings is offensive to the principles upon which the administration of justice is conducted by the courts: *R. v. Young* (1984), 13 C.C.C. (3d) 1, 46 O.R. (2d) 520 (C.A.).

Delay in charging and prosecuting an accused for sexual offences cannot in and of itself justify staying of proceedings as an abuse of process either at common law or under this section or s. 11(d). Fairness of a trial is not automatically undermined by even a lengthy pre-charge delay. The court cannot assess the fairness of a particular trial without considering the particular circumstances of the case: *R. v. L. (W.K.)* (1991), 64 C.C.C. (3d) 321, [1991] 4 W.W.R. 385, 6 C.R. (4th) 1 (S.C.C.).

While s. 11(b) does not apply to appellate delay, this section will provide a remedy when delay of appellate proceedings affects the fairness of the trial. The appellate court is the appropriate forum to determine whether there has been a violation: *R. v. Potvin*, [1993] 2 S.C.R. 880, 83 C.C.C. (3d) 97, 23 C.R. (4th) 10.

**Mens rea** – The imposition of absolute liability in penal law offends the principles of fundamental justice and therefore a law enacting an absolute liability offence will violate s. 7 if and to the extent that it has the potential of depriving of life, liberty or security of the person. Imprisonment, including probation, deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment and there is no need that imprisonment be made mandatory. A combination of imprisonment and of absolute liability violates s. 7 and can only be salvaged if the authorities demonstrate under s. 1 that such deprivation of liberty and breach of those principles of fundamental justice is a reasonable limit: *Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289.

Depending upon the provisions of the particular section and the context, the constitutional requirement of *mens rea* may be satisfied by a subjective or objective standard and

in appropriate circumstances negligence can be an acceptable basis for liability: *R. v. Hundal*, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169.

There is no principle of fundamental justice which requires an absolute symmetry between the elements of the *actus reus* and *mens rea*. Thus, there is no requirement that there be proof of *mens rea* in relation to the consequences element of the *actus reus*, such as death in a case of manslaughter: *R. v. Creighton*, [1993] 3 S.C.R. 3, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189 (S.C.C.).

The development of the doctrine of *mens rea* for criminal offences reflects the conviction that a person should not be punished unless that person knew that he was committing the prohibited act or would have known that he was committing the prohibited act if he had given to his conduct and to the circumstances that degree of attention which the law requires and which he was capable of giving. Thus, this section prohibits the existence of offences that are punishable by imprisonment and that do not allow the accused as a minimum a due diligence defence. Former s. 146(1) of the Criminal Code, by removing the defence of mistake of fact as to the age of the complainant on a charge of unlawful intercourse with a girl under the age of 14 years, infringed this section and was not a reasonable limit. The argument in favour of absolute liability is premised primarily on arguments of deterrence. Where, however, a criminal offence allows for a potential penalty of life imprisonment, as did former s. 146(1), it is not good enough to rely on intuition and speculation about the potential deterrent effect of an absolute liability offence. There must be concrete and persuasive evidence to support the argument: *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 6 W.W.R. 289 (S.C.C.) (5:2).

In *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399, the court was required to consider what degree of *mens rea* is required as a matter of fundamental justice for an offence such as murder. Lamer J., speaking for himself and Dickson C.J.C. and Wilson J., was of the view that there are certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalty, the principles of fundamental justice require a *mens rea* reflecting the particular nature of the crime.

In the subsequent case of *R. v. Martineau* (1990), 58 C.C.C. (3d) 353, [1990] 2 S.C.R. 633, 79 C.R. (3d) 129 (5:2), a majority of the court has now adopted the view that, in view of the stigma and punishment attaching to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of the crime which, for murder, cannot be anything less than subjective foresight of death. Thus, the constructive murder provisions in ss. 230 and 229(c) are unconstitutional, since they violated the principle that punishment must be proportionate to the moral blameworthiness of the offender.

It is not a principle of fundamental justice that the guilt for principal offenders and parties must always be the same. Within many offences, there are varying degrees of guilt and it remains the function of the sentencing process to adjust the punishment for each individual offender accordingly. There are, however, a few offences, such as murder and attempted murder, for which this section requires a minimum degree of *mens rea*. In the case of those offences, the constitutionally required minimum applies to both principles and parties: *R. v. Logan* (1990), 58 C.C.C. (3d) 391, 73 D.L.R. (4th) 40, [1990] 2 S.C.R. 711.

The possibility of conviction for the offence of assault causing bodily harm without any intent that bodily harm result from the assault does not contravene s. 7, notwithstanding that all that is required to be proved is a causal link between the act and the resulting bodily harm. The special stigma attached to the offence of murder and the mental element which essentially distinguishes murder from manslaughter do not apply to the offence of assault causing bodily harm: *R. v. Brooks* (1988), 41 C.C.C. (3d) 157, 64 C.R. (3d) 322, 24 B.C.L.R. (2d) 226 (C.A.).

Even where imprisonment is available as a penalty for breach of a regulatory statute, negligence is a sufficient level of fault to comport with constitutional standards, provided

that the defendant is able to defend the charge by proof of due diligence: *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799n (S.C.C.).

**Criminal procedure** – Absent impropriety, the court has no general jurisdiction at common law or under the Charter to halt a prosecution and review the merits of the exercise by the Attorney General of his authority to prefer an indictment under s. 577 of the Criminal Code. Further, the Attorney General is not required to afford an accused a hearing before he decides whether or not to exercise his jurisdiction under that section: *Re Balderstone and The Queen* (1983), 8 C.C.C. (3d) 532, 4 D.L.R. (4th) 162, [1983] 6 W.W.R. 438 (Man. C.A.); *R. v. Stolar* (1983), 4 C.C.C. (3d) 333, 32 C.R. (3d) 342, 20 Man. R. (2d) 132 (C.A.).

The constitutional standard which a criminal trial must satisfy under s. 7 is the standard encompassed by the concept of the principles of fundamental justice, and in particular the statutory right to a preliminary inquiry has not been elevated to a constitutional right. The preferring of a direct indictment may however, in combination with the failure of the Crown to make adequate disclosure, result in the accused being unable to make full answer and defence at his trial thereby contravening s. 7 and enabling the trial judge to fashion a remedy under s. 24(1): *Re R. and Arviv* (1985), 19 C.C.C. (3d) 395, 45 C.R. (3d) 354, 20 D.L.R. (4th) 422 (C.A.).

Section 7 gives the court broad powers to promote the proper administration of criminal justice by ordering disclosure and by discovery of material and objects for the purpose of independent testing. Section 7 is not limited to the notion of procedural fairness in court and encompasses the whole process, including discovery and disclosure: *R. v. Bourget* (1987), 35 C.C.C. (3d) 371, 56 C.R. (3d) 97, 41 D.L.R. (4th) 756 (Sask. C.A.).

**Double jeopardy** – Section 7 constitutionalizes a protection against double jeopardy wider than the specific protection in s. 11(h). Thus, notwithstanding the common law limitations on the ability to challenge the discretion of a trial judge to declare a mistrial, the propriety of such a decision would be subject to scrutiny under the Charter where a second trial, after the improper termination of the first trial, would contravene the principles of fundamental justice: *R. v. D.(T.C.)* (1987), 38 C.C.C. (3d) 434, 61 C.R. (3d) 168 (Ont. C.A.).

**Abuse of process** – A trial court has the power to stay proceedings to prevent the abuse of a court's process through oppressive or vexatious proceedings where compelling an accused to stand trial would violate those principles of fundamental justice which underlie the community sense of fair play and decency: *R. v. Jewitt* (1985), 21 C.C.C. (3d) 7, [1985] 2 S.C.R. 128, 20 D.L.R. (4th) 651.

**Investigative tests** – While the common law is not determinative in assessing whether particular practice violates the principles of fundamental justice, it is one of the major repositories of basic tenets of the Canadian legal system and thus of the principles of fundamental justice. It was the common law experience that custodial fingerprinting was not fundamentally unfair and legislation such as found in the Criminal Code and the Investigation of Criminals Act permitting compulsory fingerprinting does not violate s. 7. Further the legislation is not subject to attack because it gives a police officer a discretion whether or not to require the accused to attend for fingerprinting. Discretion in fact is an essential feature of a fair criminal justice system: *R. v. Beare* (1988), 45 C.C.C. (3d) 57, [1988] 2 S.C.R. 387, 55 D.L.R. (4th) 41.

**Evidentiary rules** – A trial court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aimed to safeguard does not exist: *R. v. Williams* (1985), 18 C.C.C. (3d) 356, 44 C.R. (3d) 351, 50 O.R. (2d) 321 (C.A.). Similarly *R. v. Rowbotham*, *supra*, and *semble R. v. Corbett* (1988), 41 C.C.C. (3d) 385, [1988] 1 S.C.R. 670, 64 C.R. (3d) 1.



It has never been a tenet of fundamental justice that a person has the right to confront any witness before the trier of fact. While it is a basic principle of fundamental justice that the accused has had a full opportunity to cross-examine the witness when previous testimony was taken, if the transcript of such testimony is to be introduced as evidence at a criminal trial for the purpose of convicting the accused, a provision such as s. 715 of the Criminal Code, which provides for the admission of evidence taken at the preliminary inquiry where the witness is not available, at trial does not offend s. 7. An accused would however have a constitutional right to have the evidence of prior testimony, obtained in the absence of full opportunity to cross-examine the witness, excluded: *R. v. Potvin* (1989), 47 C.C.C. (3d) 289, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193.

A law, which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion, runs afoul of our fundamental conceptions of justice and what constitutes a fair trial. The fundamental tenet of our system, that the innocent not be convicted, implies that, before a judge may exclude evidence which is relevant to a defence, the potential prejudice to the trial process must substantially outweigh the value of the evidence: *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 4 O.R. (3d) 383 (S.C.C.) (7:2).

**Jury availability and selection procedure** – The jury selection procedure prescribed by the Criminal Code, although giving the Crown 48 standasides and giving the accused only a limited number of peremptory challenges and requiring the accused to declare first whether or not he challenges a prospective jury, does not infringe, s. 7 or s. 11(d). While the process in and of itself appears to be unfair and could possibly lead to unfairness, the jury selection process is just one step in the trial and the course of the trial is governed and affected by a large number of rules. It is only an individual rule that is so unfair that it will result in an unfair trial which will be struck down: *R. v. Stoddart* (1987), 37 C.C.C. (3d) 351, 59 C.R. (3d) 134 (Ont. C.A.).

The decision of a trial judge to stay proceedings against an RCMP officer charged with an offence because of certain remarks made by the Premier in the National Assembly was premature. It was only at the stage when the jury was to be selected that it would be possible to determine whether the accused could be tried by an impartial jury. There is an initial presumption that a juror will perform his duties in accordance with his oath. In an extreme case such as this, pretrial publicity should lead to challenge for cause at the trial but it will not be assumed that a person subjected to such publicity will necessarily be biased: *R. v. Vermette* (1988), 41 C.C.C. (3d) 523, [1988] 1 S.C.R. 985, 64 C.R. (3d) 82.

There is no principle of fundamental justice that requires the right to a jury trial in all cases: *R. v. B.(S.)* (1989), 50 C.C.C. (3d) 34, 72 C.R. (3d) 117, [1989] 5 W.W.R. 621 (Sask. C.A.).

**Sentence proceedings** – The conduct of a trial in general including the applications of the rule of evidence in a given case must not result in the trial being unfair because the accused has been denied a full opportunity to prepare his case and to challenge and answer the Crown's case. If a rule of statutory or common law were framed in such a way that it would be *per se* a violation of the right to a fair trial, then the statute would be declared inoperative were the common law declared to be otherwise. However, the common law rule which permits a relaxation of the hearsay rule in sentence proceedings is not a violation of s. 7: *R. v. Albright* (1987), 37 C.C.C. (3d) 105, [1987] 2 S.C.R. 303, 60 C.R. (3d) 97.

It is a fundamental rule of law that an accused must be tried and punished under the law in force at the time the offence is committed. Thus it was held in *R. v. Gamble* (1988), 45 C.C.C. (3d) 204, [1988] 2 S.C.R. 595, 66 C.R. (3d) 193, that s. 7 was violated where the accused, prior to proclamation of the Charter, had been convicted and sentenced for first degree murder although the provision in force at the time of commission of her offence was either murder punishable by death or murder punishable by life

imprisonment. This represented a significant distinction since it was likely that the accused would only have been convicted of murder punishable by life imprisonment which would have required the judge to fix her parole eligibility date at a period between 10 and 20 years, whereas the conviction for first degree murder carried an automatic minimum period of parole ineligibility of 25 years.

It is not a violation of fundamental justice for Parliament to identify those offenders who in the interests of protecting the public ought to be sentenced according to considerations which are entirely reactive. Thus the imposition of a sentence of indeterminate detention as authorized by Part XXIV of the Criminal Code is in accordance with the fundamental purpose of the criminal laws generally and of sentencing in particular, namely, the protection of society. Further, the procedure by which a person is found to be a dangerous offender does not offend s. 7. The principles of fundamental justice do not require that the determination of whether or not the accused is a dangerous offender be made by a jury. Neither the standard proof required for successful application nor the fact that the provisions require the use of psychiatric evidence infringe s. 7. Finally, the failure of the Crown to give the accused notice prior to his election and plea that it was intending to bring an application under Part XXIV did not offend his rights under s. 7. It may be however that in certain circumstances a plea of guilty could be set aside because the court was satisfied the accused did not fully understand the nature of the charge or the potential consequences of a guilty plea: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, 61 C.R. (3d) 1, [1987] 2 S.C.R. 309.

While a sentencing scheme must exhibit a proportionality to the seriousness of the offence, it must also take into account other factors that are of significance to the societal interest in punishing wrongdoers. The provisions of the Criminal Code which provide for a minimum sentence of life imprisonment without eligibility for parole for certain types of murders, in particular murder while committing an offence such as kidnapping or sexual assault, clearly demonstrate a proportionality between the moral turpitude of the offender and the seriousness of the offence and are in accord with the objectives of a rational system of sentencing: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449, [1990] 6 W.W.R. 137, 76 Alta. L.R. (2d) 43 (S.C.C.) (7:0); *R. v. Arkel*, [1990] 2 S.C.R. 695, 59 C.C.C. (3d) 65, 79 C.R. (3d) 207 (7:0).

**Prison procedure** – The standard of procedure required to satisfy s. 7 is not necessarily the most sophisticated, elaborate or perfect procedure imaginable but only a procedure that is fundamentally just. What this may require will vary with the particular situation. An unbiased tribunal, knowledge by the person whose life, liberty and security is in jeopardy of the case to be answered, a fair opportunity to answer and a decision reached on the basis of the material in support of the case and the answer made to it are features of such a procedure. In this context any right a person may have to the assistance of counsel arises from the requirement to afford the person an opportunity to adequately present his case. There is however no absolute right in an inmate to be represented by counsel in a disciplinary court. Whether or not an inmate has such right will depend on the circumstances of the particular case, including its nature, its gravity, its complexity, and the capacity of the inmate to understand the case and present his defence: *Re Howard and Presiding Officer of Inmate Disciplinary Court of Stony Mountain Institution* (1985), 19 C.C.C. (3d) 195, [1984] 2 F.C. 642, 45 C.R. (3d) 242.

**Extradition and fugitive offender proceeding** – The admission of affidavit evidence and depositions at an extradition hearing of an accused fugitive as permitted by the Expropriation Act and Treaty does not offend s. 7, notwithstanding the fugitive is not given an opportunity to cross-examine on the affidavits or depositions. The importance of cross-examination varies with the nature of the proceedings and the purpose of an extradition hearing is not to determine guilt or innocence but is merely an inquiry to determine whether there is sufficient evidence to warrant sending the fugitive to the demanding state for trial. The trial and full determination of the fugitive's rights is to take place in



the courts of the demanding state and it is a basic assumption of extradition proceedings that the fugitive will receive a fair and just trial in the demanding state: *Re United States of America and Smith* (1984), 10 C.C.C. (3d) 540, 38 C.R. (3d) 228, 7 D.L.R. (4th) 12 (C.A.); *Re Decter and United States of America* (1983), 5 C.C.C. (3d) 364, 148 D.L.R. (3d) 496 (N.S.S.C.), affd 5 C.C.C. (3d) 381n, 148 D.L.R. (3d) 512n (N.S.C.A.).

While the surrender of a fugitive to a foreign country is subject to Charter scrutiny, notwithstanding that such surrender involves primarily the exercise of executive discretion, in some circumstances the manner in which the foreign state will deal with the fugitive may be such that will violate the principles of fundamental justice to surrender an accused. However, there is nothing unjust to surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from Canada's with different checks and balances. Thus it was held in *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193, [1987] 1 S.C.R. 500, 58 C.R. (3d) 1, that surrendering the fugitive for trial on state charges, notwithstanding her acquittal on similar federal charges, did not offend fundamental justice. While repeated attempts by the same prosecutorial authorities to prosecute a person for the same offence may in certain circumstances amount to harassment sufficiently oppressive that to surrender such a person would violate the principles of fundamental justice, the court should intervene only in compelling situations and this was not one of those cases.

Even a substantial delay between the time when the demanding state was informed of the presence of the accused in Canada and the request for extradition would not constitute a violation of fundamental justice. To arrive at the conclusion that the surrender of a fugitive would violate the principles of fundamental justice it would be necessary to establish that the fugitive would face a situation that is simply unacceptable. As well, while the courts undoubtedly have the right to review the decision of the executive by virtue of the court's responsibility to uphold the Constitution in extradition matters, this role must be exercised with caution bearing in mind that the discretion to surrender a fugitive to the demanding state is primarily that of the executive. Canada's external obligations are involved and the executive obviously has primary responsibility in this area: *Argentina (Republic) v. Mellino* (1987), 33 C.C.C. (3d) 334, [1987] 1 S.C.R. 536, 40 D.L.R. (4th) 74; *United States of America v. Allard and Charette* (1987), 33 C.C.C. (3d) 501, [1987] 1 S.C.R., 40 D.L.R. (4th) 102.

The test of whether the extradition action offends this section on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state shocks the Canadian conscience. Returning to the United States where they faced the death penalty, fugitives convicted of, or alleged to have committed, murders which were brutal and shocking does not meet this test. Accordingly, the Minister was not required to seek assurances from the requesting state that the death penalty would not be imposed as a condition for return of the fugitive: *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438 (S.C.C.) (4:3); *Reference re: Ng Extradition (Can.)* (1991), 67 C.C.C. (3d) 61, 84 D.L.R. (4th) 498 (S.C.C.) (4:3).

**Defences** – In *R. v. Morgentaler, Smoling and Scott* (1988), 37 C.C.C. (3d) 449, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1, the court was required to consider the therapeutic abortion provisions in s. 287 of the Criminal Code. Dickson C.J.C. and Lamer J. were of the view that state interference with bodily integrity and serious state-imposed psychological stress at the least in a criminal law context constitutes a breach of security of the person. They held that the breach of the principles of fundamental justice came about by the fact that the requirements of s. 287(4) permitting an abortion where it was approved by hospital committee while seemingly neutral on their face, resulted in abortions being absolutely unavailable in many areas and hospitals, and does not provide a clear legal standard to be applied by the therapeutic abortion committee in reaching its decision as to



when to grant a certificate. One of the basic tenets of a criminal justice system is that when Parliament creates a defence to a criminal charge the defence should not be illusory or so difficult to attain as to be practically illusory. While Parliament must be given room to design an appropriate administrative and procedural structure for bringing into operation a particular defence to criminal liability, if that structure is too manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice then the structure must be struck down. Beetz and Estey JJ. were of the view that the procedural requirements of s. 287, by significantly delaying a pregnant woman's access to medical treatment, result in additional dangers to her health and thereby deprive her of her rights to security of the person and do so in a manner which does not accord with the principles of fundamental justice. Finally Wilson J. held that the legislative scheme set up in s. 287 not only violates the pregnant woman's rights to security of the person but also the right to liberty as guaranteed by s. 7.

This section does not require that a defence such as drunkenness be available for all offences. Thus, it was open to Parliament in creating the offence of impaired driving to preclude drunkenness as a defence. The mental element of voluntary intoxication is a sufficiently guilty mind: *R. v. Penno* (1990), 59 C.C.C. (3d) 344, [1990] 2 S.C.R. 865, 80 C.R. (3d) 97.

The principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused, who is fit to stand trial, have the right to control his own defence. Any common law limit on this right which infringes the life, liberty or security of the person, must be the least intrusive rule which will attain the objectives which are of sufficient importance to override this section of the Charter: *R. v. Swain* (1991), 63 C.C.C. (3d) 481, 5 C.R. (4th) 253, 125 N.R. 1 (S.C.C.).

## SEARCH OR SEIZURE.

### 8. Everyone has the right to be secure against unreasonable search or seizure.

#### ANNOTATIONS

**Interpretation generally** – The purpose of this section is to act as a limitation on whatever powers of search and seizure the federal or provincial governments already and otherwise possess. It does not itself confer any power even of reasonable search and seizure on these governments. Accordingly, an assessment of the constitutionality of a search and seizure, or of a statute authorizing the search or seizure, must focus on its reasonable or unreasonable impact on the subject of the search or seizure, and not simply on its rationality in furtherance of a valid government objective. This section guarantees a broad and general right to be secure from unreasonable search and seizure beyond mere protection of property. Its protections go at least as far as protecting an individual's reasonable expectations of privacy. Thus an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. The purpose in this section of protecting individuals from unjustified state intrusions upon their privacy requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This can only be accomplished by a system of prior authorization, not one of subsequent validation. Accordingly, where it is feasible to obtain prior authorization such authorization is a pre-condition for a valid search and seizure. Accordingly, there is a presumption of unreasonableness where the search has taken place without a warrant which the party seeking to justify the warrantless search must rebut: *Hunter v. Southam Inc.* (1984), 14 C.C.C. (3d) 97, [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

Since the purpose of the requirement of prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be

assessed, so that the individual's right of privacy will be breached only where the appropriate standard has been met and the interests of the state are demonstrably superior, it is necessary for the person authorizing the search to be able to assess the evidence as to whether that standard has been met in an entirely neutral and impartial manner and, while this person need not be a judge, he must at a minimum be capable of acting judicially. Further, ordinarily where on the one hand the state interest is law enforcement rather than, for example, state security, and on the other hand the individual's interest is not one which threatens his bodily integrity, then the standard which must be met before a search should be authorized is the establishment upon oath of reasonable and probable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the search: *Hunter v. Southam Inc.*, *supra*.

The exercise of a judicial discretion in the decision to grant or withhold authorization for a search warrant is a fundamental aspect of the scheme of prior authorization which is an indispensable requirement for compliance with this section. The decision to grant or withhold a warrant requires a balancing of the interests of the individual and the state and a section of the Income Tax Act which removed that discretion by requiring the judge to issue the warrant if the statutory prerequisites were met was unconstitutional: *Baron v. Canada* (1993), 78 C.C.C. (3d) 510, 18 C.R. (4th) 374, 93 D.T.C. 5018 (S.C.C.).

A demand by a police officer that a motorist who he has stopped surrender his driver's licence and insurance card for inspection, as required by provincial legislation, does not offend s. 8 because such procedure is not a search, there being no intrusion on a reasonable expectation of privacy. There is no intrusion on a reasonable expectation of privacy where a person is required to produce his licence, or permit, or other documentary evidence of a status, or compliance with some legal requirement that is a lawful condition of the exercise of a right or privilege: *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398, [1988] 1 S.C.R. 621, 63 C.R. (3d) 14.

In considering the nature of the right to be secure against unreasonable search and seizure, the following principles apply: (1) a claim for relief under s. 24(2) of the Charter could only be made by the person whose Charter rights have been infringed; (2) like all Charter rights, s. 8 is a personal right which protects people and not places; (3) the right to challenge the legality of a search depends upon the accused establishing that his personal rights to privacy have been violated; (4) as a general rule, two distinct inquiries must be made in relation to this section: first, has the accused a reasonable expectation of privacy and secondly, if so, was the search by the police conducted reasonably; (5) a reasonable expectation of privacy is to be determined on the basis of the totality of circumstances; (6) the factors to be considered in assessing the totality of the circumstances may include presence at the time of the search, possession or control of the property or place searched, ownership of the property or place, historical use of the property or item, ability to regulate access to the place, existence of a subjective expectation of privacy, and objective reasonableness of the expectation; and (7) if an accused established a reasonable expectation of privacy, the inquiry must proceed to the second stage to determine whether the search was conducted in a reasonable manner. In this particular case, the accused did not have a reasonable expectation of privacy in his girlfriend's apartment: *R. v. Edwards* (1996), 104 C.C.C. (3d) 136, 26 O.R. (3d) 736n, 192 N.R. 81.

For constitutional protection to be extended to commercial records relating to the accused, the information seized must be of a personal and confidential nature. This section protects a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual. Records kept by the utilities commission of electricity consumption at the accused's residence would not fall within the category of protected information: *R. v. Plant*, [1993] 3 S.C.R. 281, 84 C.C.C. (3d) 203, 24 C.R. (4th) 47.

The power to make copies of documents, under provincial legislation, authorizes a seizure within the meaning of this section. The power is analogous to that of requiring documents to be produced which the court has previously characterised as a seizure. Other inspection powers, such as the power to examine the work environment and inspect documents are properly characterized as a search. The purpose of this section is to protect the individual's reasonable expectation of privacy from unjustified state intrusion. Despite its less invasive nature, inspection is unquestionably an intrusion. The powers of inspection were, however, reasonable even though the inspector need not have had a warrant nor need the inspection have been based upon reasonable and probable grounds. The Federal and Provincial legislatures have, in many statutes, included powers of inspection. Those statutes deal with various areas such as health, safety, the environment, taxation, and labour. Inspection, especially if it is done without notice, is a practical means of encouraging observance of statutory standards. The underlying purpose of inspection is to ensure that the regulatory statute is being complied with. The exercise of powers of inspection does not carry with it the stigma normally associated with criminal investigation. It may be that, in the course of inspection, violations of the statute will be uncovered, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true even when the enforcement is prompted by a complaint: *Comité paritaire de l'industrie de la chemise v. Potash; Comité paritaire de l'industrie de la chemise v. Sélection Milton*, [1994] 2 S.C.R. 406, 115 D.L.R. (4th) 702, 61 Q.A.C. 241, *sub nom. R. v. Potash, R. v. Sélection Milton*.

In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, and Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417, 76 C.R. (3d) 129, [1990] 1 S.C.R. 425 the court divided on whether or not compelled production of documents pursuant to s. 17 of the former Combines Investigation Act constituted a seizure within the meaning of s. 8 and if so, whether or not such seizure was unreasonable. La Forest and L'Heureux-Dubé JJ. held that, while compelled production of documents may constitute a seizure within the meaning of s. 8, the seizure contemplated by s. 17 of the Combines Investigation Act is reasonable and there is no requirement that the stringent standards of reasonableness articulated in *Hunter v. Southam Inc.*, *supra*, apply in light of the limited scope of the s. 17 power to order production of documents and the limited privacy interests with respect to these documents. Sopinka J., in his concurring judgment, held that an order under s. 17 requiring production of documents does not constitute a seizure within the meaning of s. 8 of the Charter. Lamer and Wilson JJ. dissenting were of the view that s. 17 did violate the right to be secure against unreasonable seizure as guaranteed by s. 8. They were of the view that the compulsory production of documents in a criminal or quasi-criminal law context falls within the definition of seizure and the seizure was unreasonable because it did not meet the test of reasonableness set out in *Hunter v. Southam Inc.*

In *R. v. McKinlay Transport Ltd.* (1990), 55 C.C.C. (3d) 530, 76 C.R. (3d) 283, [1990] 1 S.C.R. 627 all members of the court held that the provisions in the Income Tax Act (Canada) providing that the authorities may make a demand for information and the production of documents did not violate s. 8. Lamer and Wilson JJ. held that, while the demand constitutes a seizure, it is not an unreasonable one. The standard of review of what is "reasonable" in a given context must be flexible and a distinction drawn between seizures in the criminal or quasi-criminal context to which the criteria set out in *Hunter v. Southam Inc.*, *supra*, must apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review. It was evident that in the case of demands under the Income Tax Act the *Hunter* criteria were ill-suited to determine whether or not a seizure was unreasonable. La Forest and L'Heureux-Dubé JJ., for the reasons they gave in *Thomson*, *supra*, held that the demand under the Income Tax Act although it may be a seizure is not unreasonable. Sopinka J., for the reasons he gave in *Thomson*, held that the demand does not constitute a seizure within the meaning of s. 8.



While the accused bears the burden of persuading the court that her Charter rights or freedoms have been infringed or denied, once the accused has demonstrated that a search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable. A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable: *R. v. Collins* (1987), 33 C.C.C. (3d) 1, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193.

Where the Crown seeks to show that a warrantless search was reasonable because the officer making the search believed on reasonable grounds that the accused was in possession of narcotics, then evidence as to the officer's belief and the reasonable grounds for that belief are admissible even where those reasonable grounds are based on information received from third parties. The hearsay rule has no application in those circumstances, the evidence not being adduced for its truth but to establish the officer's belief and grounds for belief: *R. v. Collins, supra*.

A so-called "perimeter search", in which the police officer trespassed onto the accused's property and attempted to peer into the windows in an effort to confirm suspicions that the accused was cultivating marijuana in his residence, is a search within the meaning of this section. While in *Hunter v. Southam Inc., supra*, the court adopted the view that this section, like the Fourth Amendment to the United States Constitution "protects people, not places", this was not intended to inhibit the reasonableness of the expectation of privacy of the individual with respect to his activities on private property. The point was, rather, that the reasonableness of a citizen's expectation of privacy cannot be confined to those situations which involve the enjoyment of property. A warrantless perimeter search, done merely upon suspicion, is not authorized by the search provisions of the Narcotic Control Act and constitutes a violation of this section of the Charter: *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, [1991] 1 W.W.R. 193 (S.C.C.).

A "knock-on" investigation, in which the police attended at the suspect's door in the hope that, when the suspect opened the door, they would smell marijuana, is a search within the meaning of this section. The occupier of a residential dwelling is deemed to grant the public permission to approach the door and knock. However, the implied invitation to knock extends no further than is required to permit convenient communication with the occupant of the dwelling, and only those activities that are reasonably associated with this purpose are authorized by the implied license to knock. Individuals in the position of the accused have a reasonable expectation of privacy in the approach to their home that is waived for the purpose of facilitating communication with the public. Where members of the public, including police, exceed the terms of this waiver and approach the door for some unauthorized purpose, they exceed the implied invitation and approach the door as intruders: *R. v. Evans* (1996), 104 C.C.C. (3d) 23, 131 D.L.R. (4th) 654, 191 N.R. 327 (S.C.C.).

A warrantless entry into a dwelling-house, even in exigent circumstances to prevent the destruction of contraband, constitutes a violation of this section although the police merely entered to secure the premises and did not actually commence the search for the narcotics until an officer arrived with the search warrant: *R. v. Silveira*, [1995] 2 S.C.R. 297, 97 C.C.C. (3d) 450, 38 C.R. (4th) 330.

**Reasonable grounds for search** – The appropriate standard of proof which must be met in order to establish reasonable grounds for a search is one of reasonable probability rather than proof beyond a reasonable doubt or *prima facie* case. The police officer who must have the reasonable and probable grounds for believing for example that a suspect is in possession of a controlled drug, is the one who decides that the suspect should be searched. If another officer conducts the search, then he is entitled to assume that the officer who ordered the search had reasonable and probable grounds for doing so. In determining whether the standard of reasonableness has been met, the court must consider the totality of the circumstances. In weighing evidence relied on by the police to

justify a warrantless search, the court must consider whether the information predicting the commission of a criminal offence was compelling; where that information was based on an informer's tip, whether that source was credible; and whether the information was corroborated by a police investigation prior to making the decision to conduct the search. Weaknesses in one of these three areas may to some extent be compensated by strengths in the other two. Police are also entitled to take into account the accused's past record and reputation provided that the reputation is related to the ostensible reasons for the search. If the reputation of the suspect was based on hearsay rather than police familiarity with the suspect, its veracity cannot be assumed. It is not necessary for the police to confirm each detail in an informer's tip so long as the sequence of events actually observed conforms sufficiently to the anticipated pattern to remove the possibility of innocent coincidence. On the other hand, the level of verification required may be higher where the police rely on an informer whose credibility cannot be assessed or where fewer details are provided and the risk of innocent coincidence is greater: *R. v. Debot* (1989), 52 C.C.C. (3d) 193, 54 C.R. (3d) 120 (S.C.C.).

In considering the validity of a search warrant, facts obtained as a result of an unreasonable search must be excised. The court must then determine whether the warrant would have been issued without the improperly obtained facts: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 (9:0).

**Relationship between sections 8 and 10(b)** – Police proceeding to conduct a search are not always obliged to suspend the search and give a person the opportunity to retain and instruct counsel. When the police are conducting a body search, since it is impossible to search without detaining the individual, s. 10(b) applies. Therefore, immediately upon detention the detainee has the right to be informed of his right to retain and instruct counsel. However, the police are not obligated to suspend the search incident to arrest until the detainee has had the opportunity to retain counsel, except for example where the lawfulness of the search is dependent on the detainee's consent or where a statute gives a person a right to seek review of the decision to search. However, denial of a right to counsel will rarely be a factor when determining the reasonableness of a search within the meaning of s. 8. It is only in exceptional circumstances as where the lawfulness of the search is dependent upon the consent of the detainee or the statute gives a person a right to seek review of the decision to search that the denial of right to counsel will trigger a violation of s. 8 of the Charter. While the search, to be reasonable must be carried out in a reasonable manner, the manner in which the search is conducted relates to the physical way in which it is carried out and should not be inclusive of restrictions of other rights that already receive the benefit of protection from the Charter, such as right to counsel under s. 10(b): *R. v. Debot*, *supra*.

Once the police have the situation clearly under control in the course of execution of a search warrant then they are required to afford an occupant of the premises who has been arrested an opportunity to exercise his rights under s. 10(b) of the Charter: *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87.

**Seizure of blood samples** – The seizure of a blood sample from the accused without his consent and without lawful authority is an unreasonable seizure within the meaning of s. 8 although the sample was taken by a physician. The blood sample was not required for medical purposes and was taken at the direction of the police: *R. v. Pohoretsky* (1987), 33 C.C.C. (3d) 398, [1987] 1 S.C.R. 945, 39 D.L.R. (4th) 699.

Further, the taking of a blood sample by a police officer from a physician was unreasonable within the meaning of this section, where the sample was taken by the physician without the accused's consent and was turned over to the police without a warrant and not pursuant to any other law. Although the sample had originally been taken by the physician for medical purposes it was no longer required for those purposes. The fact was however that at the time the physician gave the vial of blood to the police he had in his possession the accused's blood subject to a duty to respect the accused's privacy and

this was sufficient to qualify the officer's receiving of a vial of blood without the consent of the accused as being a seizure within the meaning of this section. The Crown having adduced no evidence that the seizure was lawful and there being no urgency or any other reason justifying a warrantless seizure, the seizure was unreasonable: *R. v. Dyment* (1988), 45 C.C.C. (3d) 244, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348.

The obtaining of confidential information as to the results of a blood alcohol test from the accused's physician, without the accused's consent and without a search warrant, was analogous to a search or seizure and violated this section. The accused, who in fact had refused to consent to the taking of a blood sample by the hospital or the police (the sample was taken when he was unconscious), had a reasonable expectation that specific medical information would be kept confidential: *R. v. Dersch*, [1993] 3 S.C.R. 768, 85 C.C.C. (3d) 1, 25 C.R. (4th) 88 (9:0).

When a bodily fluid sample ends up being used by the police in a criminal prosecution, even when the sample was initially extracted for medical purposes in the absence of the police, the court must focus on the actions of the police in determining whether or not there has been a violation of this section. Thus, even where a sample was initially properly seized by a coroner pursuant to presumed valid provincial legislation, this does not preclude a finding that the police may also have seized the sample or that the subsequent appropriation of the evidence for use in a criminal prosecution may make the seizure unreasonable. The taking of a bodily fluid sample need not be directly from the person whose rights are affected, or even from the medical staff who extracted the sample, in order to constitute a seizure sufficient to invoke the protection of this section: *R. v. Colarusso*, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193, 26 C.R. (4th) 289. In this case, the court went on to hold that a seizure by the coroner would be reasonable and not caught by this section only so long as the evidence is being used by the coroner for valid non-criminal purposes. When the evidence, or the information derived from the evidence, is appropriated by the criminal law enforcement arm of the state for use against the person from whom it was seized, the seizure will become unreasonable and will run afoul of this section.

**Border searches** – The reasonableness of border searches must be treated differently from searches occurring in other circumstances. The degree of personal privacy reasonably expected at customs is lower than most situations. People do not expect to be able to cross international borders free from scrutiny. Routine questioning by customs officers, search of luggage, frisk or pat searches and the requirement to remove in private such articles of clothing as will permit investigation of suspicious bodily bulges as permitted by provisions of the Customs Act are not unreasonable. However, a search is not conducted in a reasonable manner where the accused was not informed of the right to counsel at the time that she was detained for a strip search. Had the accused been informed of the right to counsel she might have had the benefit of legal advice including explanation that the decision to search may be reviewed by a magistrate or chief officer of the court: *R. v. Simmons* (1988), 45 C.C.C. (3d) 296, [1988] 2 S.C.R. 495, 66 C.R. (3d) 297.

A conclusion that the police had reliable information that the accused was attempting to import narcotics must be based on more than the fact of a subsequent recovery of the drugs. There must be a proper inquiry into the source and reliability of the confidential information in order to determine whether, "in the totality of the circumstances", there existed reasonable and probable grounds to believe that the accused was carrying the narcotic or whether there was only a suspicion. A rectal examination of the accused, based on the mere suspicion that he was carrying drugs and as an incident to an arrest for outstanding traffic fines, was a serious violation of this section: *R. v. Greffe* (1990), 55 C.C.C. (3d) 161, 75 C.R. (3d) 257, [1990] 1 S.C.R. 755 (4:3).

**Waiver** – The standard for the waiver of a person's rights under s. 8 is the same as that accorded the statutory procedural guarantees as laid down in *Korponey v. Canada (Attorney General)* (1982), 65 C.C.C. (2d) 65, [1985] 1 S.C.R. 41, 26 C.R. (3d) 343. The onus



is on the Crown, relying upon such a waiver, to establish that the person had full knowledge of his right to be secure against an unreasonable search and that he had full knowledge of the effect the waiver would have on that right: *R. v. Nielsen* (1988), 43 C.C.C. (3d) 548, [1988] 6 W.W.R. 1, 66 Sask. R. 293 (C.A.).

**Consent search** – In order for a waiver of the right to be secure against unreasonable seizure to be effective, the person purporting to consent must be possessed of the requisite informational foundation for a true relinquishment of the right. A right to choose requires not only the volition to prefer one option over another, but also sufficient available information to make the preference meaningful. Thus, where the police relied upon the accused's consent to the taking of a blood sample for use in a sexual assault investigation, it was necessary that the consent form make clear the scope of the investigation, *i.e.* that the blood was sought in relation to two assaults, not just the one upon which the accused had been arrested: *R. v. Borden*, [1994] 3 S.C.R. 145, 92 C.C.C. (3d) 404, 33 C.R. (4th) 147. Also see *R. v. Wills* (1992), 70 C.C.C. (3d) 529, 12 C.R. (4th) 58, 7 O.R. (3d) 337 (C.A.).

The fact that guests are aware that cleaning staff will enter their rooms at least daily cannot remove the reasonable expectation of privacy that hotel guests have, at least with respect to objects which are not left in plain view nor stored in areas which do not require daily maintenance. Thus it was held that the consent given by hotel management to police officers to enter the accused's room and which led to the invasion of their privacy by agents of the state was not, in the circumstances, an acceptable substitute for the absence of prior judicial authorization. The warrantless and surreptitious search of a hotel room, upon mere suspicion of criminal activities, when the registered guests are absent and have left a 'Do Not Disturb' sign on the door, constitutes an impermissible intrusion by the state on a legitimate and reasonable expectation of privacy and therefore, constitutes a violation of this section. The police officers' mistaken belief that the management of the hotel had a sufficient possessory or other interest in the room to authorize police entry in the absence and without the consent of the guests, could not render the search valid: *R. v. Mercer*; *R. v. Kenny* (1992), 70 C.C.C. (3d) 180, 7 O.R. (3d) 9 (C.A.).

**Vehicle searches** – A warrantless search of a vehicle, which may move quickly, may be reasonable where there are reasonable grounds for believing that the vehicle contains contraband: *R. v. McComber* (1988), 44 C.C.C. (3d) 241, 66 C.R. (3d) 142, 9 M.V.R. (2d) 97 (Ont. C.A.).

There is no "automobile exception" permitting warrantless search of an automobile because such vehicles are readily moveable. The power to search a vehicle without warrant must be found either in statute or at common law, as, for example, a search incident to a valid arrest: *R. v. Klimchuk* (1991), 67 C.C.C. (3d) 385 (B.C.C.A.).

In *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481, [1992] 3 S.C.R. 615, 16 C.R. (4th) 273 it was held that the accused's rights under this section were violated when, after he was stopped at a police check stop, the accused was questioned by the officer about the contents of a bag in the car and as a result the accused produced the bag which was found to contain narcotics. When he questioned the accused, the officer did not have any suspicion that the accused was in possession of contraband. The check stop is justified as a means of detecting impaired drivers or dangerous vehicles but not as a means to conduct an unfounded general inquisition or an unreasonable search. In the circumstances, it could be assumed that the accused felt compelled to respond to the police questions and it was not shown that any search was as a result of an informed consent.

**Abandonment** – There is no reasonable expectation of privacy in relation to information that may be obtained from trash which has been abandoned by a householder to the municipal garbage disposal system and thus, the warrantless seizure of the garbage did not violate this section: *R. v. Krist* (1995), 100 C.C.C. (3d) 58, 42 C.R. (4th) 159, 103 W.A.C. 133 (B.C.C.A.).

**Warrantless search of office** – A warrantless search of a person's office requires justification in order to meet the constitutional standard of reasonableness secured by this section, and statutory provisions authorizing such reasonable searches are subject to challenge. Justification for a warrantless search may be found in the existence of circumstances which make it impracticable to obtain a warrant, but where no such circumstances exist and when the obtaining of a warrant would not impede effective law enforcement, the warrantless search of an office at a fixed location, except as an incident of a lawful arrest, cannot be justified and does not meet the constitutional standard of reasonableness proscribed by this section: *R. v. Rao*, *supra*.

Customers of securities-brokers have a reasonable expectation of privacy with respect to the documents in the hands of the broker. Thus, if a police officer attends at the office of a broker and enlists his cooperation without executing a search warrant then the accused, who had accounts with the broker who accommodated the police, have been subjected to a violation of their rights under s. 8 of the Charter: *R. v. Donaldson* (1990), 58 C.C.C. (3d) 294, 48 B.C.L.R. (2d) 273 (C.A.).

**Search incident to arrest** – Police officers have power to search an accused as an incident to a lawful arrest and to seize anything in his possession or immediate surroundings to guarantee the safety of the police and the accused, prevent the accused's escape or provide evidence against him. The existence of reasonable and probable grounds to believe that the accused is in possession of weapons or evidence is not a prerequisite to the existence of the power to search, provided however that the search is for a valid objective and not unrelated to the objectives of the proper administration of justice. Further, the search must not be conducted in an abusive fashion and the use of physical or psychological constraints should be proportionate to the objective sought and the other circumstances of the situation: *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, 53 C.C.C. (3d) 257, 74 C.R. (3d) 316.

A seizure from an accused may properly be made pursuant to the common law power to search as an incident of arrest even where the seizure is made many hours after initial arrest but at a time when the accused is still in detention: *R. v. Miller* (1987), 38 C.C.C. (3d) 252, 62 O.R. (2d) 97 (C.A.).

**Electronic surveillance** – As a general proposition surreptitious electronic surveillance of an individual by an agency of the state constitutes an unreasonable search or seizure under s. 8. There is no logical reason to distinguish third party electronic surveillance where neither of the participants consent, and surveillance where one of the parties consents. The rationale for regulating the power of the state to record communications that their originator expects will not be intercepted by anyone other than the person intended by the originator to receive them has nothing to do with protecting individuals from the threat that the person to whom they talk will divulge communications that are meant to be private. Rather, the regulation of electronic surveillance protects against the more insidious danger inherent in allowing the state in its unfettered discretion to record and transmit our words. It is unacceptable in a free society that agents of the state be free to use this technology at their sole discretion: *R. v. Duarte* (1990), 53 C.C.C. (3d) 1, 65 D.L.R. (4th) 240, [1990] 1 S.C.R. 30, 71 O.R. (2d) 575n.

This section did not apply, however, where the interception was made by Bell Canada on its own in an attempt to identify the person who was using its services to make obscene and harassing telephone calls to its subscribers. In those circumstances, Bell Canada was not an agent of the state: *R. v. Fegan* (1993), 80 C.C.C. (3d) 356, 21 C.R. (4th) 65, 13 O.R. (3d) 88 (C.A.).

The requirement in Part VI of the Criminal Code that before an authorization to intercept private communications may be granted, a judge must be satisfied that other investigative methods would fail or have little likelihood of success and that the granting of the authorization is in the best interests of the administration of justice, meets the high standards which this section imposes as a prerequisite to electronic surveillance. In par-

particular the requirement that the authorization could only be granted where it is in the best interests of the administration of justice imports as a minimum requirement that the issuing judge must be satisfied that there are reasonable and probable grounds to believe that an offence has been, or is being, committed and that the authorization sought will afford evidence of that offence: *R. v. Duarte, supra*.

Surreptitious video surveillance by agents of the state, where the target of the surveillance has a reasonable expectation of privacy, can constitute a search and seizure within the meaning of s. 8. The test to be applied, in determining whether the person had a reasonable expectation of privacy and was thus entitled to the protection of this section, is whether the person whose privacy was intruded upon could legitimately claim that, in the circumstances, it should not have been open to the agents of the state to act as they did without prior judicial authorization. In assessing the constitutionality of a search, the court is not to be influenced by the fact that the target was in fact carrying on illegal activities. Rather, the question is to be framed in broad and neutral terms. Thus, in the case of video surveillance of a hotel room, the issue was whether, in a society such as ours, persons who retire to a hotel room and close the door behind them have a reasonable expectation of privacy. An accused, carrying on illegal gambling in a hotel room to which persons, including strangers in his community who had been invited, nevertheless had a reasonable expectation of privacy and video surveillance of his activities violated s. 8: *R. v. Wong* (1990), 60 C.C.C. (3d) 460, 1 C.R. (4th) 1 (S.C.C.).

Both the installation in the accused's car and subsequent monitoring by the police of an electronic "beeper" which was capable of locating the car constitute searches for the purpose of this section: *R. v. Wise* (1992), 70 C.C.C. (3d) 193, 11 C.R. (4th) 253, [1992] 1 S.C.R. 527.

## DETENTION OR IMPRISONMENT.

### **9. Everyone has the right not to be arbitrarily detained or imprisoned.**

#### ANNOTATIONS

The random stopping of a motorist for the purpose of spot check procedures, to check the driver's licence and proof of insurance and to observe the motorist's condition or sobriety, results in a detention within the meaning of this section. There is no reason to give detention under this section a different meaning than as determined for the purpose of s. 10 in *R. v. Therens* (1985), 18 C.C.C. (3d) 481, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97 [noted under s. 10]. By the random stop for the purposes of the spot check procedure the officer assumes control over the movement of the motorist by a demand or direction that may have significant legal consequences. Further, detention resulting from a random stop for the purposes of a spot check procedure is arbitrary within the meaning of this section where the provincial legislation empowers the police officer to require the driver of any motor vehicle to stop, but on its face leaves the choice of the drivers to be stopped to the discretion of the officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise. However, the right not to be arbitrarily detained as guaranteed by s. 9 is subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society within the meaning of s. 1 and such a reasonable limit could be found in provincial motor vehicle legislation such as s. 189a(1) of the Highway Traffic Act, R.S.O. 1980, c. 198: *R. v. Hufsky* (1988), 40 C.C.C. (3d) 398, [1988] 1 S.C.R. 621, 63 C.R. (3d) 14.

Routine check/random stopping of a motorist, as authorized by provincial legislation, violates this section, the officer having assumed control over the movement of the motorist by a demand or direction, even where the detention involved only traffic offences rather than violations of the Criminal Code. These offences, however, carried maximum penalties including fine and/or imprisonment. The detention was arbitrary, since the decision as to whether the stop should be made lay in the absolute discretion of the police officers. Such violation can, however, be justified as a reasonable limit to meet the



pressing and substantial concern for safety on the highways. The stop must, however, be for legal reasons, to check the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped, the only questions which may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds: *R. v. Ladouceur* (1990), 56 C.C.C. (3d) 22, [1990] 1 S.C.R. 1257, 108 N.R. 171.

Stopping of a motorist, as authorized by provincial legislation on grounds which are reasonable and can be clearly expressed, is not random and thus not a violation of this section: *R. v. Wilson* (1990), 56 C.C.C. (3d) 142, [1990] 1 S.C.R. 1291, 108 N.R. 207.

In the absence of statutory authority to stop a vehicle, the stopping and detention of the occupants for the purpose of determining whether they were involved in criminal activity can only be justified if the detaining officer has some articulable cause for the detention. There must be a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is implicated in the activity under investigation. A "hunch" based entirely on intuition gained by experience cannot suffice: *R. v. Simpson* (1993), 79 C.C.C. (3d) 482, 20 C.R. (4th) 1, 43 M.V.R. (2d) 1 (Ont. C.A.).

A provision of the provincial Highway Traffic Act which authorizes a police officer in the lawful execution of his duty to require a motorist to stop his vehicle and produce his licence can be resorted to, even where the officer is not acting to enforce the Act, provided the officer is in the lawful execution of his duties. The provision is a reasonable limit on the rights guaranteed by this section: *R. v. Duncanson* (1991), 12 C.R. (4th) 86, 30 M.V.R. (2d) 17, 93 Sask. R. 193 (C.A.), affd on other grounds 12 C.R. (4th) 98, [1992] 1 S.C.R. 836, 97 Sask. R. 96n.

It is not every unlawful arrest that necessarily falls within the words "arbitrarily detained" within the meaning of s. 9. Whether or not the unlawful arrest will constitute an arbitrary detention depends on the particular facts of the case and the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of and the basis for the belief in the existence of reasonable and probable grounds on the part of the officer: *R. v. Duguay, Murphy and Sevigny* (1985), 18 C.C.C. (3d) 289, 18 D.L.R. (4th) 32, 45 C.R. (3d) 148 (C.A.), affd on other grounds 46 C.C.C. (3d) 1, [1989] 1 S.C.R. 93, 67 C.R. (3d) 252.

Assuming that the right to attack a sentence under s. 9 is not foreclosed by the fact that it is legislatively prescribed and that the statutory procedures have been judicially complied with, it could not be said that imprisonment resulting from the successful invocation of an application under the Criminal Code to have an accused declared a dangerous offender could be considered arbitrary. The legislation narrowly defines the class of offenders with respect to whom it may properly be invoked and prescribes quite specifically the conditions under which an offender may be designated as dangerous. The lack of uniformity in the treatment of dangerous offenders that arises by virtue of prosecutorial discretion to make an application to have an accused declared a dangerous offender does not constitute unconstitutional arbitrariness. In fact, the absence of discretion could render arbitrary the law's application: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1.

The provisions of the Criminal Code which provide for a minimum sentence of life imprisonment without eligibility for parole for certain types of murders, in particular murder while committing an offence such as kidnapping, do not demonstrate arbitrariness on the part of Parliament so as to violate this section. The sentence is statutorily authorized, applies to a narrowly defined class of offenders and prescribes, quite specifically, the conditions under which the offender is liable to be convicted of this offence: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449, [1990] 6 W.W.R. 137, 76 Alta. L.R. (2d) 43 (S.C.C.) (7:0).

An arrest which is lawfully made, having been made on the basis of reasonable and

probable grounds as authorized by s. 495 of the Criminal Code, does not become unlawful simply because the police intend to continue their investigation after the arrest. Moreover, in this case the accused's detention for some 18 hours before a formal charge was laid until a lineup could be held did not violate either the Criminal Code or s. 9. The delay was necessary to assemble the witnesses in order to hold the lineup and immediately after the accused was positively identified he was taken before a justice as required by the Criminal Code: *R. v. Storrey* (1990), 53 C.C.C. (3d) 316, [1990] 1 S.C.R. 241.

In *R. v. Storrey*, *supra*, the court also considered what constitutes reasonable and probable grounds so as to constitute a proper arrest without warrant. The requirement of reasonable grounds requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. These grounds must in addition be justifiable from an objective point of view. That is, a reasonable person placed in the position the officer, must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds and specifically are not required to establish a *prima facie* case for conviction before making the arrest.

## ARREST OR DETENTION.

### 10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

## ANNOTATIONS

**Meaning of detention** – In its use of the word detention this section is directed to a restraint of liberty other than arrest in which a person may reasonably require the assistance of counsel but may be prevented or impeded from retaining and instructing counsel without delay except for the constitutional guarantee. In addition to the case of deprivation of liberty by physical constraint there is a detention within the meaning of s. 10 when a peace officer or other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel. While there must be some form of compulsion or coercion to constitute an interference with liberty or freedom of action which amounts to a detention within the meaning of this section, there need not be physical compulsion. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes the choice to do otherwise does not exist: *R. v. Therens* (1985), 18 C.C.C. (3d) 481, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97.

A motorist required to comply with the demand that he provide samples for analysis in a roadside screening device as required pursuant to former s. 234.1 of the Criminal Code is detained within the meaning of s. 10. The necessary element of compulsion or coercion that constituted detention may arise from criminal liability for refusal to comply with a demand or direction, or from a reasonable belief that one does not have a choice as to whether or not to comply. Nevertheless, the motorist is not entitled to retain and instruct counsel and to be informed of that right since the provisions of s. 234.1 constitute a reasonable limit within the meaning of s. 1: *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411, [1988] 1 S.C.R. 640, 63 C.R. (3d) 1.

Similarly, a motorist directed to pull over to the side of the road by a police officer and required to undertake certain co-ordination tests to determine whether or not his ability to drive was impaired is detained within the meaning of s. 10. However, provincial legislation authorizing such stops will constitute a reasonable limit within the meaning of s. 1: *R. v. Saunders* (1988), 41 C.C.C. (3d) 532, 63 C.R. (3d) 37, 4 M.V.R. (2d) 199

(Ont. C.A.); *R. v. Bonin* (1989), 47 C.C.C. (3d) 30 (B.C.C.A.), leave to appeal to S.C.C. refused 50 C.C.C. (3d) vi, 102 N.R. 400n. Where however there is no such legislation there is no limit prescribed by law which would justify infringement of a motorist's rights under s. 10(b) where he is detained while performing sobriety tests: *R. v. Gallant* (1989), 48 C.C.C. (3d) 329, 70 C.R. (3d) 139, 95 A.R. 101 (C.A.).

A person attempting to enter Canada who is required to submit to a strip or skin search pursuant to the provisions of the Customs Act is detained within the meaning of this section. There are three distinct types of border search. The first is the routine questioning which every traveller undergoes at a port of entry accompanied in some cases by a search of baggage and perhaps a pat or frisk of outer clothing. A person subjected to this type of search could not be said to be detained. The second type of border search, a strip or skin search conducted in a private room after a secondary examination and with the permission of a customs officer in authority does result in detention. The third and most highly intrusive type of search is a body cavity search in which customs officers have recourse to medical doctors, x-rays and other highly invasive techniques. A person subjected to these latter two kinds of searches is clearly subject to external restraint and a customs officer having assumed control over the accused's movements by demands which have significant legal consequences has detained the accused: *R. v. Simmons* (1988), 45 C.C.C. (3d) 296, [1988] 2 S.C.R. 495, 66 C.R. (3d) 297.

Similarly an accused was detained within the meaning of s. 10 when he was ushered into an interview room by customs officers who suspected that he was carrying narcotics. The accused had been ordered into an interview room where he was questioned and then required to empty his pockets on the table, place his hands against the wall and spread his feet apart: *R. v. Jacoy* (1988), 45 C.C.C. (3d) 46, [1988] 2 S.C.R. 548, 66 C.R. (3d) 336.

In determining whether a person who subsequently is an accused was detained at the time he was questioned at a police station by the police, the following factors are relevant: (1) The precise language used by the police officer in requesting the person to come to the police station and whether the person was given a choice or expressed a preference that the interview be conducted in the police station rather than at his home; (2) Whether the accused was escorted to the police station by a police officer or came himself in response to a police request; (3) Whether the accused left at the conclusion of the interview or whether he was arrested; (4) The stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or was involved in its commission and the questioning was conducted for the purpose of obtaining an incriminating statement; (5) Whether the police had reasonable and probable grounds to believe the accused had committed the offence; (6) The nature of the questions, whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his guilt; (7) The subjective belief by an accused that he was detained, although relevant, is not decisive because the issue is whether he reasonably believed that he was detained. Personal circumstances relating to the accused such as low intelligence, emotional disturbance, youth and lack of sophistication are circumstances to be considered in determining whether he had a subjective belief that he was detained. This list is not intended to be exhaustive and the absence of any one factor is not determinative in a particular case: *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Voss* (1989), 50 C.C.C. (3d) 58, 71 C.R. (3d) 178, 33 O.A.C. 190 (C.A.).

The accused who, given the choice of whether to attend at the police station or be interviewed at home, agreed to go to the station for the interview and was not detained: *R. v. Hawkins*, [1993] 2 S.C.R. 157, 79 C.C.C. (3d) 576, 20 C.R. (4th) 55.

**Right to be informed of reason for detention [s. 10(a)]** – In considering whether or not there has been a breach of this paragraph, it is the substance of what the detainee can reasonably be supposed to have understood, rather than the formalism of the precise



words used, which must govern. The question is whether what the detainee was told, viewed reasonably in all the circumstances of the case, was sufficient to permit him to make a reasonable decision to decline to submit to arrest, or alternatively, to decide whether or not to exercise his right to consult counsel: *R. v. Evans*, [1991] 1 S.C.R. 869, 63 C.C.C. (3d) 289, 4 C.R. (4th) 144.

**Right to counsel** – Section 10(b) imposes at least two duties on the police in addition to the duty to inform detainees of their rights. The first is that the police must give the accused or detained person who so wishes a reasonable opportunity to exercise the right to retain and instruct counsel without delay. The police must also refrain from attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel: *R. v. Manninen* (1987), 34 C.C.C. (3d) 385, [1987] 1 S.C.R. 1233, 58 C.R. (3d) 97; *R. v. Ross* (1989), 46 C.C.C. (3d) 129, [1989] 1 S.C.R. 3, 67 C.R. (3d) 209.

The accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused is not diligent in this regard then the correlative duties imposed upon the police to refrain from questioning the accused are suspended: *R. v. Tremblay* (1987), 37 C.C.C. (3d) 565, [1987] 2 S.C.R. 435, 60 C.R. (3d) 59.

Section 10(b) must be considered in light of s. 10(a) requiring the police to advise an individual who is arrested or detained of the reasons for such arrest or detention. The individual can only exercise her s. 10(b) right in a meaningful way if she knows the extent of her jeopardy. Thus, where the accused is originally arrested for attempted murder, when she was later informed that the victim had died and that she was under arrest for first degree murder she should have been informed of her right to counsel and given a reasonable opportunity to again exercise her rights under s. 10(b): *R. v. Black* (1989), 50 C.C.C. (3d) 1, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97.

While the accused, in order to meaningfully exercise the right to counsel, must possess knowledge of the extent of his jeopardy, it is not necessary that the accused be given full information. Rather, what is required is that the accused understand generally the jeopardy in which he finds himself and appreciate the consequences of deciding for or against counsel. The trial judge must be satisfied that, in all the circumstances revealed by the evidence, the accused generally understood the sort of jeopardy he faced when he made the decision to dispense with counsel. The accused need not be aware of the precise charge faced, nor need the accused be made aware of all the factual details of the case. What is required is that he be possessed of sufficient information to allow making an informed and appropriate decision as to whether to speak to a lawyer or not. The emphasis must be on the reality of the total situation as it impacts on the understanding of the accused, rather than on the technical detail of what the accused may or may not have been told: *R. v. Smith* (1991), 63 C.C.C. (3d) 313, 4 C.R. (4th) 125, [1991] 1 S.C.R. 714.

In order to comply with s. 10(b), the police must restate the accused's right to counsel when there is a fundamental and discrete change in the purpose of the investigation, one involving a different and unrelated offence or a significantly more serious offence than that contemplated at the time of the original warning: *R. v. Evans, supra*.

As part of the information component of s. 10(b) detainees must be informed as a matter of routine of the existence and availability of the applicable systems of duty counsel and legal aid in the jurisdiction, in order to give the detainee a full understanding of the right to retain and instruct counsel. Imposing this additional duty is consistent with one of the main purposes underlying the s. 10(b) right which is to facilitate contact with counsel. It may well be that imposing this additional duty on the police will have an effect on what constitutes reasonable diligence in the exercise of the right to counsel. However, in light of the imposition of this additional duty on the police as part of the information component of s. 10(b) a transition period is appropriate. A period of 30 days from the date of release of the judgment [February 1, 1990] would be appropriate: *R. v.*

*Brydges* (1990), 53 C.C.C. (3d) 330, [1990] 1 S.C.R. 190, [1990] 2 W.W.R. 220, 103 N.R. 282.

The detainee is entitled under the information component of para. (b) to be advised of whatever system for free and immediate, preliminary legal advice exists in the jurisdiction at the time of detention and how such advice can be accessed: *R. v. Pozniak*, [1994] 3 S.C.R. 310, 92 C.C.C. (3d) 472, 33 C.R. (4th) 49. While situations may occasionally arise in which the police officer's duty to make a reasonable effort to inform the detainee of his rights will be satisfied even if certain elements of the standard caution are omitted. This will only be the case if the detainee explicitly waives his rights to receive the standard caution and if the circumstances reveal a reasonable basis for believing that the detainee in fact knows and has adverted to his rights, and is aware of the means by which these rights can be exercised. The fact that a detainee merely indicates that he knows his rights will not by itself provide a reasonable basis for believing that the detainee in fact understands their full extent or the means by which they can be implemented: *R. v. Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, 33 C.R. (4th) 1.

The duties imposed on the police to refrain from attempting to elicit evidence from the detainee are suspended when the detainee is not reasonably diligent in the exercise of his rights. This limit on the rights of the detainee is essential because it would otherwise be possible for the accused to delay needlessly and with impunity an investigation and even in certain cases to allow for an essential piece of evidence to be destroyed or rendered impossible to obtain. In this case the accused, after being taken back to the police station, refused to attempt to try to contact his lawyer believing that it would be useless to do so having regard to the time of day. It could not be said however that it would have been impossible for the accused to contact his lawyer when he was initially arrested or when he was at the police station and given an opportunity to do so. The case would be different if the accused had in fact tried to contact his lawyer but failed in the attempt. However, his decision to not even try to contact his lawyer was fatal and prevented him from establishing that he was reasonably diligent in the exercise of his rights. The burden of proving that it was impossible for him to communicate with his lawyer when the police offered him the opportunity to do so was on the accused. The fact that the accused subsequently during questioning reiterated his intention to speak to his lawyer before saying anything with respect to the charge did not change the legal situation. A detainee who has had a reasonable opportunity to communicate with his counsel but who was not diligent in the exercise of the right cannot in the absence of exceptional circumstances subsequently require the police to suspend one more time the investigation or the questioning: *R. v. Smith* (1989), 50 C.C.C. (3d) 308, [1989] 2 S.C.R. 368, 71 C.R. (3d) 129.

Paragraph (b) prohibits the police from belittling an accused's lawyer with the express goal or effect of undermining the accused's confidence in a relationship with defence counsel. The accused's rights were also violated when the police pressured the accused into accepting a "plea bargain" without the accused first having the opportunity to consult with his lawyer. This paragraph mandates the Crown or police, when offering a plea bargain, to tender that offer either to accused's counsel or to the accused while in the presence of counsel, unless the accused has expressly waived the right to counsel: *R. v. Burlingham*, [1995] 2 S.C.R. 206, 97 C.C.C. (3d) 385, 38 C.R. (4th) 265.

Paragraph (b) does not create a constitutional obligation on governments to ensure that free and immediate preliminary legal advice is available to all detainees: *R. v. Matheson*, [1994] 3 S.C.R. 328, 92 C.C.C. (3d) 434, 33 C.R. (4th) 136. Nevertheless, where a detainee has indicated a desire to exercise his right to counsel, the state is required to provide him with a reasonable opportunity to do so. During this period, state agents must refrain from eliciting incriminating evidence from the detainee until he has had a reasonable opportunity to reach counsel. The police are obliged to "hold off" from attempting to elicit criminatory evidence from the detainee until he has had a reasonable opportunity to reach counsel. What constitutes a reasonable opportunity will depend on all of the circumstances. Those circumstances will include the availability of duty coun-

sel services in the jurisdiction where the detention takes place. The non-existence of such services will also affect the determination of what, under the circumstances, is a reasonable opportunity to consult counsel. The absence of duty counsel in a jurisdiction extends the period in which a detainee will have been found to have been duly diligent in exercising his right to counsel. The reasonable opportunity might extend to when the local legal aid office opens, when a private lawyer willing to provide free summary advice can be reached, or when the detainee is brought before a justice of the peace for bail purposes. While during this time detainees would continue to be deprived of their freedom, any deprivation of liberty in the circumstances would be minimal and in accordance with the principles of fundamental justice under s. 7 of the Charter. Further, in circumstances where the detainee has asserted his right to counsel and has been reasonably diligent in exercising it, yet has been unable to reach a lawyer because duty counsel is unavailable at the time of detention, courts must ensure that the Charter-protected right to counsel is not too easily waived. Thus, an additional information obligation on police will be triggered once a detainee, who has previously asserted the right to counsel, indicates that he has changed his mind and no longer wants legal advice. At this point, the police will be required to tell the detainee of his right to a reasonable opportunity to contact the lawyer and of the obligation on the part of the police during this time not to take any statements or require the detainee to participate in any potentially incriminating process until he has had that reasonable opportunity. Once the detainee has asserted the right to counsel, there must be clear indication that he has changed his mind and the burden of establishing an unequivocal waiver will be on the Crown. The waiver must be free and voluntary and it must not be the product of direct or indirect compulsion: *R. v. Prosper*, [1994] 3 S.C.R. 236, 92 C.C.C. (3d) 353, 33 C.R. (4th) 85.

The detainee has the right to consult in private: *R. v. Dempsey* (1987), 77 N.S.R. (2d) 284, 46 M.V.R. 179 (C.A.); *R. v. McKane* (1987), 35 C.C.C. (3d) 481, 58 C.R. (3d) 130, 49 M.V.R. 1 (Ont. C.A.); *R. v. LePage* (1986), 32 C.C.C. (3d) 171, 54 C.R. (3d) 371, 44 M.V.R. 167 (N.S.C.A.); *R. v. Playford* (1987), 40 C.C.C. (3d) 142, 61 C.R. (3d) 101, 63 O.R. (2d) 289 (C.A.); *R. v. Standish* (1988), 41 C.C.C. (3d) 340, 24 B.C.L.R. (2d) 323, 5 M.V.R. (2d) 239 (C.A.); *R. v. Young* (1987), 38 C.C.C. (3d) 452, 81 N.B.R. (2d) 233, 6 M.V.R. (2d) 295 (C.A.). //

The duty on the police to inform the detainee of his right to counsel includes the duty to explain the right in a manner which the detainee can understand. In most cases, one can infer from the circumstances that the accused understands what he has been told and, in such cases, the police are required to go no further in explaining the right. Where, however, there is a positive indication that the accused does not understand his right to counsel, the police cannot rely on their mechanical recitation of the right to the accused; they must take steps to facilitate that understanding: *R. v. Evans*, *supra*.

Absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus is on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it: *R. v. Baig* (1987), 37 C.C.C. (3d) 181, [1987] 2 S.C.R. 537, 45 D.L.R. (4th) 106; *R. v. Anderson* (1984), 10 C.C.C. (3d) 417, 39 C.R. (3d) 193, 45 O.R. (2d) 225 (C.A.).

In its terms this section appears to focus on the rights of an accused to retain and instruct counsel at the time of the initial arrest and detention. It does not give an accused the right to be informed of his right to counsel and to be given an opportunity to instruct counsel whenever he has a critical encounter (either knowingly or unknowingly) with the police or other authorities. The words "upon arrest or detention" indicate a point in time not a continuum. They do not deal with a continuing right to be instructed before every occasion on which the police obtain a statement from the accused: *R. v. Logan* (1988), 46 C.C.C. (3d) 354, 67 O.R. (2d) 87 (C.A.), *affd* on other grounds (1990), 58 C.C.C. (3d) 391 (S.C.C.).

As a detainee can only exercise his s. 10(b) rights in a meaningful way if he knows the extent of his jeopardy, there must be a close factual connection or linkage relating the



warning to the detention and the reasons therefore. However, the fact that the accused is informed of his right to counsel before the actual detention is not determinative. Section 10(b) refers to a factual connection between the detention and the right to a warning rather than a mere coincidence in time. Where the accused was informed at the outset of an interview, prior to his detention, of his right to counsel and his right to remain silent and informed that the police were investigating a hit and run accident, s. 10(b) was complied with although the accused was only actually detained a short time later when given a breathalyzer demand. The situation that arose with the breathalyzer demand was directly connected to the investigation. The demand itself, together with the fact that the accused was advised of the criminal consequences of a refusal to comply, would normally trigger the consideration of the accused whether or not to instruct counsel. The demand arose directly and immediately out of the inquiries; it was part of a single incident in which the accused was made fully aware of his rights: *R. v. Schmautz* (1990), 53 C.C.C. (3d) 556, [1990] 1 S.C.R. 398.

In exercising the right to counsel or waiving the right, a mentally ill accused must possess the limited cognitive capacity required for fitness to stand trial. This requires that the accused be capable of communicating with counsel to instruct counsel, and understand the function of counsel and that he can dispense with counsel even if this is not in the accused's best interests. It is not necessary that the accused possess analytical ability, nor need the Crown, in order to prove a valid waiver, satisfy a separate awareness of consequences test: *R. v. Whittle*, [1994] 2 S.C.R. 914, 92 C.C.C. (3d) 11, 32 C.R. (4th) 1.

**Right to habeas corpus [s. 10(c)]** – While s. 10(c) guarantees the right to challenge the validity of an inmate's detention in proceedings by way of *habeas corpus*, it has not changed the procedure with respect to the writ of *habeas corpus* and thus the judge has jurisdiction to proceed in the absence of the inmate. However, if some arguable issue or *prima facie* case is suggested then the writ should issue commanding the jailer to bring the prisoner before the court and to prove the lawfulness of the detention: *R. v. Olson* (1987), 38 C.C.C. (3d) 534, 62 O.R. (2d) 321 (C.A.), *affd* 47 C.C.C. (3d) 491, [1989] 1 S.C.R. 296, 68 O.R. 256n.

## PROCEEDINGS IN CRIMINAL AND PENAL MATTERS

### 11. Any person charged with an offence has the right

- (a) to be informed without unreasonable delay of the specific offence;
- (b) to be tried within a reasonable time;
- (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- (e) not to be denied reasonable bail without just cause;
- (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
- (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
- (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

## ANNOTATIONS

**“Charged with an offence”** – This section is limited to criminal or quasi-criminal proceedings or proceedings giving rise to penal consequences. The matter will fall within this section either because, by its very nature, it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence. The first category of offences are those which involve a matter of public nature, intended to promote public order within a public sphere of activity. Those matters are to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity. Thus all prosecutions for criminal offences under the Criminal Code or for quasi-criminal offences under provincial legislation are automatically subject to this section. However, even a private, domestic or disciplinary matter can fall within this section if it involves the imposition of true penal consequences, namely, imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere: *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385, [1987] 2 S.C.R. 541, 60 C.R. (3d) 193.

**Section 11(a)** – The making of an *ex parte* injunction on the court’s own motion restraining picketing of courthouses in the course of a legal strike cannot be said to infringe s. 11(a) on the ground that no notice was given to the picketers and they were not afforded an opportunity to be heard. There can be no violation of this paragraph where no person is charged with a specific offence and there is therefore no one to notify of any offence: *B.C.G.E.U. v. British Columbia (Attorney General)* (1988), 44 C.C.C. (3d) 289, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1.

The right to be informed of the specific offence within the meaning of s. 11(a) means the right to be informed of the substantive offence and the acts or conduct which allegedly form the basis of the charge. It does not give an accused charged with a hybrid offence the right to be informed of how the Crown will exercise its discretion with respect to the manner of prosecution: *Re Warren and The Queen* (1983), 35 C.R. (3d) 173, 6 C.R.R. 82 (Ont. H.C.J.).

This paragraph enshrines the rights contained in s. 581(3) of the Criminal Code which establishes the minimum requirements of a valid count in an indictment. It was intended to protect the right of an accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and fair trial: *R. v. Lucas* (1983), 6 C.C.C. (3d) 147, 150 D.L.R. (3d) 118, 21 M.V.R. 293 (C.A.).

The purpose of this paragraph is to confirm the right of an accused to be informed of the substantive offence and the acts or conduct which allegedly formed the basis of that charge as is now required by s. 581 of the Criminal Code. It is not a right to be charged within a reasonable time of the Crown having knowledge of the offence: *R. v. Cancor Software Corp.* (1990), 58 C.C.C. (3d) 53, 79 C.R. (3d) 22, 74 O.R. (2d) 65, (C.A.).

**Unreasonable delay [s. 11(b)]** – A person is only charged with an offence within the meaning of s. 11 when an information is sworn against him alleging an offence or where a direct indictment is laid against him when no information is sworn. Accordingly, the reckoning of time in considering whether a person has been accorded a trial within a reasonable time within the meaning of s. 11(b) will commence with the information or indictment, where no information has been laid, and will continue until the completion of the trial. Pre-information delay is not a factor. This does not mean that delays which occur at the pre-charge stage are immune from scrutiny under the law. The Criminal Code itself in ss. 650(3) and 802(1) protects the right of the accused to make full answer and defence should he be prejudiced by pre-charge delay and other provisions of the Criminal Code provide for the prompt swearing of an information. As well the doctrine of abuse of process may be invoked in an appropriate case. In addition, given the broad



wording of s. 7 it is not necessary to distort the words of s. 11(b) in order to guard against a pre-charge delay: *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260.

Although the primary aim of s. 11(b) is the protection of the individual's rights and the provision of fundamental justice for the accused, none the less, there is a community or societal interest implicit in s. 11(b). The four factors to be considered in determining whether there has been an unreasonable delay are: (1) the length of the delay; (2) explanation for the delay; (3) waiver; and (4) prejudice to the accused. As regards the length of the delay, while this is not a threshold requirement, it is a factor to be balanced along with others. The longer the delay, the more difficult it should be for a court to excuse it and very lengthy delays may be such that they cannot be justified for any reason. In considering the explanation for the delay, the court will consider those delays attributable to the Crown, including systemic or institutional delays and those delays attributable to the accused. Delay attributable to the Crown will comprise all of the potential factors causing delay which flow from the nature of the case, the conduct of the Crown, including officers of the state, and the inherent time requirements of the case. The delay attributable to the actions of the Crown or its officers will weigh in favour of the accused. Systemic or institutional limitations will often be the most difficult to assess. The court must pay due deference to political decisions respecting the allocation of funds for courtrooms and Crown Attorneys which must be balanced against the duty on the state to provide other services such as health care and highways. The right guaranteed by s. 11(b), however, is of such fundamental importance to both the individual and the community that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials. In considering the question of how long a delay is too long, the court will compare the questioned jurisdiction to the standard maintained by the best comparable jurisdiction in the country. The comparison need not be too precise or exact. Rather, it should look to the appropriate ranges of delay to determine what is a reasonable limit. In all cases, it will be incumbent upon the Crown to show that the institutional delay in question is justifiable. In considering delay attributable to the accused, it must be borne in mind that the right to be tried within a reasonable time is an aspect of fundamental justice protected by s. 7 of the Charter and thus, any inquiry into the conduct of the accused should in no way absolve the Crown from its responsibility to bring the accused to trial. None the less there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. The inquiry into the actions of the accused will be restricted, however, to discovering those situations where the accused's acts either directly caused the delay or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. Delay caused by factors beyond the control of the accused or a situation where the accused did nothing to prevent a delay caused by the Crown must be distinguished. The burden of proving that the direct acts of the accused caused the delay must fall upon the Crown, except in those cases where the effects of the accused's actions are so clear and readily apparent that the intent of the accused to cause the delay is the inference that must be drawn from the record of his actions. As regards the factor of waiver, it is now well established that any waiver of a Charter right must be clear and unequivocal. The accused is not required to assert explicitly his right to trial within a reasonable time and his failure to assert the right does not give the Crown license to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused. Rather, there must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he had a guarantee under s. 11(b), understood its nature and waived the right provided by that guarantee. Silence or lack of objection cannot constitute a lawful waiver. On the other hand, it may well be that the setting of trial dates and the agreement to those dates by counsel for the accused may be sufficient to constitute waiver. As regards prejudice to the accused, it should be inferred that a very long and unreasonable delay has prejudiced the accused. It will, however, be open to the



Crown to attempt to demonstrate that the accused has not been prejudiced. In addition, it will be open to an accused who has suffered some additional form of prejudice to adduce evidence of prejudice on his own initiative, in order to strengthen his position in seeking a remedy under s. 24(1). With respect to transitional periods, whatever the length of the transitional period necessitated by the passage of the Charter, that transitional period has long since passed. That is not to say that consideration of the transitional period should always be precluded in the future. The consideration of a transitional period might well be required by change in conditions in a particular district: *R. v. Askov* (1990), 59 C.C.C. (3d) 449, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273.

In determining whether the right of the accused has been denied, no mere administrative formula can be applied but rather there must be a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. The first factor is the length of the delay and requires the court to examine the period from the charge to the end of the trial. Pre-charge delay may, in certain circumstances, have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself is not counted in determining the length of the delay. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the accused is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If the length of delay warrants an inquiry into the reasons for the delay, then the court will first consider whether the accused has waived, in whole or in part, her right to complain of the delay. However, any waiver must be clear and unequivocal, with full knowledge of the rights that the procedure was enacted to protect and of the affect that waiver will have on those rights. If the application by the accused is not resolved by reason of principles of waiver, the court will then have to consider other explanations for the delay. This includes consideration of the inherent time requirements which inevitably lead to delay. Thus, the more complex the trial, the more time will be needed to prepare for trial and for the trial to be conducted once it begins. As well, there are inherent requirements which are common to almost all cases. This includes activities such as retention of counsel, bail hearings, police and administrative paperwork, disclosure and similar activities. Another inherent delay that must be taken into account is whether the case proceeds through a preliminary inquiry. The actions of the accused must also be considered as must the actions of the Crown. Another factor is the limits on institutional resources. This period starts to run when the parties are ready for trial but the system cannot accommodate them. While account must be taken of the fact that the state does not have unlimited funds, the court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline, but is not a limitation period nor is it a fixed ceiling on delay. Rapidly changing conditions within a particular jurisdiction may place a sudden and temporary strain on resources and this must be taken into account in applying the guideline. The application of a guideline will also be influenced by the presence or absence of prejudice. It is appropriate for the court to suggest a period of institutional delay of between eight to ten months as a guide to provincial courts. As regards institutional delay after committal for trial, the range should be an additional six to eight months. There may, as well, be other reasons for delay as for example, actions by the trial judge. The final factor to be considered is prejudice to the accused. In any particular case, prejudice may be inferred simply from the length of the delay. The longer the delay, the more likely that such an inference will be drawn. On the other hand, in circumstances in which prejudice is not inferred and is not otherwise proved, the basis for an enforcement of the accused's right is seriously undermined. The purpose of s. 11(b) is to expedite trials and minimize prejudice and not to avoid trials on the merits. Action or non-action by the accused which is inconsistent with a desire for a timely trial is something that the court must consider. Apart,

however, from inferred prejudice, either party may rely on evidence to show prejudice or to dispel such a finding. Conduct of the accused falling short of waiver may be relied upon to negative prejudice: *R. v. Morin* (1992), 71 C.C.C. (3d) 1, 12 C.R. (4th) 1, [1992] 1 S.C.R. 771 (7:0).

A corporate accused charged with a provincial regulatory offence has the right to be tried within a reasonable time. However, in considering the factor of prejudice to the accused, there is no presumption of prejudice in the case of a corporate offender and a corporate accused must be able to establish that its fair trial interest has been irremediably prejudiced: *R. v. CIP Inc.* (1992), 71 C.C.C. (3d) 129, 12 C.R. (4th) 237, [1992] 1 S.C.R. 843.

The decision in *R. v. Askov*, *supra*, did not enact a judicially developed limitation period to be mechanically applied whenever there has been a period of systemic delay. In every case, the court is required to weigh the four factors of length of delay, explanation for the delay, waiver and prejudice to the accused: *R. v. Bennett* (1991), 64 C.C.C. (3d) 449, 3 O.R. (3d) 193, 6 C.R. (4th) 22, 46 O.A.C. 99 (C.A.).

A longer period of delay will be reasonable in a complex case which requires the commitment of substantial preparation time, court time and support services. In considering whether the state has allocated sufficient resources to the preparation of the case, some deference should be given to decisions made by the police in the investigation and it must be recognized that complex cases will often require longer than normal preparation time, greater expenditure of Crown and other resources and the longer use of courtrooms: *R. v. Atkinson* (1991), 68 C.C.C. (3d) 109, 5 O.R. (3d) 301, 50 O.A.C. 48 (C.A.).

Agreement by an accused to a future court date will in most circumstances give rise to an inference that the accused waives his right to subsequently allege that an unreasonable delay has occurred. However, in this case it was held that the actions of defence counsel on behalf of the accused rebutted any possible inference that he waived his s. 11(b) rights. When the case had to be adjourned at the request of the Crown in order to convenience the investigating officer defence counsel wrote to Crown counsel indicating his concern and making it clear that he was not waiving his s. 11(b) rights. The accused had demonstrated that he neither caused nor acquiesced in the postponement of the preliminary inquiry: *R. v. Smith* (1989), 52 C.C.C. (3d) 97, [1989] 2 S.C.R. 1120, 73 C.R. (3d) 1.

While there may be cases where an agreement to a date constitutes nothing more than an agreement to the inevitable, in the absence of any evidence that this is so, counsel's consent to a trial date can give rise to an inference of waiver: *R. v. Heikel* (1992), 72 C.C.C. (3d) 481, 125 A.R. 298 (C.A.).

In *R. v. Smith*, *supra*, it was also held that it was open to an accused to bring an application in the superior court alleging a violation of s. 11(b) several months prior to the date scheduled for the commencement of his preliminary inquiry. The accused's application was anticipatory in the sense that it was brought before the commencement of the preliminary inquiry. However, in the circumstances of the case and since the date for the preliminary inquiry was fixed and could not, at the behest of the accused, be moved up, the superior court judge properly considered the accused's application on the basis that the time had already elapsed. This was also an appropriate case for the superior court to exercise its jurisdiction, notwithstanding the preference for alleged violations of s. 11(b) being heard by the trial court. The preliminary inquiry was not scheduled to begin for several months and the provincial court judge would not have jurisdiction to consider an alleged infringement of s. 11(b) since he was not a court of competent jurisdiction.

Acquiescence by the accused to a delay that is requested by the judge in whose hands the fate of a motion for directed verdict lies must be assessed differently than acquiescence to those delays and proceedings that are made at the request of the Crown. In this case a substantial delay while the trial judge considered an application for a directed verdict was held to have resulted in an unreasonable delay within the meaning of s. 11(b) and in requiring a stay of proceedings. This was also an appropriate case for bringing an

application to the superior court as the trial court was implicated in the delay: *Rahey v. The Queen* (1987), 33 C.C.C. (3d) 289, [1987] 1 S.C.R. 588, 57 C.R. (3d) 289.

An evidentiary hearing to inquire into the Crown's explanation for delay is not justified by merely pointing out that the discretion of the Crown could have been exercised differently and that this could have entailed different consequences to one or more of the accused. To warrant a hearing, there must be some basis for suspecting the Crown's choice of conduct. The accused bears the burden of making a tenable allegation of bad faith on the part of the Crown, which allegation can be supported by the record before the court or by some offer of proof: *R. v. Durette* (1992), 72 C.C.C. (3d) 421, 54 O.A.C. 81 (C.A.).

While the right to trial within a reasonable time is an individual right, the court cannot ignore the practicalities of what is involved in the prosecution of a conspiracy case and thus an accused's right under this paragraph is not infringed simply because the arranging of a joint trial involving several accused may involve greater delay. To suggest severance as a simple solution ignores the real cost to the Crown and the public from separate trials: *R. v. Koruz*; *R. Schiewe* (1992), 72 C.C.C. (3d) 353, 125 A.R. 161 (C.A.).

While charges against young offenders should be proceeded with promptly, this is only one factor to be considered. Further, the time required for an application for transfer to adult court and appeals relating thereto is part of the inherent time requirements of a case under the Young Offenders Act. The application for transfer must, however, be made within a reasonable time and pursued meritoriously and in good faith: *R. v. D.* (S.), [1992] 2 S.C.R. 161, 72 C.C.C. (3d) 575n, 14 C.R. (4th) 223.

The failure to apply at trial for a stay of proceedings on the ground of a violation of the right to trial within a reasonable time as guaranteed by s. 11(b) will normally amount to a waiver depriving the accused of the right to raise the matter for the first time on appeal: *R. v. Rabba* (1991), 64 C.C.C. (3d) 445, 3 O.R. (3d) 238, 46 O.A.C. 120 (C.A.).

The right to trial within a reasonable time does not apply to appellate delay. This is the case whether the accused or the Crown is the appellant and whether the appeal by the Crown is from an acquittal or a stay of proceedings: *R. v. Potvin*, [1993] 2 S.C.R. 880, 83 C.C.C. (3d) 97, 23 C.R. (4th) 10.

**Non-compellability of accused [s. 11(c)]** – A corporation cannot be said to be a witness within the meaning of s. 11(c) and is therefore not entitled to claim its protection when an officer of the corporation is compelled to testify against it: *R. v. Amway Corp.*, [1989] 1 S.C.R. 21, 68 C.R. (3d) 97, [1989] 1 C.T.C. 255.

Neither s. 11(c) nor (d) requires that a trial judge specifically instruct jurors that no adverse inference can be drawn from the failure of the accused to testify: *R. v. Boss* (1988), 46 C.C.C. (3d) 523, 68 C.R. (3d) 123, 30 O.A.C. 184 (C.A.).

Comment by counsel for the co-accused that the accused did not testify does not violate s. 11(c): *R. v. Naglik* (1991), 65 C.C.C. (3d) 272, 3 O.R. (3d) 385, 46 O.A.C. 81 (C.A.).

A person sued for contempt of court in a civil action cannot be compelled to testify against himself: *Vidéotron Ltée v. Industries Microlect Produits Électriques Inc.* (1990), 56 C.C.C. (3d) 436, 69 D.L.R. (4th) 519, [1990] R.J.Q. 703 (C.A.).

Compelling a witness to testify against an accused does not violate para. (c), notwithstanding the witness is himself accused in a separate indictment of a related offence: *Re Crooks and the Queen* (1982), 2 C.C.C. (3d) 57, 143 D.L.R. (3d) 601, 39 O.R. (2d) 193 (H.C.J.), *affd loc. cit.* (C.A.).

However, in *R. v. Zurlo* (1990), 57 C.C.C. (3d) 407, 78 C.R. (3d) 167 (Que. C.A.) the court queried whether, in light of recent decisions of the Supreme Court of Canada, such as *Thomson Newspapers Ltd. v. Canada* (*Director of Investigation and Research, Restrictive Trade Practices Commission*) (1990), 54 C.C.C. (3d) 417, 67 D.L.R. (4th) 161, [1990] 1 S.C.R. 425, a witness could now be compelled to testify at the preliminary inquiry of an accused charged in a separate information with the same offence as the witness, in view of the guarantees in ss. 7, 11 and 13 against self incrimination.



**Presumption of innocence [s. 11(d)]** – At a minimum the right to be presumed innocent as guaranteed by s. 11(d) requires that the accused must be proven guilty beyond a reasonable doubt and that it is the state which must bear the burden of proof. The additional requirement in s. 11(d) that proof of guilt be “according to law in a fair and public hearing by an independent and impartial tribunal” requires that criminal prosecutions be carried out in accordance with lawful procedures and fairness. A statutory provision which requires an accused to disprove on a balance of probability the existence of a presumed fact, which is an important element of the offence in question violates s. 11(d): *R. v. Oakes* (1986), 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.

Any uncertainty as to whether reversal of the burden of proof of a defence, as opposed to an element of the offence, infringes the presumption of innocence appears to have been resolved as a result of two decisions in the Supreme Court of Canada: *R. v. Whyte* (1988), 42 C.C.C. (3d) 97, [1988] 2 S.C.R. 3, 64 C.R. (3d) 123 and *R. v. Keegstra* (1990), 61 C.C.C. (3d) 1, [1991] 2 W.W.R. 1, 77 Alta. L.R. (2d) 193 (S.C.C.). The combined effect of those two cases is that the distinction between elements of the offence and other aspects of the charge is irrelevant. The real concern is not whether the accused must disprove an element or prove an excuse, but that the accused may be convicted while a reasonable doubt exists. When that possibility exists then the presumption of innocence is infringed. Thus, in the latter case, it was held that s. 319(3)(a) of the Criminal Code, which requires the accused to prove as a defence to the charge of wilfully promoting hatred that the statements were true, infringes s. 11(d). The issue then must be whether the provision can be justified under s. 1. In *Keegstra*, the court held that the reverse onus was a reasonable limit. The objective behind the reverse onus was found to be closely connected with the purpose of the offence itself and if the defence were too easily used, the pressing and substantial objective of Parliament in preventing the harm from hate literature would suffer unduly. It was open to Parliament to use the reverse onus provision to strike a balance between the legitimate concerns of preventing the damage caused by hate literature and the importance of truth in freedom of expression values.

The presumption of innocence is infringed whenever the accused is liable to be convicted, despite the existence of a reasonable doubt and thus only if proof of the basic fact contained in a presumption leads inexorably to proof of the presumed fact will a statutory presumption not infringe this paragraph: *R. v. Downey* (1992), 72 C.C.C. (3d) 1, 13 C.R. (4th) 129, [1992] 2 S.C.R. 10.

There is no general requirement that, for a reverse onus provision to pass the rational connection part of the s. 1 analysis, that provision be internally rational in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption. However, the lack of rational connection is a factor to be considered in applying the third stage of the test in *R. v. Oakes*, *supra*, namely the proportionality requirement: *R. v. Laba*, [1994] 3 S.C.R. 965, 94 C.C.C. (3d) 385, 34 C.R. (4th) 360.

In a proper case, rather than strike down a reverse onus provision entirely, it was open to the court to read the section down so as to merely place an evidentiary burden on the accused: *R. v. Laba*, *supra*.

Shifting the burden to the defendant charged with a regulatory offence to prove on a balance of probabilities that he acted with due diligence is a reasonable limit on the guarantee to the presumption of innocence: *R. v. Wholesale Travel Group Inc.* (1991), 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161 (S.C.C.).

The presumption of innocence applies at all stages of the criminal process and is a factor to be considered in considering whether the accused should be released on bail pending trial: *R. v. Lamothe* (1990), 58 C.C.C. (3d) 530, 77 C.R. (3d) 236 (Que. C.A.).

**Right to fair hearing [s. 11(d)]** – The right to a fair hearing does not require that the accused have a full opportunity to cross-examine every witness before the trier of fact. An accused would have a constitutional right to have evidence of prior testimony otherwise admissible under s. 715 of the Criminal Code excluded when it is obtained in the absence of a full opportunity to cross-examine the witness at the prior proceeding. The

fact that the accused bears the burden of showing that he did not have an adequate opportunity to cross-examine does not infringe the presumption of innocence as guaranteed by s. 11(d): *R. v. Potvin* (1989), 47 C.C.C. (3d) 289, [1989] 1 S.C.R. 525, 68 C.R. (3d) 193.

In considering whether any particular rule of criminal procedure infringes the right to a fair hearing, that rule must be considered in the context of the entire process. Thus while the jury selection procedure prescribed by the Criminal Code may in and of itself appear to be unfair or could possibly lead to unfairness, the jury selection process is just one step in the trial and the course of the trial is governed and affected by a large number of rules. It is only an individual rule that is so unfair that it will result in an unfair trial that will be struck down: *R. v. Stoddart* (1987), 37 C.C.C. (3d) 351, 59 C.R. (3d) 134 (Ont. C.A.).

While the Charter does not in express terms guarantee the accused a right to counsel at trial, such right can be inferred from the provisions of s. 11(d) and s. 7. The duty on a trial judge to ensure that an accused has a fair hearing will generally cast upon the judge an obligation to point out to the accused that he would be at a distinct disadvantage of proceeding without the assistance of competent counsel and that the accused is entitled to have such counsel: *R. v. McKibbin* (1988), 45 C.C.C. (3d) 334, 31 O.A.C. 10 (C.A.).

In *R. v. Vermette* (1988), 41 C.C.C. (3d) 523, [1988] 1 S.C.R. 985, 64 C.R. (3d) 82, it was held that a decision by a superior court judge staying proceedings against an accused because of pre-trial publicity following statements by the premier in the National Assembly was premature. It was only at the stage when the jury is to be selected that it would be possible to determine whether the accused could be tried by an impartial jury. There is an initial presumption that a juror will perform his duties in accordance with his oath. In an extreme case pretrial publicity would lead to challenge for cause at the trial but it was not to be assumed that a person subjected to such publicity will necessarily be biased against the accused. Reckless remarks of politicians cannot frustrate the whole judicial process.

This paragraph does not require that a defence such as drunkenness be available for all offences. Thus, it was open to Parliament, in creating the offence of impaired driving, to preclude drunkenness as a defence. The accused's voluntary intoxication provides the guilty mind fundamental to the offence and unavailability of the drunkenness defence does not violate the right to make full answer and defence: *R. v. Penno* (1990), 59 C.C.C. (3d) 344, [1990] 2 S.C.R. 865, 80 C.R. (3d) 97.

**Trial by independent tribunal [s. 11(d)]** – Generally speaking, where the alleged contemptuous language or actions are insulting and insolent it is preferable that any contempt proceedings be taken before a judge other than the judge to whom the remarks were addressed: *R. v. Martin* (1985), 19 C.C.C. (3d) 248, 15 C.R.R. 231 (Ont. C.A.).

Judicial independence involves both individual and institutional relationships. The individual independence of a judge is reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he presides is reflected in its institutional or administrative relationship to the executive and legislative branches of government. The test for independence for the purposes of s. 11(d) is whether the tribunal may reasonably be perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. It is important that a tribunal should be perceived as independent and that the test for independence should include that perception. The perception must however be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees. The standard of judicial independence must necessarily be a standard that reflects what is common to, or at the heart of, various approaches to the essential conditions of judicial independence in Canada and need not be a standard of uniform provisions such as the standard embodied in the Constitution Act 1867 for superior court

judges: *Valente v. The Queen* (1985), 23 C.C.C. (3d) 193, [1985] 2 S.C.R. 673, 24 D.L.R. (4th) 161.

To meet the requirements of independence, a tribunal must meet three essential conditions, namely: security of tenure, financial security and institutional independence with respect to matters of administration that relate directly to the exercise of the tribunal's judicial function. With respect to this latter, it is unacceptable that an external force be in a position to interfere in matters which are directly and immediately relevant to the adjudicative function. The accused, in challenging the independence of the tribunal for the purposes of this section, need not prove an actual lack of independence. Rather, the test is whether an informed and reasonable person would perceive the tribunal as independent. The independence of a tribunal is to be determined on the basis of the objective status of that tribunal. This objective status is revealed by an examination of the legislative provisions governing the tribunal's constitutional proceedings, irrespective of the actual good faith of the adjudicator. Practice or tradition is not sufficient to support a finding of independence where the status of the tribunal itself does not support such a finding. While the Charter contemplates a separate system of military law, the system of General Court Martial in force at the time of the accused's trial infringed the principle of independence as guaranteed by this section and, in the absence of exceptional circumstances, could not be upheld as a reasonable limit. Recent amendments to the applicable legislation would, however, probably meet the requirements of this section: *R. v. Généreux* (1992), 70 C.C.C. (3d) 1 (S.C.C.).

Trial by standing court martial violates the guarantee in this paragraph, at least where the offence is alleged to have been committed in Canada and in the absence of an emergency: *R. v. Ingebrigtsen* (1990), 61 C.C.C. (3d) 541, 76 D.L.R. (4th) 481, 114 N.R. 381 (C.M.A.C.).

Judicial independence is not related solely to independence from government and includes independence from the parties to the litigation. Judicial independence is a safeguard for judicial impartiality. However, this provision does not prohibit the use of part-time judges who are also practicing lawyers where there are sufficient safeguards in place to ensure institutional impartiality. This provision guarantees that part-time judges will not engage in activities which are incompatible with their duties as a judge: *R. v. Lippé* (1991), 64 C.C.C. (3d) 513, [1991] 2 S.C.R. 114, 5 C.R.R. (2d) 31.

**Reasonable bail [s. 11(e)]** – There is just cause to deny bail if two factors are present. The denial of bail must occur only in a narrow set of circumstances, and the denial of bail must be necessary to promote the proper functioning of the bail system and must not be undertaken for any purpose extraneous to the bail system: *R. v. Morales* (1992), 77 C.C.C. (3d) 91 (S.C.C.); *R. v. Pearson* (1992), 77 C.C.C. (3d) 124 (S.C.C.).

It was held in *Re Global Communications Ltd. and Attorney General of Canada* (1984), 10 C.C.C. (3d) 97, 5 D.L.R. (4th) 634, 38 C.R. (3d) 209, 44 O.R. (2d) 609 (C.A.) that the provisions respecting bail pending trial under the Criminal Code should be applied to bail pending extradition. It could not be that under the Charter there are now two different standards by which reasonable bail, and thus what may constitute just cause for its denial, are to be judged.

**Right to trial by jury [s. 11(f)]** – The intent of s. 11(f) is to guarantee an accused benefit of a jury trial where a jury trial is in fact, from the accused's perspective, a benefit but not to impose it on the accused when it is not. Implicit in this interpretation is the accused's right to waive a jury trial. Moreover, the accused has the right to waive the right to a jury trial notwithstanding that there may be a substantial public interest in a jury trial. In the case of individual constitutional rights an accused cannot be compelled to take advantage of rights intended for his benefit even if such rights may have a public interest aspect. An accused is entitled to weigh the benefit of the s. 11(f) right if it is in his interest to do so. However, waiver of a constitutional right such as s. 11(f) would not create a corresponding right to a trial by judge alone where there is no statutory frame-



work for such trial. There is nothing in s. 11(f) to give the accused a constitutional right to elect their mode of trial or a constitutional right to be tried by judge alone so as to make s. 11(f) inconsistent with a provision of the Criminal Code mandating a jury trial: *R. v. Turpin* (1989), 48 C.C.C. (3d) 8, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97.

A provision of the Criminal Code taking away the accused's right to a jury trial where he has failed to appear for court violates s. 11(f). It could not be said that by failing to attend court the accused was thereby waiving his right to a jury trial. While the right to a jury trial is a right capable of being waived the standard necessary to achieve such waiver is high. The waiver must be clear and unequivocal and the accused must be fully aware of the consequences of such waiver. Simply failing to show up for one's trial does not amount to an intentional repudiation of the right to a jury trial. However, the Criminal Code provision was a reasonable limit within the meaning of s. 1 and therefore valid: *R. v. Lee* (1989), 52 C.C.C. (3d) 289, 73 C.R. (3d) 257, [1990] 1 W.W.R. 289 (S.C.C.).

In *R. v. Ruston* (1991), 63 C.C.C. (3d) 419 (Man. C.A.) it was held that, to avoid a conflict with this paragraph, s. 561(1) of the Criminal Code must be interpreted so as to give the accused the right to re-elect trial by judge and jury within 15 days of learning of a substantial change in the Crown's case, even though the provision, read literally, requires the consent of the Crown to any re-election which is beyond 15 days following the completion of the preliminary inquiry.

In *P.P.G. Industries (Canada) Ltd. v. Canada (Attorney General)* (1983), 3 C.C.C. (3d) 97, 146 D.L.R. (3d) 261, 42 B.C.L.R. 334 (C.A.) it was held that a provision of the former Combines Investigation Act removing the right of a corporation to a jury trial did not infringe s. 11(f). That decision appears to have been proved in *R. v. Amway Corp. supra*.

The requirement in the Criminal Code that an application to have an accused found to be a dangerous offender is to be tried by a judge alone does not infringe s. 11(f). The process by which an offender may be designated dangerous is simply part of the sentencing process and does not constitute the charging of an offence. The phrase "any person charged with an offence" in the opening words of s. 11 must be given a constant meaning that harmonizes with the various paragraphs of the section. It would be quite inappropriate to conclude that a convicted person is charged with an offence when confronted with a dangerous offender application: *R. v. Lyons* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1.

The "defence" of entrapment is an aspect of the abuse of process doctrine and is to be determined by the trial judge and not the jury. This procedure does not infringe s. 11(f) because the guilt or innocence of the accused is not in issue at the time the entrapment claim is to be decided. It is only if the jury finds that an accused committed the offence that the trial judge must then consider whether or not to enter a stay of proceedings on the basis of entrapment: *R. v. Mack* (1988), 44 C.C.C. (3d) 513, 67 C.R. (3d) 1, [1989] 1 W.W.R. 577 (S.C.C.).

The right to a jury trial as guaranteed by this paragraph is not the right as envisaged at common law or at the time of Confederation, namely a jury composed of 12 men. Thus, s. 644(2) of the Criminal Code, which permits the trial judge to discharge up to two jurors, does not violate this paragraph: *R. v. Genest* (1990), 61 C.C.C. (3d) 251, [1990] R.J.Q. 2387 (C.A.).

**Double jeopardy [section 11(h)]** – Section 11(h) is directed at preventing the state from making repeated attempts to convict an individual. It forbids the prosecution of an accused twice for the same offence. In order for it to be operative however there must be two proceedings or trials for the same offence. In *R. v. Shubley* (1990), 52 C.C.C. (3d) 481, 74 C.R. (3d) 1, 65 D.L.R. (4th) 193 (S.C.C.), it was held that there was no violation of s. 11(h) where the accused was charged with assault although he had previously been subject to prison disciplinary proceedings for the same act. The prison disciplinary proceedings to which the accused was subjected were neither by their very nature criminal proceedings or proceedings involving the imposition of true penal consequences and

therefore the accused had not been previously found guilty or punished for an offence within the meaning of s. 11(h).

An offence comes within the purview of s. 11(h) if either the proceedings are, by their very nature, criminal proceedings or if the punishment invoked involves the imposition of true penal consequences. However, even where the two proceedings involve an offence within the meaning of this section it still must be determined whether or not the accused is being tried and punished for the same offence. In this case the accused RCMP officer had been convicted of a major service offence under the Royal Canadian Mounted Police Act as a result of an alleged assault of a prisoner in his custody. The penalty for such an offence is imprisonment for up to one year and it therefore was an offence involving a true penal consequence thus attracting the application of s. 11. However, the accused was not being tried and punished for the same offence when he was charged with assault in the criminal courts. The offences were quite different. One was an internal disciplinary matter. The accused had been found guilty of a major service offence and therefore accounted to his profession. The other offence is the criminal offence of assault. The accused must now account to society at large for his conduct. He cannot complain as a member of a special group of individuals subject to private internal discipline, that he ought not to account to society for his wrongdoing. His conduct has a double aspect as a member of the RCMP and as a member of the public at large. The two offences were two different matters totally separate one from the other and were alternative one to the other. While there was only one act of assault there were two distinct delicts, causes or matters which would sustain separate convictions: *R. v. Wigglesworth* (1987), 37 C.C.C. (3d) 385, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235.

Similarly the accused, a former RCMP officer could not rely on s. 11(h) on the basis of acquittals in the United States of charges arising out of disclosure of confidential information gained when he was involved in a joint investigation with United States officials. The U.S. charges and the Canadian charges, also based on the disclosure, were different because they were based on duties of a different nature. The accused's conduct had a double aspect: first, wrongdoing as a Canadian official with a special duty to the Canadian public and second, wrongdoing as an American official temporarily subject to American law. The accused must now account for his conduct to the Canadian public: *R. v. Van Rassel* (1990), 53 C.C.C. (3d) 353 (S.C.C.).

Section 11(h) does not preclude the Crown's right to appeal against an acquittal in indictable matters on a question of law alone as provided in the Criminal Code. The word "finally" in this paragraph must be construed to mean after the appellate procedures have been completed: *R. v. Morgentaler, Smoling and Scott* (1988), 37 C.C.C. (3d) 449, [1988] 1 S.C.R. 30, 62 C.R. (3d) 1.

However, a provision of the Summary Convictions Act (Quebec) giving the Crown a right of appeal by way of trial *de novo* without the requirement of allegation of any error on the part of the trial judge does offend s. 11(h) and is of no force and effect. The appeal authorized by the Act does not depend on the party appealing having any ground of appeal, it being sufficient if he thinks himself aggrieved by the decision of the trial judge. The hearing takes the form of a trial, the prosecution being entitled to adduce evidence whether or not it was adduced at the first trial. While an accused has not been finally acquitted within the meaning of s. 11(h) until all appeals provided for by law have been exhausted, where the appeal is based on an error by the trial judge, since in such a case there is no real acquittal if the decision rendered was as a result of an error, an appeal by way of *de novo* is merely a new trial disguised as an appeal. This is precisely the type of abuse that s. 11(h) was sought to prevent. Further, the accused is entitled to rely on s. 11(h) although the original trial took place prior to proclamation of the Charter: *Corporation Professionnelle des Médecins du Québec v. Thibault* (1988), 42 C.C.C. (3d) 1, [1988] 1 S.C.R. 1033, 63 C.R. (3d) 273.

This section has no application to extradition proceedings. The right protected by s. 11(h) is the right of a person charged with an offence not to be tried for the offence

again if he has already been finally acquitted of the offence. An extradition, however, is not a trial, but simply a hearing similar to a preliminary hearing to determine whether there is sufficient evidence to an alleged extradition crime to warrant the government under its treaty obligations to surrender a fugitive to the demanding state for trial in that state. It may be however that some of the interests protected by s. 11 are protected under other Charter provisions such as s. 7: *Schmidt v. The Queen* (1987), 33 C.C.C. (3d) 193, [1987] 1 S.C.R. 500, 58 C.R. (3d) 1.

**Benefit of lesser punishment [s. 11(i)]**—The guarantee in this paragraph does not apply to a change in punishment after imposition of sentence but while appellate proceedings are pending: *R. v. Luke* (1994), 87 C.C.C. (3d) 121, 28 C.R. (4th) 93, 17 O.R. (3d) 51 (C.A.), leave to appeal to S.C.C. refused 92 C.C.C. (3d) vi, 23 C.R.R. (2d) 384n. However, under s. 44(e) of the Interpretation Act, R.S.C. 1985, c. I-21, an accused is entitled to the benefit of lesser penalty or punishment as a result of amendments which are proclaimed in force following sentence but before the appeal has been decided by the court of appeal: *R. v. Dunn*, [1995] 1 S.C.R. 226, 95 C.C.C. (3d) 289, 35 C.R. (4th) 247.

## TREATMENT OR PUNISHMENT.

### **12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.**

#### ANNOTATIONS

The criterion which must be applied in order to determine whether a punishment is cruel and unusual is whether the punishment prescribed is so excessive as to outrage standards of decency. The effect of the punishment must not be grossly disproportionate to what would be appropriate. The section is aimed at punishments that are more than merely excessive and are grossly disproportionate. The determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed are all guidelines which without being determinative in themselves help to assess whether the punishment is grossly disproportionate: *Smith v. The Queen* (1987), 34 C.C.C. (3d) 97, [1987] 1 S.C.R. 1045, 58 C.R. (3d) 193.

The imposition of indeterminate detention in a penitentiary following a finding under the Criminal Code that the accused is a dangerous offender does not violate this section. This section is concerned with the relation between the effects of and reasons for punishment. The effects of the punishment are to be balanced against the particular circumstances of the offence, the characteristics of the offender and the particular purposes sought to be accomplished in sentencing that person in the manner challenged. If in light of those considerations the punishment is found to be grossly disproportionate, a remedy must be afforded to the accused in the absence of justification under s. 1. However, the dangerous offender provisions apply only to persons convicted of serious personal injury offences, and before the accused can be found to be a dangerous offender it must be established to the satisfaction of the court that the offence for which the accused has been convicted is not an isolated occurrence but part of a pattern of behaviour which has involved violence, aggressive or brutal conduct or failure to control sexual impulses. As well, it must be established that the pattern is very likely to continue. Even then the court has a discretion not to designate the offender as dangerous or to impose an indeterminate sentence. The legislation therefore meets the highest standard of rationality and proportionality that society could reasonably expect of Parliament. Finally, while if the sentence imposed was indeterminate *simpliciter* it could result in sentences grossly disproportionate to what individual offenders deserved, the availability of parole saves the legislation from being successfully challenged under s. 12 as it ensures that incarceration is imposed for only as long as the circumstances of the individual case require: *Lyons v. The Queen* (1987), 37 C.C.C. (3d) 1, [1987] 2 S.C.R. 309, 61 C.R. (3d) 1.

However, an indeterminate sentence, which may have been appropriate when it was



imposed, may lead to a violation of this section. It is only by a careful consideration and application of the criteria set out in s. 16(1)(a) of the Parole Act that the indeterminate sentence can be made to fit the circumstances of the individual offender and not violate his rights under this section. If it is clear on the face of the record that the Parole Board has misapplied or disregarded those criteria over a period of years with the result that an offender remains incarcerated far beyond the time that he should have been properly paroled, resulting in a length of incarceration which is grossly disproportionate to the circumstances of the offence, then the board's decision may violate s. 12: *Steele v. Mountain Institution* (1990), 60 C.C.C. (3d) 1, 80 C.R. (3d) 257, [1990] 6 W.W.R. 673 (S.C.C.).

Confinement of an inmate in administrative or protective segregation at a federal penitentiary is not *per se* cruel and unusual treatment. On the other hand it may become so if it is so excessive as to outrage standards of decency: *Olson v. The Queen* (1987), 38 C.C.C. (3d) 534, 62 O.R. (2d) 321, 32 O.A.C. 287 (C.A.), *aff'd* 47 C.C.C. (3d) 491, [1989] 1 S.C.R. 296, 68 O.R. (2d) 256n.

The provisions of the Criminal Code which provide for a minimum sentence of life imprisonment without eligibility for parole for certain types of murders, in particular murder while committing an offence such as kidnapping, do not violate this section. The punishment is not excessive and clearly does not outrage our standards of decency. It is within the purview of Parliament, in order to meet the objectives of a rational system of sentencing, to treat the most serious crime with an appropriate degree of certainty and severity. Moreover, even in such a case, Parliament has been sensitive to the particular circumstances of each offender by providing various mechanisms for earlier parole: *R. v. Luxton* (1990), 58 C.C.C. (3d) 449 (S.C.C.) (7:0).

There are two aspects to the analysis of alleged invalidity of a statutory minimum penalty. The first aspect involves the assessment of the challenged penalty from the perspective of the person actually subjected to it, balancing the gravity of the offence itself with the particular circumstances of the offence and the personal characteristics of the offender. If it is found that the challenged provision provides for or would actually impose on the offender, a sanction so excessive or grossly disproportionate as to outrage decency in those real and particular circumstances, then it will amount to a *prima facie* violation of this section and must be justified under s. 1. Even if the particular facts do not warrant a finding of gross disproportionality then the court must also consider reasonable hypothetical circumstances to determine whether the provision will authorize the imposition of cruel or unusual punishment: *R. v. Goltz* (1991), 67 C.C.C. (3d) 481, 8 C.R. (4th) 82, 61 B.C.L.R. (2d) 145 (S.C.C.).

This section was of no application to the decision of the Minister to extradite a fugitive to the United States where the fugitive faced the death penalty. The decision to surrender a fugitive does not constitute the imposition of cruel and unusual punishment by a Canadian government. The fugitive may, however, be entitled to rely upon s. 7: *Kindler v. Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1, 84 D.L.R. (4th) 438, 8 C.R. (4th) 1, 6 C.R.R. (2d) 193 (S.C.C.).

## SELF-CRIMINATION.

**13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.**

## ANNOTATIONS

A retrial of the same offence or one included therein ordered by a Court of Appeal is an "other proceeding" within the meaning of this section. The purpose of this section when viewed in the context of s. 11(c) and (d) is to protect the individuals from being indirectly compelled to incriminate themselves, to ensure that the Crown will not be able to do indirectly what s. 11(c) prohibits. Further, the right guaranteed by this section inures

to an individual at the moment an attempt is made to utilize previous testimony to incriminate him. Therefore, the time at which the previous testimony was given is irrelevant for the purpose of determining who may claim benefit of this section and thus the section would apply notwithstanding that previous testimony had been given prior to proclamation of the Charter. This section unlike s. 5(2) of the Canada Evidence Act does not require any objection on the part of the person giving the testimony, nor does it refer to any compulsion to answer and accordingly would apply to a voluntary witness such as an accused at his own trial. The testimony in question need not have been incriminating at the first proceedings. Rather, the use which the Crown seeks to make of the evidence can only be ascertained at the time of the second proceeding and any evidence the Crown tenders as part of its case against the accused is, for the purpose of s. 13, incriminating. Thus an attempt by the Crown to introduce as part of its case in chief the accused's testimony at the first trial would constitute an incriminating use within the meaning of this section: *Dubois v. The Queen* (1985), 22 C.C.C. (3d) 513, [1985] 2 S.C.R. 350, 48 C.R. (3d) 193.

The accused's rights as guaranteed by this section were also infringed where she was cross-examined by Crown counsel on testimony that he had given on his prior trial for the same offence after a new trial ordered by the Court of Appeal. The purpose of the cross-examination was to demonstrate a consciousness of guilt on the part of the accused and was clearly used to incriminate him. The evidence was relied upon by the Crown to establish his guilt: *R. v. Mannion* (1986), 28 C.C.C. (3d) 544, [1986] 2 S.C.R. 272, 53 C.R. (3d) 193.

This section does not prevent cross-examination of an accused on testimony given in another proceeding, where the purpose of the cross-examination is to impeach the accused's credibility and not to incriminate him. In such a case, however, the previous statement may not be used to establish the truth of its contents and the trial judge must so instruct the jury: *R. v. Kuldip* (1990), 61 C.C.C. (3d) 385, [1990] 3 S.C.R. 618, 1 C.R. (4th) 285 (4:3).

This section is violated by testimony of a police officer that he was able to identify the accused as a result of hearing him testify in another proceeding: *R. v. Skinner* (1988), 42 C.C.C. (3d) 575 (Ont. C.A.).

A *voir dire* is another proceeding and thus the accused's testimony on the *voir dire* is protected from use by the Crown during the trial proper: *R. v. Tarafa* (1989), 53 C.C.C. (3d) 472, [1990] R.J.Q. 427 (S.C.).

This section does not apply so as to prevent the use, at disciplinary proceedings taken against a nurse, of her testimony at her own criminal trial on a charge of theft: *Knutson v. Sask. Registered Nurses' Assn.*, [1991] 2 W.W.R. 327, 75 D.L.R. (4th) 723 (Sask. C.A.).

This section does not fully define the scope of evidentiary immunity provided to a witness compelled to testify in criminal proceedings against a separately charged co-accused. Section 7 of the Charter provides additional protection to the witness. Thus, derivative evidence which could not have been obtained, or the significance of which could not have been appreciated, but for the testimony of the witness ought generally to be excluded under s. 7 of the Charter at the witness' subsequent trial since its admission would tend to affect the fairness of the trial: *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, 96 C.C.C. (3d) 1, 36 C.R. (4th) 1.

## INTERPRETER.

**14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.**

## ANNOTATIONS

As a general rule, courts should appoint an interpreter when it becomes apparent to the judge that an accused is, for language reasons, having difficulty expressing himself or

understanding the proceedings and that the assistance of an interpreter would be helpful; or the accused or counsel for the accused requests the services of an interpreter and the judge is of the opinion that the request is justified. There is, however, no requirement that the courts inform all accused appearing before them of the existence of the right to interpreter assistance. Where the accused at trial claims the Charter right to an interpreter, assistance should not be denied unless there is cogent and compelling evidence that the accused's request is not made in good faith but rather for an oblique motive. The quality of interpretation must be high under this section but the standard is not one of perfection. The interpretation of the proceedings should be continuous and precise. Summaries of the testimony are unlikely to meet the general standard of interpretation required. The interpretation must be objective and unbiased, although this standard may have to be relaxed where the urgency of the situation may require the use of a person as interpreter who is closely connected to the events. The interpretation must be of a high enough quality to ensure that justice is done and seen to be done. This means that, at minimum, the accused has a right to competent interpretation. An interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings. The interpretation must take place contemporaneously with the proceeding in question. In court proceedings, this will usually mean that the interpretation be consecutive (after the words are spoken) rather than simultaneous (at the same time as the words are spoken): *R. v. Tran*, [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34.

It is not every deficiency from the protected standard of interpretation which will constitute a violation of this section. The accused must establish that the lapse in interpretation which occurred was in respect of the proceedings themselves, thereby involving the vital interests of the accused, and was not merely in respect of some collateral or extrinsic matter, such as an administrative issue relating to scheduling. In determining whether the alleged deviation in interpretation was part of an occurrence which actually served in some way to advance the case and thus involved the accused's vital interests, the court will consider whether there was an unfolding or development in the proceeding with respect to a point of evidence and/or law. The Court is not looking to the effect of the occurrence in question. Since the right to interpreter assistance is not only a fundamental constitutional guarantee in its own right but also an important means of ensuring a full, fair public hearing as protected under ss. 7 and 11(d), it will be more difficult to waive s. 14 Charter rights than may have been the case under the common law and under statutory enactments. In fact, there will be situations where the rights simply cannot, in the greater public interest, be waived. Where waiver of the right to interpreter assistance is possible, the threshold will be very high. The waiver must be clear and unequivocal and must be done with full knowledge of the rights the procedure was enacted to protect and the effect that the waiver will have on those rights. The waiver should be made personally by the accused, if necessary following an inquiry by the court through an interpreter to ensure that the accused truly understands what he is doing, unless counsel for the accused is fluent in the accused's language or has communicated with the accused through an interpreter before coming to court and satisfies the court that the nature of the right and the effect on the right of waiving it has been explained to the accused: *R. v. Tran*, [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34.

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## ***Equality Rights***

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### **EQUALITY BEFORE AND UNDER LAW AND EQUAL PROTECTION AND BENEFIT OF LAW / Affirmative action programs.**

**15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particu-**



lar, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Note: By s. 32(2) of the Constitution Act, 1982, the above section came into force April 17, 1985.

## ANNOTATIONS

Section 15(1) is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, and does not impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law. The ideal embodied in the section is that a law expressed to bind all should not, because of irrelevant personal differences, have a more burdensome or less beneficial impact on one than another. It is not every distinction or differentiation in treatment at law which will violate the equality guarantee. In order to govern effectively legislatures must treat different individuals and groups in different ways. To achieve true equality it will frequently be necessary to make distinctions. This section spells out four basic rights which apply to all persons whether citizens or not: the right to equality before the law, the right to equality under the law, the right to equal protection of the law and the right to equal benefit of the law. Its purpose is to ensure equality in the formulation and application of the law and the right to equal benefit of the law. All these four rights are granted with the direction that they be without discrimination. Discrimination exists where a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual group, has the effect of imposing burdens, obligations or disadvantages not imposed upon others, or withholding or limiting access to opportunities, benefits and advantages available to other members of society. Discrimination under this section is limited to discrimination caused by the application or operation of law. The grounds of discrimination enumerated in this section are not exclusive and both they and other possible grounds of discrimination recognized under this section must be interpreted in a broad and generous manner. At a minimum s. 15(1) extends to grounds of discrimination analogous to the enumerated grounds: *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1, [1989] 1 S.C.R. 21, [1989] 2 W.W.R. 289.

Equality before the law at a minimum requires that no individual or group of individuals be treated more harshly than another under that law. However, there will only be a violation of s. 15 if the infringement of a right to equality before the law results in discrimination. Discrimination is a distinction based on grounds relating to personal characteristics of the individual or group which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others. Finding that discrimination exists will in most cases necessarily entail a search for a disadvantage that exists apart from and independent of the particular legal distinction being challenged. Thus, victims of discrimination will often be members of a discrete and insular minority who come within the protection of s. 15. Provisions of the Criminal Code which formerly give only residents of Alberta the right to elect trial by judge alone on serious offences such as murder do not violate s. 15. It could not be said that persons resident outside Alberta are members of a discrete and insular minority. There is none of the usual indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice. While it may be that a person's province of residence or place of trial could in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination, that was not the case with respect to this Criminal Code provision and it is not a fundamental principle under s. 15

that the criminal law apply equally throughout the country: *R. v. Turpin* (1989), 48 C.C.C. (3d) 8, [1989] 1 S.C.R. 1296, 69 C.R. (3d) 97.

Merely because a statutory provision addresses a group that is defined by reference to a characteristic, such as sex, that is enumerated in subsec. (1) does not automatically lead to an infringement of this section. There must also be a denial of an equality right that results in discrimination. In the context of the criminal law, a distinction based on sex may legitimately be made where, as a matter of biological fact, the offence can be committed by one sex only. Such an offence was former s. 146(1) of the Criminal Code which made it an offence to have sexual intercourse with a girl under the age of 14 years. In view of the Criminal Code definitions, it was clear that only males over 14 years are capable of committing the offence. Whether or not a female who commits a similar offence with a young male should be subject to the same societal disapprobation is a matter for Parliament, not the courts: *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 2 S.C.R. 906, 79 C.R. (3d) 332 (5:2).

The failure of the provincial Attorney General to implement a programme of alternative measures is not "the law" for the purposes of a challenge under this section, and thus a challenge under s. 15 to the exercise of that discretion given the Attorney General by the legislation [the Young Offenders Act, s. 4] must fail. The non-exercise of discretion cannot be constitutionally attacked simply because it creates differences as between provinces. To find otherwise would potentially open to Charter scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces: *R. v. S.(S.)* (1990), 57 C.C.C. (3d) 115, [1990] 2 S.C.R. 254 (7:0).

The word "individual" in this section does not include corporations: *R. v. Paul Magder Furs Ltd.* (1989), 49 C.C.C. (3d) 267, 69 O.R. (2d) 172, 33 O.A.C. 81 (C.A.), leave to appeal refused 51 C.C.C. (3d) vii, 70 O.R. (2d) x.

The Crown cannot be equated with an individual for the purposes of s. 15(1) analysis: *Rudolf Wolff & Co. v. Canada* (1990), 69 D.L.R. (4th) 392, [1990] 1 S.C.R. 695, 106 N.R. 1.

## Official Languages of Canada

### OFFICIAL LANGUAGES OF CANADA / Official languages of New Brunswick / Advancement of status and use.

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

### ENGLISH AND FRENCH LINGUISTIC COMMUNITIES IN NEW BRUNSWICK / Role of the legislature and government of New Brunswick.

16.1 (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

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**PROCEEDINGS OF PARLIAMENT / Proceedings of New Brunswick legislature.**

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

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**PARLIAMENTARY STATUTES AND RECORDS / New Brunswick statutes and records.**

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

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**PROCEEDINGS IN COURTS ESTABLISHED BY PARLIAMENT / Proceedings in New Brunswick courts.**

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

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**COMMUNICATIONS BY PUBLIC WITH FEDERAL INSTITUTIONS / Communications by public with New Brunswick institutions.**

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

- (a) there is a significant demand for communications with and services from that office in such language; or
- (b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

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**CONTINUATION OF EXISTING CONSTITUTIONAL PROVISIONS.**

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

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**RIGHTS AND PRIVILEGES PRESERVED.**

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.



## Minority Language Educational Rights

LANGUAGE OF INSTRUCTION / Continuity of language instruction / Application where numbers warrant.

### 23. (1) Citizens of Canada

- (a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
- (b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

- (a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and
- (b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

## Enforcement

ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS / Exclusion of evidence bringing administration of justice into disrepute.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

### ANNOTATIONS

**Standing** – A corporation charged with breach of a federal statute, here the *Lords Day Act*, has standing to defend the charge on the basis that the Act violates the guarantee to freedom of conscience and religion and is therefore of no force and effect by reason of s. 52 of the *Constitution Act 1982*. Section 24(1) sets out a remedy for individuals, whether real persons or artificial ones such as corporations, whose rights under the Charter have been infringed. It is not however the only recourse in the face of unconstitutional legislation. Where the challenge is based on the unconstitutionality of the legislation, recourse to s. 24(1) is unnecessary and the particular effect of the challenging party is irrelevant. Whether a corporation can enjoy or exercise freedom of religion was there-

fore irrelevant: *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321.

Similarly it was open to a corporation to challenge a provision of a federal statute on the basis that it imposed absolute liability and thus infringed the provisions of s. 7 of the Charter even though a corporation is not entitled to the protection of s. 7. Although a corporation cannot rely upon s. 7 in circumstances such as an application for a declaration that a law is invalid, it cannot be convicted under a law that violates s. 7. Once charged with an offence a corporation is entitled to submit that the legislation under which it is charged is unconstitutional because it infringes the right to life, liberty and security of the human being and thus violates s. 7: *R. v. Wholesale Travel Group Inc.* (1989), 52 C.C.C. (3d) 9, 73 C.R. (3d) 320, 63 D.L.R. (4th) 325 (C.A.), *revd* on other grounds 67 C.C.C. (3d) 193, 84 D.L.R. (4th) 161, 4 O.R. (3d) 799n (S.C.C.).

The mere fact that an accused does not have a possessory or proprietary interest in the articles seized as may have been necessary to challenge the validity of a search warrant prior to the proclamation of the Canadian Charter of Rights and Freedoms, does not mean that the accused in a proper case would not have standing to challenge the validity of a search or seizure. There is an important distinction between an application to quash a search warrant and an accused's objection at his criminal trial to the admissibility of evidence obtained pursuant to such process. The search warrant replaced the property owner's permission to enter premises, which would otherwise be necessary, and, therefore, the only person who could challenge the validity of a search warrant or demand the return of goods seized was a person whose permission to enter the premises and take possession of the goods would otherwise be required. In considering an application to exclude evidence based on an alleged violation of s. 8, the question is whether the accused can assert a right to privacy. Section 8 is directed to the protection of the security of the person, not the protection of his property, and it is the accused's personal exposure to the consequences of search and seizure that gives him the right to challenge, not the search warrant itself, but the admission into evidence at his trial of the fact of the search and the account of what was seized: *R. v. Pugliese* (1992), 71 C.C.C. (3d) 295 (Ont. C.A.). Also see: *R. v. Paolitto* (1994), 91 C.C.C. (3d) 75 (Ont. C.A.).

It would seem that the trial judge could exclude evidence as a remedy under subsec. (1) where the evidence was not obtained in violation of the Charter (having been obtained outside Canada by officials who were not acting as agents of any Canadian government) but its admission into evidence would result in the trial being unfair. On the other hand, evidence may be obtained in circumstances that would not meet the rigorous standards of the Charter and yet, if admitted into evidence, would not result in the trial being unfair. Canada cannot impose its procedural requirements on proceedings undertaken by other states in their own territories. Canada is not, however, bound by the law of other countries in conducting trials in Canada and the courts must, in determining whether evidence should be admitted, be guided by our sense of fairness as informed by the underlying principles of the Canadian legal system as it applies to the specific context of the case. It was unnecessary in this case to articulate the test to be applied. Thus, for example, it may be that excluding the evidence only where the manner in which it was obtained shocks the conscience sets the standard too low. What is sought is a fair trial in the specific context and it may be that this requirement cannot be satisfied by the rejection of foreign evidence only in the most egregious circumstances: *R. v. Harrer*, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193, 42 C.R. (4th) 269.

**Court of competent jurisdiction** – The superior court in Ontario was a court of competent jurisdiction under s. 24(1) for the purpose of considering an application by an inmate in Ontario for a remedy by way of *habeas corpus* notwithstanding that the facts underlying the application arose out of her trial in another province. The remedy of *habeas corpus* has traditionally run from the courts of the jurisdiction in which the person seeking review of the legality of her detention is confined: *R. v. Gamble* (1988), 45 C.C.C. (3d) 204, [1988] 2 S.C.R. 595, 66 C.R. (3d) 193.

A provincial court judge presiding at an accused's preliminary inquiry is not a court of competent jurisdiction for the purpose of an application to stay proceedings for unreasonable delay or for the purpose of excluding evidence on the basis of an alleged infringement of the Charter: *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481, [1986] 1 S.C.R. 863, 52 C.R. (3d) 1.

While the trial court is, as a general rule, a court of competent jurisdiction, the superior court should also have a constant, complete and concurrent jurisdiction for an application under s. 24(1). The superior court should decline to exercise its discretionary jurisdiction however unless in the opinion of that court and given the nature of the violation or any other circumstances it is more suited than is the trial court to assess and grant a remedy that is just and appropriate. An appropriate case where the superior court would exercise its jurisdiction is where an allegation of unreasonable delay is based on the conduct by the trial court: *Rahey v. The Queen* (1987), 33 C.C.C. (3d) 289, [1987] 1 S.C.R. 588, 57 C.R. (3d) 289.

Generally speaking, issues, including those with a constitutional dimension, which arise in the context of a criminal prosecution should be raised and resolved within the confines of the established criminal process, rather than by way of an interlocutory application to the superior court. On the other hand, where the circumstances are such that the interests of justice require immediate intervention by the superior court then that jurisdiction can and will be exercised. An issue, however, such as the compellability of a witness [here the common law spouse of the accused] is a matter best left for the trial court which is in the best position to determine issues based on a complete record: *R. v. Duvivier* (1991), 64 C.C.C. (3d) 20 (Ont. C.A.).

Neither s. 24(1) nor s. 52 of the Constitution Act have enlarged the jurisdiction of the Court of Appeal. In particular, s. 24(1) does not create courts of competent jurisdiction but merely vests additional powers of courts which are already found to be competent independently of the Charter: *R. v. Meltzer* (1989), 49 C.C.C. (3d) 453, [1989] 1 S.C.R. 1781, 97 N.R. 92; *R. v. Heikel* (1989), 49 C.C.C. (3d) 462, [1989] 1 S.C.R. 1776, 100 A.R. 396.

The application of s. 24(1) requires an infringement or denial of a Charter-based right. Thus in *Borowski v. Canada (Attorney General)* 1989, 47 C.C.C. (3d) 1, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231, it was held that the plaintiff's claim that the therapeutic abortion provisions of the Criminal Code violated ss. 7 and 15 of the Charter did not meet this requirement as he alleged the rights of a foetus, not his own rights, had been violated.

While there is no general power to award costs in indictable matters, in a proper case, it would be open to a trial judge to award costs against the Crown as a remedy for violation of an accused's Charter rights. Where, however, an application for costs is joined with an application for damages then both issues should be determined in the same action by way of a civil proceeding: *R. v. McGillivray* (1990), 56 C.C.C. (3d) 304 (N.B.C.A.).

A summary conviction court is a court of competent jurisdiction with the power to award costs against the Crown in a proper case as a remedy for infringing the defendant's Charter rights: *R. v. Pang* (1994), 95 C.C.C. (3d) 60, 35 C.R. (4th) 371, [1994] 4 W.W.R. 442 (Alta. C.A.).

The National Parole Board is not a court of competent jurisdiction within the meaning of s. 24: *Mooring v. Canada (National Parole Board)* (1996), 104 C.C.C. (3d) 97, [1996] 3 W.W.R. 305, 192 N.R. 161 (S.C.C.) (5:2).

**Procedure** – In considering an application to stay proceedings based on undue delay in laying charges thus infringing the accused's right to a fair trial, no particular procedure need be employed. Thus, the parties may be able to agree on a statement of facts or submit evidence by way of affidavit or argue the motion at the end of the Crown's case. However, it was not proper for the trial judge to make findings of fact against the complainants based on credibility when he had not seen them testify and was merely relying



upon portions of the transcript of the preliminary inquiry which were drawn to his attention: *R. v. L. (W.K.)* (1991), 64 C.C.C. (3d) 321, [1991] 4 W.W.R. 385, 6 C.R. (4th) 1 (S.C.C.).

In general, an accused who intends to raise a Charter challenge at trial or any other hearing should give the Crown a reasonable notice of such proceeding. It is preferable that there be a formal notice of motion indicating the nature and grounds of the challenge along with affidavit and other material relied upon in support of the application. In the case of an application under s. 11(b), the transcript of any prior proceedings should be placed before the trial court: *R. v. Franklin* (1991), 66 C.C.C. (3d) 114, 3 O.R. (3d) 597, 6 C.R. (4th) 73 (C.A.).

A trial judge to whom a motion is made to declare unconstitutional the provisions under which the accused is charged has a discretion whether or not to proceed to hear the motion or reserve the decision until the end of the case. In the exercise of that discretion, the judge should have regard to the two policy considerations favouring disposition of the issue at the end of the case, namely, that criminal proceedings should not be fragmented by interlocutory proceedings and that the adjudication of constitutional issues should be discouraged where there is no factual foundation. On the other hand, the judge did not err in determining the constitutional issue at the beginning of the case where it raised an apparently meritorious challenge which was not dependent on facts to be elicited during the trial: *R. v. DeSousa* 76 C.C.C. (3d) 124, [1992], 2 S.C.R. 944, 15 C.R. (4th) 66 (5:0).

An objection to the admissibility of evidence, including an objection based on a Charter infringement, should be made before or when the evidence is proffered and not at the end of the Crown's case. In the interests of conducting an orderly trial, the judge is entitled to insist that defence counsel state his position on possible Charter issues either before or at the outset of the trial. Failing timely notice, a trial judge, having taken into account all relevant circumstances, is entitled to refuse an application to assert a Charter remedy. The trial judge would, however, have a discretion to allow counsel to challenge evidence already received and will do so where the interests of justice so warrant. The accused cannot be required to swear an affidavit in support of the application for relief under the Charter: *R. v. Kutynec* (1992), 70 C.C.C. (3d) 289, 7 O.R. (3d) 277 (C.A.).

Where there has been a violation of s. 14, it was for the court to fashion an appropriate and just remedy tailored to the particular circumstances of the case under this section. Neither s. 686(1)(b)(iii) nor s. 686(1)(b)(iv) of the Criminal Code has any application. As a matter of law, a violation of s. 14 of the Charter precludes application of these curative provisions of the Code. To the extent that a particular Charter violation is more or less serious, prejudicing an accused to a greater or lesser degree, this raises remedial issues which fall to be decided under subsec. (1), not under the Criminal Code: *R. v. Tran*, [1994] 2 S.C.R. 951, 92 C.C.C. (3d) 218, 32 C.R. (4th) 34.

The trial judge having held that the infringement of the accused's right to counsel should not lead to exclusion of the narcotics found on the accused in the course of an otherwise lawful search erred in refusing the sentence below what would ordinarily be appropriate. The actions of the police were entirely divorced from the commission of the offence and it was inappropriate, in the circumstances of this case, to use the sentence proceedings as an avenue for sending a message to the law enforcement agencies: *R. v. Glykis* (1995), 100 C.C.C. (3d) 97, 41 C.R. (4th) 310, 24 O.R. (3d) 803 (C.A.). However, compare *R. v. MacPherson* (1995), 100 C.C.C. (3d) 216, 166 N.B.R. (2d) 81 (C.A.), where the court reduced the accused's sentence for possession of stolen goods because he had not been taken before a justice without unreasonable delay as required by s. 503 of the Criminal Code. Even though the chances that the accused would have been released on bail were negligible, a reduction of the sentence was required to emphasize that violation of the accused's rights under s. 9 was serious.

**Exclusion of evidence** – The focus of subsection (2) is the effect of the admission of the evidence in the proceedings, the purpose of the subsection being to prevent the adminis-

tration of justice from being brought into further disrepute by the admission of the evidence. The test to be applied is whether the evidence "could" bring the administration of justice into disrepute in the eyes of a reasonable person, dispassionate and fully apprised of the circumstances of the case. Thus if the admission of the evidence in some way affects the fairness of the trial then the admission of the evidence would tend to bring the administration of justice into disrepute and, subject to considerations of other factors, the evidence generally should be excluded. On the other hand, real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. Different considerations apply however where after a violation of the Charter the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Another group of factors are those going to the seriousness of the breach such as whether the police acted in good faith and the availability of other investigatory techniques. Finally, the court must consider whether the judicial system's repute will be better served by the admission or the exclusion of the evidence. Thus the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge because of a trivial breach of the Charter. The seriousness of the offence is also relevant consideration but its relevancy depends on the nature of the breach. Thus, if the admission of the evidence were to operate unfairly then, the more serious the offence, the more damaging to the system's repute would be an unfair trial. The fact that other remedies are available is an irrelevant consideration: *Collins v. The Queen* (1987), 33 C.C.C. (3d) 1, [1987] 1 S.C.R. 265, 56 C.R. (3d) 193.

In some cases the harm to the integrity of the judicial system resulting from the excluding of evidence would be so great that exclusion and not admission would bring the administration of justice into disrepute. This would be the case if evidence necessary to substantiate a charge were excluded on the basis of a trivial Charter violation. Evidence as to the finding of narcotics carried by the accused although obtained following a breach of the accused's rights under ss. 8 and 10(b) could not affect the fairness of the trial. The accused was in no way conscripted against herself and the customs officers in searching the accused acted in good faith based on accepted customs procedure. The evidence therefore should be admitted: *R. v. Simmons* (1988), 45 C.C.C. (3d) 296, [1988] 2 S.C.R. 495, 66 C.R. (3d) 297. Similarly, see *R. v. Jacoy* (1988), 45 C.C.C. (3d) 46, [1988] 2 S.C.R. 548, [1989] 1 W.W.R. 354.

While the purpose of the rule in s. 24(2) is not to allow an accused to escape conviction, neither should it be interpreted as available only in those circumstances where exclusion of evidence would have no effect at all on the result of the trial. A consideration whether to exclude evidence should not be so closely tied to the ultimate result in a particular case. While the courts must consider the effect on the administration of justice of excluding evidence, that factor alone should not decide a case. Rather in considering whether or not to exclude evidence the court must consider the three groups of factors as set out in *Collins v. The Queen*, *supra*. While the purpose of s. 24(2) is not to deter police from unlawful conduct, the court should be reluctant to admit evidence that shows signs of being obtained by an abuse of common law and Charter rights by the police. In this case, although the evidence sought to be excluded was real evidence, it was obtained through serious violations of s. 8 in circumstances that led to the conclusion that the admission of the evidence would bring the administration of justice into disrepute: *R. v. Genest* (1989), 45 C.C.C. (3d) 385, [1989] 1 S.C.R. 59, 67 C.R. (3d) 224.

In *Sieben v. The Queen* (1987), 32 C.C.C. (3d) 574, [1987] 1 S.C.R. 295, 38 D.L.R. (4th) 427, narcotics had been found in the accused's dwelling house following execution of a writ of assistance as then permitted under provisions of the Narcotic Control Act. The Crown did not seek to uphold the use of the writ of assistance and therefore the case was to be approached on the basis that the search was unreasonable. The Charter breach

was not sufficiently serious that admission of the evidence would bring the administration of justice into disrepute. The officers had reasonable grounds to enter and search the premises and were acting in good faith reliance on powers granted them by a statute which at the time had not been held to be unconstitutional.

Although breathalyzer evidence is statutorily compellable, its admission can affect the fairness of the trial. The scope of available legal advice in this context is necessarily limited, but it is improper to speculate about the nature of the advice that a detainee would have received and whether the evidence would have been obtained had the right not been infringed. The burden is on the Crown to show that the accused would not have acted any differently had his s. 10(b) rights been fully respected and that, accordingly, the evidence would have been obtained irrespective of the breach. There is sufficient scope for legal advice to a detainee who has received a breathalyzer demand to say that the courts must not speculate about the nature of that advice and whether it would have made any difference to the outcome of the case. One of the purposes of s. 10(b) is to provide detainees with an opportunity to make informed choices about their legal rights and obligations. This opportunity is no less significant when breathalyzer charges are involved: *R. v. Bartle*, [1994] 3 S.C.R. 173, 92 C.C.C. (3d) 289, 33 C.R. (4th) 1.

The requirement under s. 24(2) that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter is met where it is established that a Charter violation occurred in the course of obtaining the evidence. It is not necessary that there be a strict causal nexus between the Charter violation and the obtaining of the evidence. A temporal link however between infringement of the Charter and the discovery of the evidence will not always be determinative since situations may arise where the obtaining of the evidence, although following a breach of the Charter, will be too remote from the violation to be obtained in a manner that infringed the Charter. In most cases the real issue will be whether the admission of the evidence would bring the administration of justice into disrepute within the meaning of s. 24(2). Section 24(2) is not an automatic exclusionary rule and routine exclusion of evidence necessary to substantiate charges may itself bring the administration of justice into disrepute: *R. v. Strachan* (1988), 46 C.C.C. (3d) 479, [1988] 2 S.C.R. 980, 67 C.R. (3d) 87.

Even though a search warrant is held to be valid, if the obtaining of the warrant was preceded by an unreasonable warrantless perimeter search, this provision is triggered and the court must consider whether the admission of the evidence would bring the administration of justice into disrepute: *R. v. Grant*, [1993] 3 S.C.R. 223, 84 C.C.C. (3d) 173, 24 C.R. (4th) 1 (9:0).

Any evidence obtained after violation of the Charter by conscripting the accused against himself through a confession or other evidence emanating from him would tend to render the trial process unfair. While the identity of the accused is not evidence emanating from the accused, identification evidence obtained through a lineup is evidence that cannot be obtained but for the participation of the accused and it is not simply pre-existing real evidence. When participating in a lineup, the accused is participating in the construction of credible inculpatory evidence and where such evidence has been obtained following violation of the right to counsel its admission would tend to render the trial unfair: *R. v. Ross* (1989), 46 C.C.C. (3d) 129, [1989] 1 S.C.R. 3, 67 C.R. (3d) 209.

In *R. v. Black* (1989), 50 C.C.C. (3d) 1, [1989] 2 S.C.R. 138, 70 C.R. (3d) 97, evidence had been obtained following a serious violation of the accused's right to counsel. The court however distinguished between real evidence obtained following a violation and self-incriminating evidence and concluded that her confession and her conduct in leading the police to the murder weapon should be excluded since its admission would tend to render the trial unfair. However, the knife itself was a piece of real evidence and should have been admitted as an exhibit.

As a general rule, self-incriminating evidence obtained following violation of s. 10(b) of the Charter is inadmissible because it would adversely affect the fairness of the trial



and bring the administration of justice into disrepute. Thus, while bad faith on the part of the police may strengthen the case for exclusion, good faith will not strengthen the case for admission to cure an unfair trial as the result of the admission of self-incriminating evidence. Further, it is not open to the court to admit the evidence on the theory that the accused would probably have confessed in any event. The court cannot speculate as to what the accused might have said or done at the time of his detention had he been advised of his right to counsel or even of his right to remain silent. In considering the factor of urgency or necessity, the focus must be on the necessity or urgency of obtaining the information before advising the accused of his right to counsel and not merely on the necessity to, for example, detain the accused for a short time while investigating the alleged crime: *R. v. Elshaw* (1991), 67 C.C.C. (3d) 97, 7 C.R. (4th) 333, 59 B.C.L.R. (2d) 143 (S.C.C.) (6:1).

Similar reasoning was applied to exclude incriminating statements made by the accused to a police agent in violation of his rights under s. 7: *R. v. Broyles* (1991), 68 C.C.C. (3d) 308, [1992] 1 W.W.R. 289, 84 Alta. L.R. (2d) 1 (S.C.C.) (7:0).

The application of subsec. (2) may result in the exclusion of the evidence of a live witness where the evidence would never have been discovered but for that Charter violation: *R. v. Goldhart* (1995), 42 C.R. (4th) 22, 25 O.R. (3d) 72, 83 O.A.C. 300 (C.A.).

A violation of the sanctity of a person's body is much more serious than search of an office or even a home. Even where a blood sample was taken from an accused by a physician and the police were not directly implicated in the invasion of the accused's body, the dignity of the human being is equally seriously violated when use is made of bodily substances taken by others for medical purposes in a manner that does not respect that limitation. The trust and confidence of the public in the administration of medical facilities would be seriously taxed if an easy and informal flow of information and particularly of bodily substances from hospitals and police were allowed. Such a practice would bring the administration of health services and the administration of justice into disrepute. Accordingly, evidence obtained as a result of the unlawful seizure should be excluded: *R. v. Dymont* (1988), 45 C.C.C. (3d) 244, [1988] 2 S.C.R. 417, 66 C.R. (3d) 348.

Blood and urine samples initially obtained by hospital staff with the accused's consent for use for medical purposes, without the involvement of the state, were "real evidence" for the purpose of determining whether admission of the results of analysis of the samples would affect the fairness of the trial. The fact that the samples existed independently of the subsequent Charter violations by the authorities was an important consideration favouring admission of the evidence: *R. v. Colarusso*, [1994] 1 S.C.R. 20, 87 C.C.C. (3d) 193, 26 C.R. (4th) 289.

Notwithstanding the seriousness of the offence with which the accused was charged, importing heroin, the serious nature of the violation of the accused's rights under ss. 8 and 10(a), (b), which formed part of a pattern of disregard of the accused's rights, required exclusion of real evidence, being the discovery of a quantity of heroin following a rectal examination. The accused had not been informed of his right to counsel when subjected to a search by customs officers and had been told that he was arrested on a traffic warrant. The Crown, not having established that the police had reasonable grounds to arrest the accused for a narcotics offence, the rectal examination as an incident to an arrest for outstanding traffic tickets must be viewed as an extremely serious intrusion. In the circumstances, it was imperative that the court, having regard for the long-term consequences of admitting evidence obtained in these circumstances, disassociate itself from the conduct of the police. The administration of justice would be brought into greater disrepute if the court were to condone the practice of using an arrest for traffic warrants as an artifice to conduct a rectal examination of a person whom the police do not have reasonable and probable grounds to believe is carrying drugs: *R. v. Greffe* (1990), 55 C.C.C. (3d) 161, 75 C.R. (3d) 257, [1990] 1 S.C.R. 755 (4:3).

In *R. v. Kokesch* (1990), 61 C.C.C. (3d) 207, 1 C.R. (4th) 62, [1991] 1 W.W.R. 193 (S.C.C.) (4:3) the court excluded evidence obtained by execution of a Narcotic Control

Act search warrant at the accused's home. The evidence to obtain the warrant was based on information gathered by a police officer through a warrantless "perimeter search" of the accused's home at a time when the officer merely had a suspicion that the accused was cultivating marijuana on the premises. This was an extremely serious violation of the Charter. The lack of availability of other investigative means was not a mitigating factor. To the contrary, where the police have nothing but suspicion and no legal way to obtain other evidence then they must leave the suspect alone and not proceed to obtain evidence illegally. The illegal intrusion onto the accused's property must be seen as far from trivial and a search conducted in the knowledge that legal search powers are unavailable is not capable of being characterized as demonstrating good faith. The officer either knew or ought to have known that he was trespassing. In either case, this was not good faith. Notwithstanding that the marijuana seized was real evidence whose admission would not affect the fairness of the trial, the evidence must be excluded. The administration of justice would suffer far greater disrepute from its admission than its exclusion. The court must not be seen to condone deliberate unlawful conduct designed to subvert both the legal and constitutional limits of police power to intrude on individual privacy.

In *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481, [1992] 3 S.C.R. 615, 16 C.R. (4th) 273, it was held that the accused's rights under s. 8 were violated when, after he was stopped at a police check stop, the accused was questioned by the officer about the contents of a bag in the car and as a result the accused produced the bag which was found to contain narcotics. When he questioned the accused, the officer did not have any suspicion that the accused was in possession of contraband. The check stop is justified as a means of detecting impaired drivers or dangerous vehicles but not as a means to conduct an unfounded general inquisition or an unreasonable search. In the circumstances, it could be assumed that the accused felt compelled to respond to the police questions and it was not shown that any search was as a result of an informed consent. Further, it would affect the fairness of the trial to permit the Crown to introduce "real evidence" which could not have been discovered without the compelled assistance of the accused.

In *R. v. Grant*, *supra*, the court held that an important factor in the decision not to exclude the evidence was the fact that the police were acting in good faith reliance upon a provision of a statute which authorized a warrantless search and which had not been struck down in the particular province. Also of significance was that the narcotics offences were serious and exclusion of the evidence would render a conviction an impossibility.

An accused has standing to raise the violation of s. 8 of the Charter by reason of a consent interception between an alleged co-conspirator and an undercover police officer. The accused was entitled to have the evidence of this communication excluded pursuant to s. 24(2) of the Charter if to admit the evidence would bring the administration of justice into disrepute: *R. v. Montoute* (1991), 62 C.C.C. (3d) 481, 113 A.R. 95 (C.A.).

Evidence which has been ruled inadmissible at one stage in a trial pursuant to subsec. (2) may be admitted at another point in the trial only if there has been a material change in circumstances. It will only be in very limited circumstances that a change in use of the evidence will qualify as a material change of circumstances that would warrant the reopening of the issue once evidence has been excluded under this subsection. The admission of statements obtained from the accused in breach of the Charter generally turns on the effect of its admission on the fairness of the trial. The effect on the repute of the administration of justice is to be assessed by reference to the standard of the reasonably well informed citizen who represents community values. The effect of destroying the credibility of an accused who takes the stand in his defence, using evidence obtained from the mouth of the accused in breach of his Charter rights, will usually have the same effect as use of the same evidence when adduced by the Crown in its case-in-chief for the purpose of incrimination. A jury instruction as to the limited use of the evidence does not mean that the admission of the evidence will have a less detrimental effect on the case of the accused. If use of the statement is deemed to be unfair by reason of having

been obtained in breach of an accused's Charter rights, it is not likely to be seen to be less unfair because it was only used to destroy credibility. Where the Crown seeks to use the excluded statement for a restricting purpose, a ruling may be obtained either during its case or before cross-examining the accused in a *voir dire*: *R. v. Calder* (unreported, March 21, 1996, S.C.C.) [096/085/065-35 pp.].

Although the burden of establishing a violation of a Charter right is upon the accused, this does not mean that the accused must formally prove every single fact upon which the claim of a violation is based, including one which is not in dispute between the parties and is or should be common knowledge amongst members of the criminal bar and those on the bench. For example, the existence of duty counsel services in the province was not a matter which required independent proof by the accused. Duty counsel and legal aid services are an intrinsic part of the practice of criminal law in this country and courts are entitled to take judicial notice of the broad parameters of these services, such as their existence and how they are generally accessed: *R. v. Cobham*, [1994] 3 S.C.R. 360, 92 C.C.C. (3d) 333, 33 C.R. (4th) 73.

## General

### ABORIGINAL RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired. SI/84-102, Sch.

### OTHER RIGHTS AND FREEDOMS NOT AFFECTED BY CHARTER.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

### MULTICULTURAL HERITAGE.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

### ANNOTATIONS

In considering whether the hate literature provisions of s. 319(2) of the Criminal Code constituted a reasonable limit on freedom of expression, the court took into account the commitment to a multicultural vision. The principle of non-discrimination and the need to prevent attacks on the individual's connection with his or her culture, and, hence, upon the process of self-development, are recognized by s. 27: *R. v. Keegstra* (unreported, December 13, 1990, S.C.C. (4:3)) [090 352 004 - 229 pp.].

### RIGHTS GUARANTEED EQUALLY TO BOTH SEXES.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

### ANNOTATIONS

The guarantee in this provision does not prevent Parliament from creating an offence that, as a matter of biological fact, can only be committed by one sex. The importance of this provision lies in the fact that it is not open to the legislature to deny an accused, who



is charged with such an offence, rights and freedoms guaranteed to all persons under the Charter. A person cannot receive less protection under the Charter on account of his or her sex: *R. v. Nguyen* (1990), 59 C.C.C. (3d) 161, [1990] 6 W.W.R. 289 (S.C.C.) (5:2).

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**RIGHTS RESPECTING CERTAIN SCHOOLS PRESERVED.**

**29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.**

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**APPLICATION TO TERRITORIES AND TERRITORIAL AUTHORITIES.**

**30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.**

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**LEGISLATIVE POWERS NOT EXTENDED.**

**31. Nothing in this Charter extends the legislative powers of any body or authority.**

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***Application of Charter***

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**APPLICATION OF CHARTER / Exception.**

**32. (1) This Charter applies**

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and**
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.**

**(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.**

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**ANNOTATIONS**

In *R. v. Herrer*, [1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193, 42 C.R. (4th) 269, the court left open the question of whether the Charter could have extraterritorial application. The court did point out that automatic exclusion of Charter application outside Canada might unduly restrict the protection Canadians have a right to expect against the interference with their rights by the Canadian governments or their agents. In this case, however, the United States authorities were not acting on behalf of any of the governments of Canada, the provinces or the territories, the state actors to which, by virtue of this section the application of the Charter is confined. The Charter thus had no direct application to the interrogations in the United States. Accordingly, the rights flowing from s. 10(b) of the Charter to persons arrested or detained had no application. In those circumstances, the application of the Charter could only be triggered when the Canadian police began proceedings against the accused on her return to Canada. Since the accused did not complain of any improper police action in Canada, the only grounds available to her were that the admission of the evidence would violate the accused's liberty interests in a manner that was not in accordance with the principles of fundamental justice of the Charter or would violate the guarantee of a fair trial. Concepts of fairness and principles of fundamental justice involve a delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice.



# OFFENCE GRID

This grid covers offences under the **Criminal Code**, the **Food and Drugs Act**, and the **Narcotic Control Act**. It shows:

- whether an offence is indictable, summary, or hybrid,
- whether an offence is absolute jurisdiction,
- the maximum and minimum sentence,
- available sentencing options,
- illegal sentences,
- orders that you may wish to consider or that are mandatory,
- and more.

**CAUTION:** The applicability of remarks in the comments column depends upon the circumstances of a particular case. Thus, for example, where the comment “S. 491 mandatory weapon forfeiture order” appears, the order is mandatory only if the requirements of s. 491 are met. Likewise, where the comment “S. 100(1) mandatory firearms order” appears, the order is mandatory only if the requirements of s. 100(1) are met.

## Acknowledgments

We are indebted to the Provincial Judges’ Association of British Columbia, who developed this Offence Grid for their Judges’ Handbook and have kindly allowed us to include it here. In particular, we wish to acknowledge, with thanks, the following:

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MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE ss. 736(1), 737	FINE & PROBATION s. 737(1)(b)	PRISON ss. 737, 739	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE, SUSPENDED SENTENCE s. 737(1)(d)	COMPENSATION ORDER ss. 725, 726	COMMENTS (applicability depends on circumstances of case)
<b>57(1)</b>													
Forge passport or use forged passport	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓		
<b>57(2)</b>													
Passport, false statement	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>57(3)</b>													
Possession, forged passport	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>58</b>													
Fraud, use of citizenship certificate	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>65</b>													
Riot	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>66</b>													
Unlawful assembly	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>72, 73</b>													
Forcible entry	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		S. 100(2) discretionary firearms order.
<b>76</b>													
Hijacking	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>77</b>													
Endanger aircraft	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>78</b>													
Take weapon or explosive on board	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>80(a)</b>													
Breach of duty of care, explosives, causing death	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>80(b)</b>													
Breach of duty of care, explosives, causing harm	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>81(1)(a) &amp; (b)</b>													
Explosives, intent to cause death or harm	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>81(1)(c) &amp; (d)</b>													
Explosives, placing or making	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓		S. 100(1) mandatory firearms order.
<b>82</b>													
Explosives, possession w/o lawful excuse	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>83</b>													
Prize fight	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		S. 100(2) discretionary firearms order.

\* \$25,000 for corporations for summary  
conviction offence s. 719.

# OFFENCE GRID

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENSE SENTENCE s. 737	FINE ALONE s. 740(1) 747	FINE & PROBATION s. 737(1)(b)	PRISON s. 717 747	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE + PROB + INTERMITTENT s. 737(1)(c)	VICTIM FINE SUPPLEMENT s. 727.9	COMPENSATION ORDER s. 726.726	COMMENTS (applicability depends on circumstances of case)
<b>85</b>													
Use of firearm or imitation, commission of offence	Indictable	14 yrs max. Minimums: 1 yr-1st 3 yrs-2nd	X	X	X	X	✓	**	✓	X	X	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. Sentence must be consecutive to any other imposed. **Not a possible sentence for a second offence because there is a minimum sentence of three years. Higher penalty for second or subsequent offence requires compliance with s. 665.
<b>86(1)</b>													
Firearm, pointing	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>86(2)</b>													
Firearm, careless use or storage	Hyb-Ind.	Maximums: 2 yrs-1st 5 yrs-2nd	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order. Higher penalty for second or subsequent offence requires compliance with s. 665.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>87</b>													
Weapon or imitation for dangerous purposes	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>88</b>													
Weapon at public meeting	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>89</b>													
Weapon, concealed	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>90(1)</b>													
Prohibited weapon, possession	Hyb-Ind.	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>90(2)</b>													
Prohibited weapon, in motor vehicle	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>91(1)</b>													
Restricted weapon, possession	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719

# MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE § 736	SUSPENDED SENTENCE § 737	FINE ALONE §§ 716(1), 787	FINE & PROBATION § 737(1)(b)	PRISON § 717, 787	PRISON & PROBATION § 737(1)(b)	INTERMITTENT § 737(1)(b)	FINE, PROB & INTERMITTENT § 737(1)(b)	VICTIM FINE SURCHARGE § 727.9	COMPENSATION ORDER §§ 723, 728	COMMENTS (applicability depends on circumstances of case)
<b>91(2)</b> Restricted weapon, in unauthorized place	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>91(3)</b> Restricted weapon, in motor vehicle	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>93</b> Firearm, transfer to person under 16	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>94</b> Firearms, wrongful delivery	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>95</b> Prohibited weapon, import or deliver	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>96(1)</b> Restricted weapon, delivery to person w/o permit	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>96(3)</b> Restricted weapon, import	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>97(1)</b> Firearm, delivery to person w/o FAC	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>97(3)</b> Firearm, acquire w/o FAC	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>100(12)</b> Firearm etc., possession while prohibited	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			
<b>103(10)</b> Firearm etc., possession while prohibited	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓			

\* \$25,000 for corporations for summary  
conviction offence s. 719.



SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 738	SUSPENDED SENTENCE s. 737	FINE ALONE s. 734(1) 737	FINE & PROBATION s. 737	PRISON s. 737 737	PRISON & PROBATION s. 737(1)(b)	PRISON & FINE s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 737.9	COMPENSATION ORDER s. 725, 726	COMMENTS (applicability depends on circumstances of case)
<b>104</b>														
Finding prohibited weapon, lost weapon, tampering with serial number	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>105</b>														
Firearms, business offences	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			S. 100(2) discretionary firearms order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>113(1)</b>														
False statement to procure FAC	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>113(2)</b>														
Tampering with FAC	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>113(3)</b>														
Failing to comply with permit conditions	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>113(4)</b>														
Failing to deliver up certificate	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>119</b>														
Bribery of judicial officers	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓		Written consent of A.G. Canada required to prosecute judge. S. 522 release by superior court judge only where accused is a judge. S. 462.37 proceeds of crime for forfeiture order on Crown application. S. 748(1), (2) conviction may result in loss of office and other disabilities.
<b>120</b>														
Bribery of officers	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓		S. 462.37 proceeds of crime for forfeiture order on Crown application. S. 748(1), (2) conviction may result in loss of office and other disabilities.
<b>121</b>														
Frauds on the government	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		S. 462.37 proceeds of crime for forfeiture order on Crown application. S. 748(3) conviction bars accused from contracting with Crown or benefiting from contract with Crown unless capacity restored under s. 748(4).
<b>122</b>														
Breach of trust by public officer	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		S. 462.37 proceeds of crime for forfeiture order on Crown application.
<b>123</b>														
Municipal corruption	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>125</b>														
Influencing or negotiating appointments	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>126</b>														
Disobeying a statute	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		

MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 734(1) 737	FINE & PROBATION s. 737(1)(b)	PRISON s. 737 737	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(b)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 721.9	COMPENSATION ORDER s. 723, 726	COMMENTS (applicability depends on circumstances of case)
<b>127</b>													
Disobeying an order of court	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>129</b>													
Obstructing or resisting peace officer	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>130</b>													
Personating peace officer	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>131, 132</b>													
Perjury	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	Max. sentence is life where perjury relates to offence punishable by death.
<b>134</b>													
False statement where not required	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>136</b>													
Contradictory evidence with intent to mislead	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	Attorney General's consent required.
<b>137</b>													
Fabricating evidence	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	
<b>138</b>													
Offences relating to affidavits	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>139(1)</b>													
Obstructing justice	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>139(2)</b>													
Obstructing justice	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	
<b>140</b>													
Public mischief	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>141</b>													
Compounding indictable offence	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>144</b>													
Prison breach	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>145(1) to (5)</b>													
Escape, failure to appear, etc.	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>146</b>													
Permit or assist escape	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option    ✗ Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCES s. 737	FINE / FINE s. 719(1) / 720	FINE & PROBATION s. 737(1)(b)	PRISON s. 717	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 718, 727	FINE, PROB & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 727.9	COMPOSITION ORDER s. 728, 728	COMMENTS (applicability depends on circumstances of case)
<b>147</b>													
Rescue or permit escape	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>151</b>													
Sexual interference	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order. Summary conviction, s. 100(2) discretionary firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>152</b>													
Invite sexual touching, under 14	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order. Summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>153</b>													
Sexual exploitation, age 14 to 18	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapons forfeiture order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>155</b>													
Incest	Indictable	14 yrs	✗	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
<b>159</b>													
Anal intercourse	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order; summary conviction, s. 100(2) discretionary firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.



MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX. / MIN SENTENCE	DISCHARGE s. 736										COMMENTS (applicability depends on circumstances of case)
			SUSPENDED SENTENCE s. 737	FINE ALONE s. 738	FINE & PROBATION s. 739	PRISON s. 741	PRISON & PROBATION s. 741(1)(b)	PRISON & FINE s. 741(1)(c)	INTERMITTENT s. 741(1)(d)	FINE PROB. & INTERMITTENT s. 741(1)(e)	VICTIM FINE SURCHARGE s. 742	COMPENSATION ORDER s. 745, 746	
160													
Bestiality	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order; summary conviction, s. 100(2) discretionary firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
163, 169													
Corrupting morals	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
163.1(2), (3)													
Child pornography	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
163.1(4)													
Possession of child pornography	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
168													
Mailing obscene material	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
170													
Parent or guardian procuring sexual activity	Indictable	person under 14: 5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban.
		person 14-18: 2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
171													
Householder permitting sexual activity	Indictable	person under 14: 5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 161 discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban.
		person 14-18: 2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
172													
Corrupting children	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Attorney General's consent may be required, see s. 172(4). S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban.
173													
Indecent acts	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban.
174													
Nudity	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 174(3) Attorney General's consent required.

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option    ✗ Illegal Sentence

# OFFENCE GRID

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s 726	SUSPENDED SENTENCE s 737	FINE ALONE s 718(1) 70	FINE & PROBATION s 737	PRISON s 717 70	PRISON & PROBATION s 737(1)(b)	INTERMITTENT s 737(1)(b)	FINE, PROB & INTERMITTENT s 737	VICTIM FINE SURCHARGE s 727.9	COMPOSITION ORDER s 725, 726	COMMENTS (applicability depends on circumstances of case)
<b>175</b>													
Disturbance, indecent exhibition, loitering	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>176(1)</b>													
Obstructing or violence to clergy	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>176(2) &amp; (3)</b>													
Disturbing religious worship, etc.	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>177</b>													
Trespassing at night	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>178</b>													
Offensive volatile substance	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>179</b>													
Vagrancy	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>180</b>													
Common nuisance	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>182</b>													
Dead body	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>191</b>													
Possession, etc. of device for surreptitious interception of private communications	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 192 discretionary forfeiture order.
<b>193</b>													
Disclosure of information	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 194 discretionary order of punitive damages to maximum of \$5,000 on application of person aggrieved.
<b>193.1</b>													
Disclosure of information, radio-based telephone communications	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 194 discretionary order of punitive damages to maximum of \$5,000 on application of person aggrieved.
<b>201(1)</b>													
Keeping gaming or betting house	Indictable Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>201(2)</b>													
Person found in gaming or betting house or owner permitting use	Summary	6 mth/2000	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\*\$25,000 for corporations for summary conviction offence s. 719

✓ Sentence Option    ✗ Illegal Sentence

MARTIN'S CRIMINAL CODE

SECTION	TYPE		MAX / MIN SENTENCE											COMMENTS (applicability depends on circumstances of case)
			DISCHARGE s. 735	SUSPENDED SENTENCES 737	FINE ALONE s. 718(1) 787	FINE & PROBATION s. 731(1)(b)	PRISON s. 717 787	PRISON & PROBATION s. 731(1)(b)	INTERMITTENT s. 731(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 727.9	COMPENSATION ORDER s. 725, 726		
<b>202</b>	Indictable <b>Absolute PCJ</b>	1st offence: 2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application. Higher penalty for second or subsequent offence requires compliance with s. 665.		
		2nd offence: 14 days min., 2 yrs max.	✗	✗	✗	✗	✓	✓	✓	✓	✓			
		3rd & subsq: 3 mth min., 2 yrs max.	✗	✗	✗	✗	✓	✓	✓	✓	✓			
<b>203</b>	Indictable	1st offence: 2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			
Placing bets on behalf of others		2nd offence: 14 days min., 2 yrs max.	✗	✗	✗	✗	✓	✓	✓	✓	✓			
		3rd & subsq: 3 mth min., 2 yrs max.	✗	✗	✗	✗	✓	✓	✓	✓	✓			
<b>206(1)</b>	Indictable <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>206(4)</b>	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>210(1)</b>	Indictable <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 210(3) notice of conviction to be served on owner, landlord or lessor. S. 462.37 proceeds of crime forfeiture order on Crown application.		
<b>210(2)</b>	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.		
<b>211</b>	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
<b>212(1)</b>	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.		
<b>212(2)</b>	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.		
<b>212(4)</b>	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.		
<b>213</b>	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓			
	Prostitution, or obtaining services													

\* \$25,000 for corporations for summary  
conviction offence s. 719.

✓ Sentence Option

✗ Illegal Sentence



# OFFENCE GRID

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 736(1) 737	FINE & PROBATION s. 737(1)(b)	PRISON s. 737(2)	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 725.726	COMPENSATION ORDER s. 725.726	COMMENTS (applicability depends on circumstances of case)
<b>215</b>													
Fail to provide necessaries	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>218</b>													
Abandon child	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>220(a)</b>													
Cause death by criminal negligence, use of firearm	Indictable	Life Min: 4 yrs	✗	✗	✗	✗	✓	✗	✓	✗	✗	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>220(b)</b>													
Cause death by criminal negligence (other)	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(2) discretionary driving prohibition (no limit). S. 491 mandatory weapon forfeiture order.
<b>221</b>													
Cause bodily harm by criminal negligence	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(2) discretionary driving prohibition (up to 10 yrs). S. 491 mandatory weapon forfeiture order.
<b>229-231, 235</b>													
Murder	Indictable	Minimum Life See s. 742 for parole eligibility	✗	✗	✗	✗	✓	✗	✗	✗	✗	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 522, release by Superior Court Judge only. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>234, 236(a)</b>													
Manslaughter, use of firearm	Indictable	Life Min: 4 yrs	✗	✗	✗	✗	✓	✗	✓	✗	✗	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>234, 236(b)</b>													
Manslaughter (other)	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(2) discretionary driving prohibition (no limit). S. 491 mandatory weapon forfeiture order.
<b>237</b>													
Infanticide	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
<b>239(a)</b>													
Attempt murder, use of firearm	Indictable	Life Min: 4 yrs	✗	✗	✗	✗	✓	✗	✓	✗	✗	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture.
<b>239(b)</b>													
Attempt murder (other)	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>240</b>													
Accessory after fact. murder	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 522, release by Superior Court Judge only.

\* \$25,000 for corporations for summary  
conviction offence s. 719

✓ Sentence Option ✗ Illegal Sentence

MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 735										COMMENTS (applicability depends on circumstances of case)
			SUSPENDED SENTENCE s. 737	FINE ALONE s. 73(4), 737	FINE & PROBATION s. 737(1)(b)	PRISON s. 717, 737	PRISON & PROBATION s. 737(1)(b)	PRISON & FINE s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 721.9	COMPENSATION ORDER s. 725.776	
244													
Wounding with intent	Indictable	14 yrs Minimum - 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
244.1													
Causing bodily harm with intent, use of air gun or pistol	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100 mandatory firearms order. S. 491 mandatory weapon forfeiture.
245(a)													
Administering noxious thing with intent to endanger life or cause bodily harm	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms prohibition.
245(b)													
Administering noxious thing with intent to aggravate or annoy	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms prohibition.
246													
Overcoming resistance to commission of offence	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms prohibition.
249(1) & (2)													
Dangerous operation of vehicle, etc., no injury	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 259(2) discretionary driving prohibition (up to 3 yrs).
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
249(3)													
Dangerous operation of vehicle, etc., injury occurs	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(2) discretionary driving prohibition (up to 10 yrs).
249(4)													
Dangerous operation of vehicle, etc., death occurs	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(2) discretionary driving prohibition (up to 10 yrs).
250													
Fail to watch, water skiing at night	Summary	6 mth/2000	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 259(2) discretionary driving prohibition (up to 3 yrs).
251													
Send unsafe vessel or aircraft	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 259(2) discretionary driving prohibition (up to 3 yrs). Prosecution requires consent of A.G. of Canada.
252													
Fail to stop at scene of accident	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 259(2) discretionary driving prohibition (up to 3 yrs).
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option

X Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 726	SUSPENDED SENTENCE s. 737	FINE ALONE s. 714(1), 707	FINE & PROBATION s. 737(1)(b)	PRISON s. 717, 707	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE, SUSPENDED SENTENCE s. 727.5	COMPARISON ORDER s. 725, 726	COMMENTS (applicability depends on circumstances of case)
<b>253, 255(1)</b>  Operation or having care or control while impaired (not causing bodily harm) or while over .08.	Hyb-Ind.	5 yrs max. Minimums: \$300-1st 14 days-2nd 90 days-3rd	X X X X	X	X	X	X	X	X	X	X	X	S. 259(1) mandatory driving prohibition (maximum 3 yrs; minimum 3 months for 1st offence, 6 months for the 2nd, and 1 year for the 3rd). Discharge available in some jurisdictions for s. 253 offence, s. 255(5). Higher penalty for second or subsequent offence requires compliance with s. 665.
	Hyb-Sum.	6 mth max. Minimums: \$300-1st 14 days-2nd 90 days-3rd	X X X X	X	X	X	X	X	X	X	X	X	
<b>254(5), 255(1)</b>  Refuse to provide breath or blood sample	Hyb-Ind.	5 yrs max. Minimums: \$300-1st 14 days-2nd 90 days-3rd	X X X X	X	X	X	X	X	X	X	X	X	S. 259(1) mandatory driving prohibition (maximum 3 yrs; minimum 3 months for 1st offence, 6 months for the 2nd, and 1 year for the 3rd). Higher penalty for second or subsequent offence requires compliance with s. 665.
	Hyb-Sum.	6 mth max. Minimums: \$300-1st 14 days-2nd 90 days-3rd	X X X X	X	X	X	X	X	X	X	X	X	
<b>253(a), 255(2)</b>  Impaired operation causing bodily harm	Indictable	10 yrs max. Minimums: \$300-1st 14 days-2nd 90 days-3rd	X X X X	X	X	X	X	X	X	X	X	X	S. 100(1) mandatory firearms order. S. 259(1) mandatory driving prohibition (maximum 3 yrs; minimum 3 months for 1st offence, 6 months for the 2nd, and 1 year for the 3rd). S. 259(2) discretionary driving prohibition up to 10 years (no minimum). Higher penalty for second or subsequent offences requires compliance with s. 665.



MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCRETIONARY SENTENCES s. 737										COMMENTS (applicability depends on circumstances of case)
			DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 718(1) 70	FINE & PROBATION s. 737(1) 70	PRISON s. 717 70	PRISON & PROBATION s. 737(1) 70	INTERMITTENT s. 737(1) 70	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SUPPLEMENT s. 721.9	COMPOSITION ORDER s. 723 726	
<b>253(a), 255(3)</b>													
Impaired operation causing death	Indictable	14 yrs max. Minimums: \$300-1st	x	x	x	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 259(1) mandatory driving prohibition (maximum 3 yrs; minimum 3 months for 1st offence, 6 months for the 2nd, and 1 year for the 3rd). S. 259(2) discretionary driving prohibition up to 10 years (no minimum). Higher penalty for second or subsequent offences requires compliance with s. 665.
		14 days-2nd	x	x	x	x	✓	✓	✓	✓	✓	✓	
		90 days-3rd	x	x	x	x	✓	✓	✓	✓	✓	✓	
<b>259(4)</b>													
Operate vehicle, etc. while disqualified	Hyb-Ind. Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 259(2) discretionary driving prohibition (up to 3 yrs).
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>264</b>													
Criminal harassment	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms prohibition.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>264.1(1)(a)</b>													
Threat to cause death or harm	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	18 mth/ 2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>264.1(1)(b) or (c)</b>													
Threat to damage prop. or harm animal	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>265, 266</b>													
Assault	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>267</b>													
Assault causing bodily harm or with weapon	Hyb-Ind.	10 yrs	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order. Summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	18 mth/ 2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>268</b>													
Aggravated assault	Indictable	14 yrs	x	✓	x	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.

\* \$25,000 for corporations for summary  
conviction offence s. 719.

✓ Sentence Option    x Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 73(1)(b) & 737	FINE & PROBATION s. 73(1)(b) & 737	PRISON s. 717, 737	PRISON & PROBATION s. 73(1)(b) & 737	INTERMITTENT s. 73(1)(b) & 737	FINE, PROB. & INTERMITTENT s. 73(1)(b) & 737	VICTIM FINE SURCHARGE s. 727.9	COMPARISON ORDER s. 728, 728	COMMENTS (applicability depends on circumstances of case)
<b>269</b>													
Unlawfully cause bodily harm	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order. Summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order. May be convicted notwithstanding that charge.
	Hyb-Sum.	18 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>269.1</b>													
Torture	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>270</b>													
Assault officer, resist arrest, etc.	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>271</b>													
Sexual assault	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order; summary conviction, s. 100(2) discretionary firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 Discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
	Hyb-Sum.	18 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>272(2)(a)</b>													
Sexual assault with weapon, threats or causing harm, use of firearm	Indictable	Life Min: 4 yrs	✗	✗	✗	✗	✓	✗	✓	✗	✗	✓	S. 100(1) mandatory firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 Discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
<b>272(2)(b)</b>													
Sexual assault with weapon, threats or causing harm (other)	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 Discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.

\* \$25,000 for corporations for summary conviction offence s. 719.

MARTIN'S CRIMINAL CODE

SECTION	TYPE		MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 710(1) 787	FINE & PROBATION s. 737(1)(b) 787	PRISON s. 717 787	PRISON & PROBATION s. 737(1)(b) 787	INTERMITTENT s. 737(1)(c) 787	FINE, PROB & INTERMITTENT s. 737 787	VICTIM FINE SURCHARGE s. 723.9	COMPENSATION ORDER s. 723.726	COMMENTS (applicability depends on circumstances of case)
<b>273(2)(a)</b>														
Aggravated sexual assault, use of firearm	Indictable	Life Min: 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	✓	S. 100(1) mandatory firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 Discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
<b>273(2)(b)</b>														
Aggravated sexual assault (other)	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 486(2.1) private testimony order. S. 486(3) discretionary publication ban. S. 491 mandatory weapon forfeiture order. S. 161 Discretionary prohibition from attending certain public places or taking certain employment where complainant under 14 years.
<b>279(1), (1.1)(a)</b>														
Kidnapping, use of firearm	Indictable	Life Min: 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>279(1), (1.1)(b)</b>														
Kidnapping (other)	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order
<b>279(2)</b>														
Forcible confinement	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>279.1(2)(a)</b>														
Hostage taking, use of firearm	Indictable	Life Min: 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>279.1(2)(b)</b>														
Hostage taking (other)	Indictable	Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>280</b>														
Abduction of person under 16	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms prohibition.
<b>281</b>														
Abduction of person under 14	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms prohibition.
<b>282</b>														
Abduction contravening custody order	Hyb-Ind.	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order; summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option    X Illegal Sentence



SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 718(1)/737	FINE + PROBATION s. 737	PRISON s. 717/737	PRISON + PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE, SUSPENDED s. 721.9	COMPARISON ORDER s. 725, 728	COMMENTS (applicability depends on circumstances of case)
<b>283</b>													
Abduction where no custody order	Hyb-Ind.	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order; summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order. Needs consent of A.G. or counsel (s. 283(2)).
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>300</b>													
Defamatory libel known to be false	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			
<b>318</b>													
Advocating genocide	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓			Attorney General's consent required.
<b>319</b>													
Incite or promote hatred	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>322-332, 334(a)</b>													
Theft over \$5,000	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>322-332, 334(b)</b>													
Theft \$5,000 or less	Hyb-Ind. Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>335</b>													
Take motor vehicle without consent	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>336</b>													
Criminal breach of trust	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	
<b>337</b>													
Public servant, refuse to deliver property	Indictable	14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	
<b>338(1)</b>													
Fraudulently take cattle or deface brand, etc.	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>338(2)</b>													
Cattle theft	Indictable	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	
<b>339(1)</b>													
Take poss'n of drift timber, etc.	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>339(2)</b>													
Dealer in second hand goods	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>342</b>													
Theft or forgery of credit card	Hyb-Ind.	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>342.1</b>													
Unauthorized use of computer	Hyb-Ind.	10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option

X Illegal Sentence

MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s 736	SUSPENDED SENTENCE s 737	FINE ALONE s 738(1) 737	FINE & PROBATION s 737(1)(b)	PRISON s 737 737	PRISON & PROBATION s 737(1)(b)	PRISON & FINE s 737(1)(b)	INTERMITTENT s 737(1)(d)	FINE, PROB & INTERMITTENT s 737	VICTIM FINE SURCHARGE s 727.9	COMPENSATION ORDER s 723, 726	COMMENTS (applicability depends on circumstances of case)
<b>343, 344(a)</b>	Robbery, use of firearm	Indictable Life Min: 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>343, 344(b)</b>	Robbery (other)	Indictable Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>345</b>	Stop mail with intent	Indictable Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>346(1), (1.1)(a)</b>	Extortion, use of firearm	Indictable Life Min: 4 yrs	X	X	X	X	✓	X	✓	X	X	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>346(1), (1.1)(b)</b>	Extortion (other)	Indictable Life	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>347</b>	Criminal interest rate	Hyb-Ind. 5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Attorney General's consent required. S. 462.37 proceeds of crime forfeiture order on Crown application.
		Hyb-Sum. 6 mth/ 25,000	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>348</b>	Break & enter with intent, committing indictable offence	Indictable Life or 14 yrs	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. Max. sentence is life in the case of a dwelling; otherwise 14 yrs.
<b>349</b>	Being unlawfully in dwelling house	Indictable 10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>351(1)</b>	Housebreaking instruments poss'n	Indictable 10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	
<b>351(2)</b>	Disguise with intent	Indictable 10 yrs	✓	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	
<b>352</b>	Poss'n, instruments for breaking into coin operated devices, etc.	Indictable 2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option    X Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 736(1) 737	FINE & PROBATION s. 737(1)(b)	PRISON s. 737 737	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(b)	FINE, PROB. & INTERMITTENT s. 737	COMPENSATION ORDER s. 723, 728	COMMENTS (applicability depends on circumstances of case)
<b>354, 355(a)</b> Poss'n of property over \$5,000 obtained by crime	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>354, 355(b)</b> Poss'n of property under \$5,000 obtained by crime	Hyb-Ind. <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>356</b> Theft from mail	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	
<b>357</b> Bring into Canada property obtained by crime	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	
<b>362(2)(a)</b> False pretence, property over \$5,000	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	
<b>362(2)(b)</b> False pretence, property \$5,000 or less	Hyb-Ind. <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>362(3)</b> Obtain credit, etc. by false pretence	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	
<b>363</b> Obtain execution of security by fraud	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>364</b> Obtain food or lodging by fraud	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>365</b> Pretend to practise witchcraft	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>366, 367(1)</b> Forgery	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>368</b> Utter forged document	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>372(1)</b> False Message	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order.
<b>372(2)</b> Indecent telephone calls	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order.
<b>372(3)</b> Harassing telephone calls	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order.

\* \$25,000 for corporations for summary  
conviction offence s. 719.

✓ Sentence Option

✗ Illegal Sentence



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SECTION	TYPE		MAX / MIN SENTENCE	DISCHARGE s. 738 SUSPENDED SENTENCE s. 732 FINE ALONE s. 784(1) 787 FINE & PROBATION s. 731(1)(b) PRISON s. 717 787 PRISON & PROBATION s. 731(1)(b) INTERMITTENT s. 731(1)(c) FINE, PROB. & INTERMITTENT s. 737 VICTIM FINE SURCHARGE s. 727.9 COMPENSATION ORDER s. 725, 726										COMMENTS (applicability depends on circumstances of case)
				✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	
<b>374</b> Draw document without authority	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓		
<b>375</b> Obtaining, etc., based on forged document	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓		
<b>380(1)(a)</b> Fraud over \$5,000 or re: testamentary instrument	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.	
<b>380(1)(b)</b> Fraud, \$5,000 or less	Hyb-Ind. Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>381</b> Using mails to defraud	Indictable	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>393(3)</b> Obtain transportation by fraud	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>394</b> Fraud in relation to minerals	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 394(2) discretionary forfeiture order.	
<b>400</b> False prospectus	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓		
<b>403</b> Personation with intent	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓		
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>423</b> Intimidation	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.	
<b>426</b> Secret commissions	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.	
<b>430(2)</b> Wilful mischief endangering life	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.	
<b>430(3)</b> Wilful mischief, testamentary instrument or property over \$5,000	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Indictable, s. 100(1) mandatory firearms order. Summary conviction, s. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓		

\* \$25,000 for corporations for summary  
conviction offence s. 719.

✓ Sentence Option    ✗ Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE ss. 718(1), 787	FINE & PROBATION s. 737(1)(b)	PRISON ss. 717, 787	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737(1)(c)	FINE, PROB & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 727.9	COMPENSATION ORDER ss. 725, 728	COMMENTS (applicability depends on circumstances of case)
<b>430(4)</b>													
Wilful mischief, other property	Hyb-Ind. Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order. S. 553 absolute PCJ only if \$5,000 or less.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>430(5)</b>													
Wilful mischief, data	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>430(5.1)</b>													
Wilful act or omission, cause danger to life or mischief to property	Hyb-Ind.	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 491 mandatory weapon forfeiture order.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>433</b>													
Arson, disregard for human life	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order. S. 462.37 proceeds of crime forfeiture order on Crown application.
<b>434</b>													
Arson, damage to property of others	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 491 mandatory weapon forfeiture order.
<b>434.1</b>													
Arson, damage to own property, threat to safety of others	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	
<b>435</b>													
Arson for fraudulent purpose	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	
<b>436</b>													
Arson by negligence	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>436.1</b>													
Poss'n incendiary material	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>437</b>													
False alarm of fire	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>444</b>													
Injure or endanger cattle	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>445</b>													
Injure or endanger other animals	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>446(2)</b>													
Cause unnecessary suffering to animals or birds	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 446(5) discretionary animal or bird possession order.
<b>446(6)</b>													
Have animal contrary to court order	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736 SUSPENDED SENTENCE s. 737 FINE ALONE s. 73(8), 737 FINE & PROBATION s. 737, 737 PRISON s. 737, 737 PRISON & PROBATION s. 737(1)(b) PRISON & FINE s. 737(1)(b) INFERMIT s. 737(1)(c) FINE, PROB. & INFERMIT s. 737 VICTIM FINE SURCHARGE s. 737.9 COMPENSATION ORDER s. 736.736											COMMENTS (applicability depends on circumstances of case)
			✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	
449														
Make counterfeit money	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
450														
Possession, etc., of counterfeit money	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
452														
Uttering, etc., counterfeit money	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
460														
Advertising & dealing in counterfeit money	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
462.31														
Laundering proceeds of crime	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
463(a)														
Attempts & accessories, indictable, punishment by death or life	Indictable	14 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 462.37 proceeds of crime forfeiture order on Crown application where applicable. S. 491 mandatory weapon forfeiture order. S. 522, release by Superior Court Judge only for offences listed in s. 469.
463(b)														
Attempts & accessories, indictable, punished by 14 yrs or less	Indictable <b>Absolute PCJ</b> if principal offence absolute PCJ S.553	1/2 max. for principal offence	✗	✓	**	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 462.37 proceeds of crime forfeiture order on Crown application. S. 491 mandatory weapon forfeiture order. **Fine alone only if 1/2 of sentence for principal offence is 5 years or less.
463(c)														
Attempts & accessories, summary conviction	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
463(d)														
Attempts & accessories, hybrid offences	Hyb-Ind. <b>Absolute PCJ</b> if principal offence absolute PCJ S.553	1/2 max. for principal offence	✓	✓	**	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(2) discretionary firearms order. S. 462.37 proceeds of crime forfeiture order on Crown application where applicable. S. 491 mandatory weapon forfeiture order. For indictable, max. sentence is half of the maximum (indictable) for the principal offence. **Fine alone only if 1/2 of sentence for principal offence is 5 years or less.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option    ✗ Illegal Sentence



SECTION	TYPE		MAX / MIN SENTENCE	DISCHARGE & 736	SUSPENDED SENTENCE 737	FINE ALONE ss 738(1), 767	PRISON ss 731, 767	PRISON & PROBATION ss 731(1)(b)	PRISON & FINE ss 731(1)(b)	INTERMITTENT ss 731(1)(c)	FINE, PROB & INTERMITTENT ss 731(1)(c)	VICTIM FINE SURCHARGE ss 721.9	COMPENSATION ORDER ss 725, 726	COMMENTS (applicability depends on circumstances of case)
<b>464(a)</b>														
Counsel indictable offence, offence not committed	Indictable <b>Absolute PCJ</b> if principal offence absolute PCJ S.553	Same as for attempts	✓	✓	**	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application where applicable. Max. sentence is same as for attempt. **Fine alone only if 1/2 of sentence for principal offence is 5 years or less.
<b>464(b)</b>														
Counsel s/c offence, offence not committed	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	S. 462.37 proceeds of crime forfeiture order on Crown application where applicable.
<b>465(1)(a)</b>														
Conspiracy, murder	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	S. 100(1) mandatory firearms order. S. 462.37 proceeds of crime forfeiture order on Crown application where applicable. S. 491 mandatory weapon forfeiture order. S. 522, release by Superior Court Judge only.
<b>465(1)(b)(i)</b>														
Conspiracy to prosecute, sentence 14 yrs or more	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	
<b>465(1)(b)(ii)</b>														
Conspiracy to prosecute, sentence under 14 yrs	Indictable	5 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>465(1)(c)</b>														
Conspiracy to commit other indictable offence	Indictable <b>Absolute PCJ</b> if principal offence absolute PCJ S. 553	Same as for principal offence	**	✓	†	✓	✓	✓	✓	✓	✓	✓	✓	Max. sentence is same as for attempt. S. 100(1) mandatory firearms order if punishment for principal offence is 10 yrs or more; otherwise, s. 100(2) discretionary firearms order. S. 462.37 proceeds of crime forfeiture order on Crown application where applicable. S. 491 mandatory weapon forfeiture order. S. 522, release by Superior Court Judge only for offences listed in s. 469(a). **Discharge only if principal offence is less than 14 yrs. †Fine alone only if principal offence is 5 years or less.
<b>465(1)(d)</b>														
Conspiracy to commit summary conviction offence	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>486(5)</b>														
Breach of court order restricting public & publicity	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

MARTIN'S CRIMINAL CODE

SECTION	TYPE	MAX / MIN SENTENCE											COMMENTS (applicability depends on circumstances of case)
			DISCHARGE s. 735	SUSPENDED SENTENCE s. 737	FINE ALONE s. 738(1), 767	FINE & PROBATION s. 737, 767	PRISON s. 737, 767	PRISON & PROBATION s. 737(1)(b)	INTERMITTENT s. 737, 767	FINE, PROB. & INTERMITTENT s. 737	VICTIM FINE SURCHARGE s. 727.9	COMPENSATION ORDER s. 725, 726	
<b>708</b>		90 days/100		✓		✓		✓					May be ordered to pay costs incident to service and detention: s. 708(2). See s. 605(2) for contempt relating to exhibits.
<b>740</b>													
Fail to comply with probation order	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>811</b>													
Breach of recognizance	Hyb-Ind.	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Summary	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>31 FDA</b>													
Contravention of Act, except parts III and IV or regulation	Hyb-Ind.	5000/3 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	500/3 mth 1st: 2nd: 1000/6 mth	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>38.1 FDA</b>													
Fail to disclose prescriptions	Hyb-Ind.	5000/3 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	1000/6 mth 1st: 2nd: 1000/1 yr	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>39 FDA</b>													
Traffic, controlled drug	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Ss. 462.37 Code & 44.4 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	18 mth	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>44.2(2)(a) FDA</b>													
Poss'n property over \$1,000 obtained by trafficking, controlled drugs	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Ss. 462.37 Code & 44.4 FDA proceeds of crime forfeiture order on Crown application.
<b>44.2(2)(b) FDA</b>													
Poss'n property \$1,000 or less obtained by trafficking, controlled drugs	Indictable Absolute PCJ	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Ss. 462.37 Code & 44.4 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>44.3 FDA</b>													
Laundering proceeds of trafficking, controlled drugs	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Ss. 462.37 Code & 44.4 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>47 FDA</b>													
Poss'n, restricted drug	Hyb-Ind.	5000/3 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
	Hyb-Sum.	1000/6 mth 1st: 2nd: 2000/1 yr	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
<b>48 FDA</b>													
Traffic, restricted drug	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	Ss. 462.37 Code & 51 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	18 mth	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option

✗ Illegal Sentence

SECTION	TYPE	MAX / MIN SENTENCE	DISCHARGE s. 736	SUSPENDED SENTENCE s. 737	FINE ALONE s. 73(1) / 787	FINE & PROBATION s. 73(1) / 787	PRISON s. 717 / 787	PRISON & PROBATION s. 73(1) / 787	PRISON & FINE s. 717 / 787	INTERMITTENT s. 73(1) / 787	FINE, PROB. & INTERMITTENT s. 737	COMPENSATION ORDER s. 723, 726	COMMENTS (applicability depends on circumstances of case)
<b>50.2(2)(a) FDA</b>													
Poss'n property over \$1,000 obtained by trafficking, restricted drugs	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 51 FDA proceeds of crime forfeiture order on Crown application.
<b>50.2(2)(b) FDA</b>													
Poss'n property \$1,000 or less obtained by trafficking, restricted drugs	Indictable <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 51 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>50.3 FDA</b>													
Laundering proceeds of trafficking, restricted drugs	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 51 FDA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>3 NCA</b>													
Poss'n of narcotic	Hyb-Ind.	7 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		
	Hyb-Sum.	1st: 1000/6 mth 2nd: 2000/1 yr	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>3.1 NCA</b>													
Fail to disclose prescriptions	Hyb-Ind.	7 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		
	Hyb-Sum.	1st: 1000/6 mth 2nd: 2000/1 yr	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>4 NCA</b>													
Traffic in narcotic	Indictable	Life	✗	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
<b>5 NCA</b>													
Import or export a narcotic	Indictable	Max. life Min. 7 yrs	✗	✓	✗	✓	✓	✓	✓	✓	✓		Minimum sentence is unconstitutional. Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
<b>6 NCA</b>													
Cultivate opium or marihuana	Indictable	7 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
<b>19.1(2)(a) NCA</b>													
Poss'n of property \$1,000 or more obtained from trafficking, etc.	Indictable	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
<b>19.1(2)(b) NCA</b>													
Poss'n of property \$1,000 or less obtained from trafficking, etc.	Indictable <b>Absolute PCJ</b>	2 yrs	✓	✓	✓	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		
<b>19.2 NCA</b>													
Laundering proceeds of trafficking in narcotics, etc.	Hyb-Ind.	10 yrs	✓	✓	✗	✓	✓	✓	✓	✓	✓		Ss. 462.37 Code & 19.3 NCA proceeds of crime forfeiture order on Crown application.
	Hyb-Sum.	6 mth/2000*	✓	✓	✓	✓	✓	✓	✓	✓	✓		

\* \$25,000 for corporations for summary conviction offence s. 719.

✓ Sentence Option

✗ Illegal Sentence





# INDEX

Indexing by Ken Chasse  
Mississauga (Toronto), Ontario

**NOTE:** All references are to sections of the Criminal Code unless preceded by the following abbreviations:

CCR = Canadian Charter of Rights and Freedoms

E = Canada Evidence Act

FD = Food and Drugs Act

NC = Narcotic Control Act

YO = Young Offenders Act

**NOTE:** *Italicized* section numbers refer to section numbers that were not yet in effect when this index was published.

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# APPENDIX

## FORMS OF CHARGES



## INTRODUCTORY NOTE

The Appendix contains a collection of suggested forms of charges pursuant to Form 2 of the Criminal Code for the offences most commonly encountered by police officers. It is suggested that the Crown Attorney or his appropriate counterpart be consulted in the case of offences not included in these pages, and in all cases where the facts are complicated.

The charges are arranged under the sections of the Code to which they relate, in numerical sequence. If the particular section number is not known, it can be readily found by reference to the Index preceding these pages. The section numbers of the Code and the subject-matter of each charge are printed in bold face type.

The use of square brackets and italic type should be explained. Square brackets are used either to set out editorial instructions, which are in all cases printed in italics, or to indicate alternate words or phrases which are printed in ordinary type. See, for example, the first form of charge for an offence under s. 57(1)(a), the opening charge, in which the editorial instruction "specify the forged passport" is printed in italics within square brackets, and the charge under s. 81(1)(a) in which the alternate words "was likely to cause serious damage to property" are printed in ordinary type within square brackets preceded by the word "or" which is printed in italics to indicate that it is not part of the charge. Round brackets within square brackets indicate an alternative within the alternative (see, for example, the charge under s. 81(1)(b)(ii)).

It will be noted that every charge ends with the word "contrary *etc.*". This phrase has been used to avoid needless repetition, but the actual charge should state the section of the Code under which it is laid, *e.g.*, ". . . contrary to section 81(1)(a) of the Criminal Code".





## FORMS OF CHARGES UNDER THE CRIMINAL CODE

### 57(1)(a) Forging a passport

A.B. on ..... at ..... did forge a passport [*specify the forged passport*] contrary *etc.*

### 57(1)(b) Uttering a forged passport

A.B. on ..... at ..... did knowingly

(i) use [*or deal with or act upon*] a forged passport to wit [*specify the forged passport*] as if it were genuine contrary *etc.*

*or*

(ii) cause [*or attempt to cause*] C.D. to use [*or deal with or act upon*] a forged passport to wit [*specify the forged document*] as if it were genuine contrary *etc.*

### 57(2) False statement for passport

A.B. on ..... at ..... did for the purpose of procuring a passport for himself [*or C.D.*] make a written [*or oral*] statement to wit [*specify the statement*] that he knew was false [*or misleading*] contrary *etc.*

*or*

A.B. on ..... at ..... did for the purpose of procuring a material alteration [*or addition*] to a passport for himself [*or C.D.*] make a written [*or oral*] statement to wit [*specify the statement*] that he knew was false [*or misleading*] contrary *etc.*

### 57(3) Possession of forged passport

A.B. on ..... at ..... did without lawful excuse have in his possession a forged passport to wit [*specify the forged passport*] contrary *etc.*

### 65 Participating in riot

A.B. on ..... at ..... did take part in a riot [*specify time and place*] contrary *etc.*

### 66 Unlawful assembly

A.B. on ..... at ..... was a member of an unlawful assembly [*specify time and place*] contrary *etc.*

### 72(1) Forcible entry

A.B. on ..... at ..... did commit forcible entry on the real property of C.D. at [*insert address*] contrary *etc.*

### 72(2) Forcible detainer

A.B. on ..... at ..... did commit forcible detainer of the real property known as [*insert address*] against C.D. the person entitled by law to possession of it, contrary *etc.*

### 76 Hijacking

A.B. on ..... at ..... did by force [*or by threat of force or specify form of intimidation*] seize [*or exercise control of*] an aircraft [*specify*] with intent

(a) to cause C.D. on board the said aircraft to be confined [*or imprisoned*] against his will contrary *etc.*

*or*

(b) to cause C.D. on board the said aircraft to be transported against his will to [*specify place*] which place was other than [*specify*], the then next scheduled place of landing of the said aircraft contrary *etc.*

or

(c) to hold C.D. on board the said aircraft for ransom [or to service against his will] contrary, *etc.*

or

(d) to cause the said aircraft to deviate in a material respect [*specify*] from its flight plan [*specify*] contrary *etc.*

**77(a) Assault in aircraft in flight**

A.B. on ..... on board aircraft [*specify*] was in flight over the Province of ..... between [*specify by longitudes and latitudes or geographical locations*] did commit an assault on C.D., which assault was likely to endanger the safety of the said aircraft contrary *etc.*

**77(c) Damage to aircraft in service**

A.B. on ..... at ..... did cause damage [*specify*] to a [*specify*] aircraft in service that rendered the said aircraft incapable of flight [or was likely to endanger the safety of the said aircraft in flight] contrary *etc.*

**77(d) Placing dangerous substance on an aircraft**

A.B. on ..... at ..... did place [or cause to be placed] on board a [*specify*] aircraft in service a [*specify*] that was likely to cause damage to the said aircraft that would render it incapable of flight [or that was likely to endanger the safety of the said aircraft in flight] contrary *etc.*

**77(e) Damaging or interfering with a navigation facility**

A.B. on ..... at ..... did cause damage to [or interfere with the operation of] a [*specify*] air navigation facility, which damage [or interference] was likely to endanger the safety of aircraft in flight contrary *etc.*

**77(g) Endangering aircraft by false information**

A.B. on ..... at ..... did endanger the safety of a [*specify*] aircraft in flight between ..... and ..... in the Province of ..... by communicating to C.D. information that [*specify*], which information he knew was false, contrary *etc.*

**78(1) Offensive weapon or explosive substance on aircraft**

A.B. on ..... at ..... did take on board a [*specify*] aircraft an offensive weapon [or an explosive substance] [*specify*]

(a) without the consent of the owner or the operator or any person duly authorized by the owner or the operator to consent thereto contrary *etc.*

or

(b) with the consent of the owner [or the operator or C.D., a person duly authorized by the owner (or the operator) to consent thereto] but without complying with the term [or condition] [*specify*] on which consent was given contrary *etc.*

**81(1)(a) Explosives: intent to cause explosion**

A.B. on ..... at ..... with intent to cause an explosion of an explosive substance, to wit ..... that was likely to cause serious bodily harm or death to persons [or was likely to cause serious damage to property] did [*specify act done*] contrary *etc.*

**81(1)(b) Explosives: intent to cause bodily harm**

A.B. on ..... at ..... with intent to do bodily harm to C.D. did

(i) cause an explosive substance, to wit ..... to explode contrary *etc.*



or

- (ii) send [or deliver] to C.D. [or cause C.D. to take (or receive)] an explosive substance [or other dangerous substance or thing] to wit ..... contrary etc.

or

- (iii) place upon [or throw upon or throw at] C.D. a corrosive fluid [or explosive substance or dangerous substance or dangerous thing] to wit ..... contrary etc.

### 81(1)(c) Explosives: intent to cause damage to property

A.B. on ..... at ..... with intent to destroy or damage the property of C.D. and without lawful excuse did place [or throw] an explosive substance, to wit ..... upon [or at] a [specify property, e.g., building, motor vehicle, etc.] of the said C.D. contrary, etc.

### 81(1)(d) Explosives: making or possession of substance; intending bodily harm or property damage

A.B. on ..... at ..... did make [or have in his possession or have under his care or have under his control] an explosive substance to wit ..... with intent thereby

- (i) to endanger life [or to cause serious damage to property] contrary etc.

or

- (ii) to enable C.D. to endanger life [or to cause serious damage to property] contrary etc.

### 82 Explosives: making or possession for unlawful purpose

A.B. on ..... at ..... without lawful excuse did make [or have in his possession or have under his care or have under his control] an explosive substance to wit ..... contrary etc.

### 85(1)(a) Firearm: use while committing or attempting to commit offence

A.B. on ..... at ..... did use a firearm to wit ..... while committing [or attempting to commit] the indictable offence of [specify offence, e.g., robbery] contrary etc.

### 85(1)(b) Firearm: use during flight

A.B. on ..... at ..... did use a firearm to wit ..... during his flight after committing [or attempting to commit] the indictable offence of [specify offence, e.g., robbery] contrary etc.

### 86(1) Firearm: pointing

A.B. on ..... at ..... did without lawful excuse point a firearm to wit ..... at C.D. contrary etc.

### 86(2) Firearm or ammunition: careless use etc.

A.B. on ..... at ..... did without lawful excuse use [or carry, or handle, or ship or store] a firearm [or ammunition], to wit ..... in a careless manner [or without reasonable precaution for the safety of other persons] contrary etc.

### 87 Offensive weapon: possession

A.B. on ..... at ..... did carry [or have in his possession] [an imitation of] a weapon, to wit ....., for a purpose dangerous to the public peace [or for the purpose of committing the indictable offence of ..... ] contrary etc.

### 88 Offensive weapon: possessing at public meeting

A.B. on ..... at ..... did have in his possession a weapon, to wit ..... while attending [or on his way to attend] a public meeting at [specify meeting place] contrary etc.

**89 Offensive weapon: carrying concealed weapon**

A.B. on ..... at ..... did carry concealed a weapon without being the holder of a permit under which he may lawfully carry it, to wit ..... contrary *etc.*

**90(1) Prohibited weapon: possession**

A.B. on ..... at ..... did have in his possession a prohibited weapon, to wit ..... contrary *etc.*

**90(2) Prohibited weapon: in motor vehicle**

A.B. on ..... at ..... was an occupant of a motor vehicle, to wit ..... in which he knew that there was at that time a prohibited weapon, to wit ..... contrary *etc.*

**91(1) Unregistered restricted weapon: possession**

A.B. on ..... at ..... did have in his possession a restricted weapon, to wit . for which he did not have a registration certificate issued to him contrary *etc.*

**91(2) Restricted weapon: possession in place not authorized by certificate**

A.B. on ..... at ..... not being the holder of a permit under which he may lawfully so possess it did have in his possession a restricted weapon, to wit ..... at .... a place at which he was not entitled to possess it as indicated on the registration certificate issued therefor contrary *etc.*

**91(3) Restricted weapon: occupant of motor vehicle**

A.B. on ..... at ..... was an occupant of a motor vehicle, to wit ..... in which he knew there was at the time a restricted weapon, to wit ..... for which no occupant of the motor vehicle was the holder of a permit under which he may lawfully have that weapon in his possession in such vehicle, contrary *etc.*

**93 Firearm: transfer to person under 16**

A.B. on ..... at ..... did give [or lend or transfer or deliver] a firearm, to wit ..... to C.D., a person under the age of sixteen years who did not hold a permit under which he could lawfully possess it contrary *etc.*

**94 Offensive weapon or firearm: wrongful delivery**

A.B. on ..... at ..... did sell [or barter or give or lend or transfer or deliver] a firearm [or an offensive weapon or ammunition or explosive substance], to wit ..... to C.D. whom he knew [or had reason to believe] was:

(a) of unsound mind [or impaired by alcohol or drugs] contrary *etc.*

*or*

(b) a person who was prohibited by an order made pursuant to section 98 [or s. 101] of the Criminal Code contrary *etc.*

*or*

(c) a person who was prohibited by a probation order referred to in paragraph 737(2)(d) of the Criminal Code from possessing the firearm [or offensive weapon or ammunition, or explosive substance] so sold [or bartered or given or loaned or transferred or delivered] contrary *etc.*

**95 Prohibited weapon: importing *etc.***

A.B. on ..... at ..... did buy [or import into Canada or sell or barter or give or lend or transfer or deliver]:

(a) a prohibited weapon to wit ..... contrary *etc.*

*or*

- (b) a component [*or part*] to wit ..... designed exclusively for use in the manufacture or assembly of a prohibited weapon to wit ..... contrary *etc.*

**96(1) Restricted weapon: delivery *etc.* to person without permit**

A.B. on ..... at ..... did sell [*or barter or give or lend or transfer or deliver*] a restricted weapon to wit ..... to C.D. a person who was not the holder of a permit authorizing him to possess that weapon contrary *etc.*

**96(3) Restricted weapon: import without permit**

A.B. on ..... at ..... did import into Canada a restricted weapon to wit ..... at a time when he was not the holder of a permit authorizing him to possess that weapon contrary *etc.*

**97(1) Firearm: delivery *etc.* to person without firearm acquisition certificate**

A.B. on ..... at ..... did sell [*or barter or give or lend or transfer or deliver*] a firearm to wit ..... to C.D. a person who at the time of such sale [*or barter or giving or lending or transfer or delivery*]:

- [a] did not produce a firearm acquisition certificate for inspection contrary *etc.*

*or*

- [b] produce a firearm acquisition certificate for inspection which A.B. had reason to believe was invalid contrary *etc.*

*or*

- [c] produced a firearm acquisition certificate for inspection which was issued to a person other than C.D. contrary *etc.*

**97(1) Firearm: mail-order sale to person without firearm acquisition certificate**

A.B. on ..... at ..... did sell by mail-order a firearm to wit ..... to C.D. a person who, within a reasonable time period to such sale:

- [a] did not produce a firearm acquisition certificate contrary *etc.*

*or*

- [b] produced a firearm acquisition certificate for inspection which A.B. had reason to believe was invalid contrary *etc.*

*or*

- [c] produced a firearm acquisition certificate for inspection which was issued to a person other than C.D. contrary *etc.*

**97(3) Firearm: importing without firearm certificate**

A.B. on ..... at ..... did import [*or specify means of acquisition*] a firearm to wit ..... at a time when he was not the holder of a firearm acquisition certificate contrary *etc.*

**100(12) Firearm: possession while prohibited**

A.B. on ..... at ..... did have in his possession a firearm [*or ammunition or explosive substance*] to wit ..... while he was prohibited from doing so by reason of an order made pursuant to section 100(1) [*or specify subsection*] of the Criminal Code contrary *etc.*

**103(10) Firearm: possession while prohibited**

A.B. on ..... at ..... did have in his possession a firearm [*or offensive weapon or ammunition or explosive substance*] while he was prohibited from doing so by reason of an order made pursuant to section 103(6)(b) of the Criminal Code contrary *etc.*



**104(1) Offensive weapon: finding**

A.B. on ..... at ..... having found a prohibited weapon [*or* restricted weapon *or* firearm] to wit ..... that he had reasonable grounds to believe had been lost or abandoned did not with reasonable despatch deliver it, nor report that he had found it, to a peace officer or a local registrar of firearms contrary *etc.*

**104(2) Restricted weapon: losing**

A.B. on ..... at ..... having lost or mislaid [*or* having had stolen] a restricted weapon to wit ..... for which he had a registration certificate or permit issued to him, did not with reasonable despatch report that he had lost or mislaid [*or* had stolen] such weapon to a peace officer or a local registrar of firearms contrary *etc.*

**104(3) Firearm: altering serial numbers**

A.B. on ..... at ..... did:

- (a) alter [*or* deface *or* remove] a serial number on a firearm to wit ..... contrary *etc.*  

*or*
- (b) have in his possession a firearm to wit ..... knowing that the serial number thereon had been altered [*or* defaced *or* removed] contrary *etc.*

**105(8) Museums and weapons businesses: firearms and restricted weapons: failure to keep records of transactions**

A.B. on ..... at ..... did while carrying on a business that included at the time the manufacture [*or* buying *or* selling at wholesale or retail *or* storing *or* importing *or* repairing *or* altering *or* modifying *or* taking in pawn] of restricted weapons [*or* firearms] fail to:

- [a] keep a record of a transaction that he entered into with respect to such weapons or components thereof in a form prescribed by the Commissioner [containing such information as was prescribed by the Commissioner] to wit [*specify the transaction*] contrary *etc.*
- [b] keep an inventory of all such weapons [and firearms or components thereof] from time to time on hand at his place of business contrary *etc.*
- [c] produce at the request of a police officer [*or* police constable *or* *specify authorized person*] the record of a transaction that he entered into with respect to such weapons [*or* firearms or components thereof] in a form prescribed by the Commissioner [containing such information as was prescribed by the Commissioner], to wit [*specify the transaction for which the record was not produced*] contrary *etc.*

*or*

the inventory of all such weapons [and firearms or components thereof] from time to time on hand at his place of business contrary *etc.*

- [d] mail to the Commissioner [*or* *specify person making request*] a copy of the record of a transaction, that he entered into with respect to such weapons [and firearms or components thereof] in a form prescribed by the Commissioner [containing such information as is prescribed by the Commissioner] in accordance with a request in writing made by the Commissioner [*or* *specify person making request*], to wit [*specify transaction*] contrary *etc.*

**105(8) Museums and weapons businesses: firearms and restricted weapons: losing**

A.B. on ..... at ..... did while carrying on a business that included at the time:

- [a] the manufacture [*or* buying *or* selling at wholesale or retail *or* importing *or* repairing *or* altering *or* modifying *or* taking in pawn] of restricted weapons [*or* firearms]  

*or*
- [b] the manufacture [*or* buying *or* selling at wholesale or retail *or* importing] of ammunition

or

[c] the transportation [or shipping] of restricted weapons [or firearms or ammunition]

fail to report to a local registrar of firearms or a peace officer

- (i) the loss [or destruction] of a restricted weapon [or firearm] to wit .....  
which loss [or destruction] occurred in the course of the said business contrary  
etc.

or

- (ii) the theft of a restricted weapon [or firearm or ammunition] to wit .....  
which theft occurred in the course of the said business contrary etc.

**105(8) Firearms and restricted weapons: carrying on business without permit**

A.B. on ..... at ..... did carry on a business that included:

[a] the manufacture [or buying or selling at wholesale or retail or storing or importing or repairing or altering or modifying or taking in pawn] of restricted weapons [or firearms]

or

[b] the manufacture [or buying or selling at wholesale or retail or importing] of ammunition without at that time being the holder of a permit to carry on such business contrary etc.

**105(8) Firearms, ammunition and restricted weapons: safe handling**

A.B. on ..... at ..... did while carrying on a business that included at the time:

[a] the manufacture [or buying or selling at wholesale or retail or importing or repairing or altering or taking in pawn] of restricted weapons [or firearms]

or

[b] the manufacture [or buying or selling at wholesale or retail or importing] of ammunition  
[i] handle [or store or display or advertise] a restricted weapon [or firearm or ammunition] to wit ..... in a manner contrary to section 116(a) of the Criminal Code in that he did [specify contravention] contrary etc.

or

- [ii] sell by mail-order a restricted weapon [or firearm or ammunition] to wit ..... in a manner contrary to Regulation ..... made pursuant to section 116(c) of the Criminal Code in that he did [specify contravention] contrary etc.

**105(8) Firearms and ammunition: secure handling**

A.B. on ..... at ..... did while carrying on a business that included at the time:

[a] the manufacture [or buying or selling at wholesale or retail or importing or repairing or altering or modifying or taking in pawn] of firearms

or

[b] the manufacture [or buying or selling at wholesale or retail or importing] of ammunition

or

[c] the transportation [or shipping] of firearms [or ammunition] knowingly handle [or ship or store or transport] a firearm [or ammunition] to wit ..... in a manner contrary to Regulation ..... made pursuant to section 116(d) of the Criminal Code in that he [specify manner of violation] contrary etc.

**113(1) Firearms certificates and permits: false statements to procure**

A.B. on ..... at ..... did for the purpose of procuring a firearm acquisition certificate [or registration certificate or permit] [identify certificate or permit] for himself [or for C.D.]

[a] make a statement orally [*or in writing*] that he knew to be false [*or misleading*] to wit [*specify false or misleading statement*] contrary *etc.*

*or*

[b] knowingly fail to disclose information that was relevant to the said application, to wit [*specify information not disclosed*] contrary *etc.*

**113(2) Tampering with firearms acquisition certificate etc.**

A.B. on ..... at ..... did alter [*or deface or falsify*] a firearm acquisition certificate [*or registration certificate or permit or identify certificate or permit*] contrary *etc.*

**113(3) Firearms permits: fail to comply with conditions**

A.B. on ..... at ..... being the holder of permit ..... did without lawful excuse fail to comply with a condition of the said permit to wit [*specify condition*] contrary *etc.*

**113(4) Firearms certificate and permits: failure to deliver up**

A.B. on ..... at ..... being:

(a) the holder of a registration certificate [*or permit*] that was revoked did fail to deliver up the said certificate [*or permit*] to a peace officer or to a local registrar of firearms or to a firearms officer forthwith after such revocation contrary *etc.*

*or*

(b) being prohibited:

(i) from possessing any firearms or ammunition pursuant to an order made under section 100 [*or paragraph 103(6)(b)*] of the Criminal Code

*or*

(ii) from possessing any firearms pursuant to a probation order

did fail to deliver up to a peace officer, or to a local registrar of firearms or to a firearms officer a firearm acquisition certificate [*or registration certificate or permit*] held by him forthwith after the making of the said order contrary *etc.*

**120(a) Bribery: officers accepting bribes**

A.B. on ..... at ..... being a justice [*or police commissioner or peace officer or public officer or officer of a juvenile court or being employed in the administration of criminal law*] to wit [*specify position held*] did corruptly

(i) accept [*or obtain*]

*or*

(ii) agree to accept

*or*

(iii) attempt to obtain

for himself [*or C.D.*] a sum of money [*or valuable consideration, or office, or place or employment*] to wit [*specify item sought*] with intent

(iv) to interfere with the administration of justice by [*specify details*] contrary *etc.*

*or*

(v) to procure or facilitate the commission of the offence of ..... contrary *etc.*

*or*

(vi) to protect from detection [*or punishment*] E.F. who had committed [*or who had intended to commit*] the offence of ..... contrary *etc.*

**120(b) Bribery of officers**

A.B. on ..... at ..... did corruptly give [*or offer*] C.D., a justice [*or police commissioner, or peace officer or public officer or officer of a juvenile court or a person employed in the administration of criminal law*], to wit [*specify position held*] a sum of money



[or valuable consideration or office or place or employment] to wit ..... with intent that C.D. should

[a] interfere with the administration of justice [*specify interference contemplated*] contrary *etc.*  
or

[b] procure or facilitate the commission of the offence of ..... contrary *etc.*  
or

[c] protect A.B. [or E.F.] who had committed [or who had intended to commit] the offence of ..... from detection or punishment for such offence contrary *etc.*

## **121(1) Frauds on the government**

### **121(1)(a) Giving a benefit to an official/accepting a benefit**

(i) A.B. on ..... at ..... did give [or offer or agree to give or agree to offer] to C.D. [or E.F. a member of the family of C.D. or G.H. for the benefit of C.D.] an official [*specify nature of office*]  
or

(ii) C.D., being an official [*specify nature of office*] on ..... at ..... did demand [or accept or offer to accept or agree to accept] from A.B. for himself [or E.F.] a loan [or reward or advantage or benefit] to wit [*specify loan etc.*] as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with  
(iii) the transaction of business with [or a matter of business relating to] the government [*specify*] contrary *etc.*  
or

(iv) a claim against Her Majesty [or a benefit that Her Majesty is authorized or is entitled to bestow] to wit [*specify*] contrary *etc.*

### **121(1)(b) Conferring a benefit by person having dealings with government**

A.B. a person having dealings with the government of [*specify*] on ..... at ..... did, without the consent in writing of the head of the branch of that government, pay a commission to [or reward to or confer an advantage or benefit on] C.D. [or E.F. a member of the family of C.D. or G.H. for the benefit of C.D.] an official [or employee] of the government of [*specify*] with respect to those dealings contrary *etc.*

### **121(1)(c) Accepting a benefit from person having dealings with government**

C.D. being an official [or employee] of the government of [*specify*] on ..... at ..... did, for his benefit and without the consent in writing of the head of the branch of that government of which he is an official [or that employs him], demand [or accept or offer to accept or agree to accept] a commission [or reward or an advantage or benefit] of [*specify*] from A.B. a person having dealings with the government of [*specify*] contrary *etc.*

### **121(1)(d) Influence peddling**

C.D. a person having or pretending to have influence with the government [or with E.F. a minister of the government] of [*specify*] on ..... at ..... did demand [or accept or offer to accept or agree to accept] a commission [or reward or an advantage or benefit] of [*specify*] for himself [or G.H.] from A.B. as consideration for cooperation, assistance, exercise of influence or an act or omission [*specify*] in connection with  
the transaction of business with [or a matter of business relating to] the government [*specify*] contrary *etc.*  
or

a claim against Her Majesty [or a benefit that Her Majesty is authorized or is entitled to bestow] to wit [*specify*] contrary *etc.*

### **121(1)(e) Offering benefit for exercise of influence**

A.B. on ..... at ..... did give [or offer or agree to give or agree to offer] to C.D. a Minister [or official] of the government of [*specify*] as consideration for cooperation, assistance, exercise of influence or an act or omission [*specify*] in connection with

the transaction of business with [or a matter of business relating to] the government [specify] contrary *etc.*

*or*

a claim against Her Majesty [or a benefit that Her Majesty is authorized or is entitled to bestow] to wit [specify] contrary *etc.*

*or*

his appointment [or the appointment of E.F.] to an office to wit [specify] contrary *etc.*

**121(1)(f) Fraud in relation to government tenders**

A.B. having made a tender to obtain a contract [specify] with the government of [specify] on ..... at ..... did,

- (i) give [or offer to give] to C.D. [or E.F. a member of the family of C.D. or G.H. for the benefit of C.D.], a person who has also made a tender to obtain the contract, a reward [or an advantage or benefit] of [specify] as consideration for C.D. withdrawing his tender contrary *etc.*

*or*

- (ii) demand [or accept or offer to accept or agree to accept] from C.D. a person who has also made a tender to obtain the contract a reward [or an advantage or benefit] of [specify] as consideration for withdrawing his tender contrary *etc.*

**121(2) Contractor subscribing to election fund**

A.B. in order to obtain [or retain] a contract [specify] with the government of [specify] on ..... at ..... did subscribe [or give or agree to give or agree to subscribe] to C.D. the sum of [specify]

- (a) for the purpose of promoting the election of E.F. a candidate [or, specify class or party] to Parliament [or, specify provincial legislature] contrary *etc.*

*or*

- (b) with the intention of influencing or affecting the result of the election held [or to be held] on ..... for the purpose of electing persons to serve in Parliament [or, specify provincial legislature] contrary *etc.*

**122 Breach of trust by public officer**

A.B. on ..... at ..... being an official [specify nature of office] did commit a fraud [or a breach of trust] in connection with the duties of his office by [specify fraud or breach of trust] contrary *etc.*

**Municipal corruption**

**123(1) Corruption of municipal official**

- (a) A.B. on ..... at ..... did give [or offer or agree to give or agree to offer] to C.D. a municipal official to wit [specify nature of office]

*or*

- (b) C.D., being a municipal official [specify nature of office] on ..... at ..... did demand [or accept or offer to accept or agree to accept] from A.B.

a loan [or reward or advantage or benefit] to wit [specify loan *etc.*] as consideration for C.D.

*or*

- (c) abstaining from voting at a meeting of the municipal council [or specify committee of council e.g. the committee of adjustment] in relation to [specify e.g. severance of the property of A.B. at .....] contrary *etc.*

*or*

- (d) voting in favour of [or against] a measure [or motion or resolution] to wit [specify the measure, motion or resolution] contrary *etc.*

or

- (e) aiding [or procuring or preventing] the adoption of a measure [or motion or resolution] to wit [specify the measure, motion or resolution] contrary etc.

or

- (f) performing [or failing to perform] an official act, to wit, [specify] contrary etc.

### **123(2) Influencing municipal official**

- (a) A.B. being under a duty to disclose the truth did on ..... at ..... suppress the truth in relation to [specify]

or

- (b) A.B. on ..... at ..... by threats [or deceit] [specify]

or

- (c) A.B. on ..... at ..... by [specify unlawful means]

influenced or attempted to influence C.D. a municipal official to wit [specify nature of office] to abstain from voting at a meeting of the municipal council [or specify committee of council e.g. the committee of adjustment] in relation to [specify e.g. severance of the property of A.B. at .....] contrary etc.

or

vote in favour of [or against] a measure [or motion or resolution] to wit [specify the measure, motion or resolution] contrary etc.

or

aid in [or procure or prevent] the adoption of a measure [or motion or resolution] to wit [specify the measure, motion or resolution] contrary etc.

or

perform [or fail to perform] an official act, to wit [specify] contrary etc.

### **125 Influencing or negotiating appointments or dealing in offices**

- (a) A.B. on ..... at ..... did receive from C.D. [or agree to receive from C.D. or give to C.D. or agree to give to C.D. or procure to be given to C.D.] a reward [or an advantage or benefit] of [specify] as consideration for the cooperation [or assistance or exercise of influence] by [specify e.g. A.B. or C.D. as the case may be] to secure the appointment of [specify person to be appointed] to the office of [specify nature of office] contrary etc.

or

- (b) A.B. on ..... at ..... did in the expectation of a reward [or an advantage or benefit] of [specify] solicit [or recommend or negotiate] the appointment of C.D. to [or resignation of C.D. from] the office of [specify] contrary etc.

or

- (c) A.B. on ..... did without lawful authority keep premises at ..... for the purpose of transacting or negotiating business in relation to the filling of vacancies in [or the sale of or purchase of or the appointment to or resignation from] offices of [specify] contrary etc.

### **127 Disobeying court order**

A.B. on ..... at ..... did without lawful excuse disobey the lawful order made by [specify judge and court or other body authorized by an act of Parliament or the Legislature] to [specify order] contrary etc.

### **128(a) Misconduct of officers in executing process**

A.B. on ..... at ..... being a peace officer [or coroner] for [specify police force or as the case may be] and being entrusted with the execution of a process, to wit [specify process e.g. execution of a warrant of committal for C.D.] wilfully



(i) misconducted himself in the execution of that process contrary *etc.*

*or*

(ii) made a false return to that process contrary *etc.*

**129(a) Resisting or obstructing public or peace officer**

A.B. on ..... at ..... did resist [*or wilfully obstruct*] C.D. a public [*or peace*] officer to wit [*describe C.D., e.g., a police constable for the City of .....*] engaged in the execution of his duty [*specify act C.D. engaged in*] by [*specify manner of resistance or obstruction*] contrary *etc.*

*or*

E.F. a person acting in aid of C.D. [*a police constable for the City of .....*] engaged in the execution of his duty [*specify C.D.'s duty*] by [*specify manner of resistance or obstruction*] contrary *etc.*

**129(b) Omitting to assist peace officer**

A.B. on ..... at ..... did omit without reasonable excuse, to assist C.D., a public [*or peace*] officer to wit [*describe C.D.*] engaged in the execution of his duty in arresting E.F. [*or in preserving the peace*] after having reasonable notice that he was required to do so contrary *etc.*

**129(c) Obstructing or resisting bailiff, etc.**

A.B. on ..... at ..... did resist [*or wilfully obstruct*] C.D., a person engaged in the lawful execution of a process issued out of [*specify court*] against the lands [*or goods*] of A.B. [*or E.F.*] contrary *etc.*

*or*

C.D. a person engaged in the making of a lawful distress [*or seizure*] upon [*specify subject-matter*] contrary *etc.*

**130 Personating peace officer**

(a) A.B. on ..... at ..... did falsely represent himself to be a peace [*or public*] officer to wit [*specify, e.g., a police constable for the City of .....*] to C.D. contrary *etc.*

*or*

(b) A.B. on ..... at ..... not being a peace [*or public*] officer did use a badge [*or article of uniform or equipment*] to wit ..... in a manner that was likely to cause C.D. to believe that A.B. was [*specify, e.g., a police constable for the City of .....*] contrary *etc.*

**131 Perjury**

A.B. on ..... at ..... did commit perjury at the trial in the [*specify court and place and time of sitting*] between [*state full style of cause of the judicial proceeding*] by swearing falsely and with intent to mislead the court that [*recite evidence verbatim*] contrary *etc.*

*or*

A.B. on ..... at ..... being specially permitted [*or authorized or required*] by law to make a statement by affidavit [*or solemn declaration or solemn affirmation or orally under oath*] to wit [*specify, e.g., an affidavit under the Marriage Act*] did make a false statement to wit [*specify false statement, e.g., that he had not been previously married*] knowing that such statement was false contrary *etc.*

**134 Statements not specially permitted**

A.B. on ..... at ..... not being specially permitted, authorized or required by law to make a statement under oath or solemn affirmation, did make such a statement, by affidavit [*or solemn declaration or disposition or orally*] to wit [*specify*] before C.D. who was

authorized by law to permit it to be made before him, knowing that the statement was false contrary *etc.*

### 136 Witness giving contradictory evidence

A.B. on ..... at ..... being a witness at [*specify judicial proceeding e.g. the trial of C.D. on a charge of first degree murder before the Honourable Madam Justice Smith in the Court of Queens Bench*] gave evidence that [*specify testimony of matter of fact or knowledge*] which was contrary to the evidence he gave on ..... at ..... while a witness at [*specify earlier judicial proceeding e.g. the preliminary hearing of C.D. on a charge of first degree murder before His Honour Judge Jones in the Manitoba Provincial Court*] contrary *etc.*

### 137 Fabricating evidence

A.B. on ..... at ..... did with intent to mislead fabricate [*specify item fabricated, e.g., a photograph*] with intent that it should be used as evidence in an existing [*or proposed*] judicial proceeding contrary *etc.*

### 138(a) Swearing pretended affidavit

A.B. on ..... at ..... did sign a writing that purported to be an affidavit [*or statutory declaration*] subscribed to by C.D. and dated the ..... day of ....., 19 ....., and to have been sworn [*or declared*] before him when the writing was not so sworn [*or declared*] contrary *etc.*

*or*

A.B. on ..... at ..... did unlawfully sign a writing that purported to be an affidavit [*or statutory declaration*] subscribed to by C.D. and dated the ..... day of ....., 19 ....., when he knew that he had no authority to administer the oath [*or declaration*] contrary *etc.*

### 138(b) Using pretended affidavit

A.B. on ..... at ..... did [*offer for*] use a writing that purported to be an affidavit [*or statutory declaration*] dated the ..... day of ....., 19 .....,

[a] that he knew was not sworn [*or declared*] by C.D. the affiant [*or declarant*] therein contrary *etc.*

*or*

[b] that he knew was not sworn [*or declared*] before a person authorized to administer the oath [*or declaration*] contrary *etc.*

### 138(c) Signing pretended affidavit

A.B. on ..... at ..... did sign a writing that purported to be an affidavit dated the ..... day of ....., 19 ....., and to have been sworn [*or declared*] before C.D. by him as affiant [*or declarant*] when the writing was not so sworn contrary *etc.*

### 139(1) Obstructing justice

A.B. on ..... at ..... did wilfully attempt to obstruct [*or pervert or defeat*] the course of justice in a judicial proceeding by [*specify act done*] contrary *etc.*

### 140(1) Public Mischief

A.B. on ..... at ..... did commit public mischief in that with intent to mislead he caused C.D. a peace officer [*describe C.D., e.g., a police constable for the City of .....*] to enter upon [*or continue*] an investigation by

(a) making a false statement to [*specify*] that accused E.F. of having committed the offence of [*specify offence*] contrary *etc.*

or

- (b) [specify act done by A.B., e.g., placing counterfeit twenty dollar bills in the seat lining of E.F.'s automobile], which act was intended to cause E.F. to be suspected of having committed an offence which E.F. had not committed [or to divert suspicion from himself] contrary *etc.*

or

- (c) reporting that the offence ..... had been committed when it had not been committed contrary *etc.*

or

- (d) reporting [or making it known] that he had died [or that E.F. had died when E.F. had not died] contrary *etc.*

#### 141 Compounding indictable offence

A.B. on ..... at ..... did ask for [or obtain or agree to receive or obtain] [specify valuable consideration, e.g., the sum of fifty dollars] from C.D. for himself [or E.F.] by agreeing to compound [or conceal] the indictable offence of ..... committed by the said C.D. [or X.Y.] contrary *etc.*

#### 142 Corruptly taking reward for recovery of goods

A.B. on ..... at ..... did corruptly and directly [or indirectly] accept a valuable consideration from C.D. to wit [specify consideration, e.g., the sum of fifty dollars] under pretence [or upon account] of helping C.D. [or E.F.] to recover [specify article] obtained by the commission of an indictable offence to wit [specify offence, e.g., robbery] contrary *etc.*

#### 143 Advertising reward and immunity

- (a) A.B. on ..... at ..... did publicly advertise a reward of [specify] for the return of stolen [or lost] goods to wit [specify] and in the said advertisement used words indicating that no questions would be asked if the goods were returned, contrary *etc.*

- (b) A.B. on ..... at ..... did use words in a public advertisement indicating that a reward [specify] would be given or paid for stolen [or lost] goods to wit [specify] and that there would be no interference with or inquiry about the person producing the goods contrary *etc.*

- (c) A.B. on ..... at ..... promised [or offered] in a public advertisement to return to anyone who has advanced money by way of loan on [or has bought] stolen [or lost] goods [specify] the money which was advanced [or paid or any other sum of money], for the return of those goods contrary *etc.*

- (d) A.B. on ..... at ..... did print [or publish] an advertisement that a reward of [specify] would be given or paid for the return of stolen [or lost] goods to wit [specify] which advertisement used words indicating that no questions would be asked if the goods were returned contrary *etc.*

or

a reward [specify] would be given or paid for stolen [or lost] goods to wit [specify] and that there would be no interference with or inquiry about the person producing the goods contrary *etc.*

or

promised [or offered] to return to anyone who had advanced money by way of loan on [or has bought] stolen [or lost] goods [specify] the money which was advanced [or paid or any other sum of money] for the return of those goods contrary *etc.*

#### 144 Prison-breach

A.B. on ..... at ..... did by force [or violence] break a prison to wit [specify prison] with intent to set at liberty himself [or C.D. a person confined therein] contrary *etc.*



or

A.B. on ..... at ..... did with intent to escape forcibly break out of [or make a breach in] a cell [or *specify other place*] within a prison to wit [specify prison] in which he was confined contrary *etc.*

**145(1)(a) Escape from lawful custody**

A.B. on ..... at ..... did escape from lawful custody at [specify manner of custody] contrary *etc.*

**145(1)(b) Being unlawfully at large**

A.B. on ..... at ..... was, before the expiration of a term of imprisonment to which he was sentenced, at large within Canada without lawful excuse contrary *etc.*

**145(2) Failing to attend court when at large on undertaking or recognizance: failing to surrender**

A.B. on ..... at ..... unlawfully

- [a] did being at large on his undertaking [or recognizance] given to [or entered into before] a justice [or a judge] without lawful excuse fail to attend Court [specify Court, e.g., Courtroom 21, 1000 Eagle Street] in accordance therewith, contrary *etc.*

or

- [b] [did, fail to surrender himself in accordance with the order of [here specify Judge] at [specify place of surrender] contrary *etc.*

or

A.B. on ..... at ..... having appeared before a Court [or justice or judge] to wit [specify, e.g., Provincial Court Judge C.D.] on [specify date of last appearance] did unlawfully fail to attend Court on [specify date that failed to appear] at ..... as required by the said Court [or justice or judge] contrary *etc.*

**145(3) Failing to comply with condition of undertaking or recognizance**

A.B. on ..... at ..... did being at large on his undertaking [or recognizance] given to [or entered into before] a justice [or judge] and being bound to comply with a condition of that undertaking [or recognizance] directed by the said justice [or judge] fail without lawful excuse to comply with that condition to wit: [specify condition, e.g., abstain from the consumption of alcohol] contrary *etc.*

**145(4) Failing to appear or to comply with summons**

A.B. having been served with a summons did fail without lawful excuse

- [a] to appear on ..... at ..... for the purposes of the Identification of Criminals Act in accordance therewith, contrary *etc.*

or

- [b] to attend on ..... at [specify courtroom] in accordance therewith, contrary *etc.*

**145(5) Failing to appear or to comply with appearance notice, promise to appear or recognizance**

A.B. on ..... at ..... unlawfully did having been named in an appearance notice [or promise to appear or recognizance entered into before an officer in charge] that has been confirmed by a justice under s. 508 of the Criminal Code fail without lawful excuse

- [a] to appear in accordance therewith on ..... at ..... for the purposes of the Identification of Criminals Act, contrary *etc.*

or

- [b] [to attend court in accordance therewith by not appearing in [specify courtroom] on ..... contrary *etc.*

**146 Escape: permitting, assisting in, or procuring**

A.B. on ..... at ..... did

- (a) permit C.D. whom he had in lawful custody to escape by failing to perform a legal duty imposed on him to wit [*specify failure of specific legal duty*] contrary *etc.*  
or
- (b) convey [*or cause to be conveyed by E.F.*] [*specify item, e.g., a revolver*] into [*specify prison*] with intent to facilitate the escape of C.D. imprisoned therein contrary *etc.*  
or
- (c) direct [*or procure*] under colour of pretended authority [*specify pretended authority*] the discharge of C.D., a prisoner not entitled to be discharged contrary *etc.*

**147(a) Escape: Rescuing or assisting**

A.B. on ..... at ..... did

rescue C.D. from unlawful custody to wit [*specify manner of custody*] contrary *etc.*

or

assist C.D. in escaping [*or attempting to escape*] from lawful custody to wit [*specify manner of custody*] contrary *etc.*

**147(b) Escape: peace officer permitting**

A.B. on ..... at ..... did

being a peace officer to wit [*describe A.B., e.g., a police officer for the City of .....,*] wilfully permit C.D., a person in his lawful custody, to escape contrary *etc.*

**147(c) Escape: prison officer permitting**

A.B. on ..... at ..... did

being an officer of [*or an employee in*] a prison to wit [*specify prison*] wilfully permit C.D. to escape from lawful custody therein contrary *etc.*

**151 Sexual interference**

A.B., on ..... did for a sexual purpose touch C.D. a person under the age of fourteen years directly [*or indirectly*]

- [a] with a part of his body, to wit [*specify the part of the body*] contrary *etc.*

or

- [b] with an object, to wit [*specify the object*] contrary *etc.*

**152 Invitation to sexual touching**

A.B. on ..... did for a sexual purpose invite [*or counsel or incite*] C.D. a person under the age of fourteen years to touch directly [*or indirectly*] with a part of his body [*or with an object*] to wit [*specify the part of the body or the object used*] the body of A.B. [*or the said C.D. or E.F. as the case may be*] contrary *etc.*

**153 Sexual exploitation**

A.B. on ..... being in a position of trust or authority towards C.D. a young person, [*or being a person with whom C.D., a young person, was in a relationship of dependency*] did

- (a) for a sexual purpose, touch directly [*or indirectly*] the body of C.D., a young person, with a part of his body [*or with an object*] to wit [*specify the part of the body of A.B. or the object used*] contrary *etc.*

or

- (b) for a sexual purpose invite [*or counsel or incite*] C.D. a young person to touch directly [*or indirectly*] with a part of his body [*or with an object*] to wit [*specify the part of the body or the object used*] the body of A.B. [*or the said C.D. or E.F. as the case may be*] contrary *etc.*

**155 Incest****Single charge**

A.B. on ..... at ..... did have sexual intercourse with C.D. while knowing that C.D. was his [or her] [*specify blood relationship e.g., daughter*] contrary *etc.*

**Joint charge**

A.B. and C.D. on ..... at ..... did have sexual intercourse with each other while knowing that they were related by blood relationship to wit [*specify blood relationship e.g., father and daughter*] contrary *etc.*

**159 Anal intercourse**

A.B. on ..... at ..... did engage in an act of anal intercourse with C.D. contrary *etc.*

**160(1) Bestiality**

A.B. on ..... at ..... did commit bestiality with [*specify e.g., an animal e.g. a cow*] contrary *etc.*

**160(2) Compelling bestiality**

A.B. on ..... at ..... did compel C.D. to commit bestiality with [*specify e.g., an animal e.g. a cow*] contrary *etc.*

**160(3) Bestiality in presence of person under fourteen years etc.**

A.B. on ..... at ..... did commit bestiality with [*specify e.g., an animal e.g. a cow*] in the presence of C.D. a person under the age of fourteen years contrary *etc.*

*or*

A.B. on ..... at ..... did incite C.D., a person under the age of fourteen years, to commit bestiality with [*specify e.g., an animal e.g. a cow*] contrary *etc.*

**161(4) Breach of Prohibition Order in Relation to Children**

A.B. on ..... at ..... being a person bound by an Order of Prohibition made on ..... at ..... by [*specify judge who made order*] prohibiting him from [*specify terms of Order eg. attending a public park or public swimming area where persons under the age of 14 are present or can reasonably be expected to be present etc.*] did fail to comply with the said Order by [*specify nature of failure to comply eg. attending the public park at 1000 Eagle Street where persons under the age of 14 were present*] contrary *etc.*

**163(1)(a) Obscene matter****Making, etc.**

A.B. on ..... at ..... did make [or print or publish or distribute or circulate] obscene matter [or an obscene picture or model or phonograph record *etc.*] to wit [*specify item*] contrary *etc.*

*or*

**Possessing**

A.B. on ..... at ..... unlawfully did have in his possession for the purpose of publication [or distribution or circulation] obscene written matter [or an obscene picture or model or phonograph record *etc.*] to wit [*specify item*] contrary *etc.*

**163(1)(b) Crime Comics****Making, etc.**

A.B. on ..... at ..... did make [or print or publish or distribute] a crime comic to wit [*specify comic*] contrary *etc.*



or

**Possessing**

A.B. on ..... at ..... did have in his possession for the purpose of publication [or distribution or circulation] a crime comic to wit [specify comic] contrary etc.

**163(2) Obscene matter: selling, exposing or exhibiting**

A.B. on ..... at ..... knowingly and without lawful justification or excuse did

[a] sell [or expose to public view or have in his possession for the purpose of selling (or exposing to public view)] obscene written matter [or an obscene picture or model or phonograph record etc.] to wit [specify item] contrary etc.

or

[b] publicly exhibit a disgusting object [or an indecent show] to wit [specify object or show] contrary etc.

**163.1(2) Child Pornography: Printing and publishing**

A.B. on ..... at ..... did make [or print or publish or have in his possession for the purpose of publication] child pornography to wit [specify item] contrary etc.

**163.1(3) Child Pornography: Importing and distributing**

A.B. on ..... at ..... did import [or distribute or sell or have in his possession for the purpose of distribution or sale] child pornography to wit [specify item] contrary etc.

**163.1(4) Child Pornography: Possession**

A.B. on ..... at ..... did have in his possession child pornography to wit [specify item] contrary etc.

**165 Tied sale**

A.B. on ..... at ..... did refuse to sell [or supply] to C.D. copies of a publication to wit [specify publication] because C.D. refused to purchase [or acquire] from A.B. copies of another publication to wit [specify] which publication C.D. was apprehensive of being obscene [or a crime comic] contrary etc.

**167 Immoral theatrical performance**

A.B. on ..... at ..... being the lessee [or manager or agent or person in charge] of a theatre to wit [specify] did present [or give or allow to be presented therein] an immoral [or indecent or obscene] performance [or entertainment or representation] to wit [specify] contrary etc.

or

A.B. on ..... at ..... did unlawfully take part [or appear as an actor or performer or assistant (state capacity)] in an immoral [or indecent or obscene] performance [or entertainment or representation] to wit [specify, e.g., a play] in a theatre to wit [specify] contrary etc.

**168 Obscene matter: mailing**

A.B. on ..... at ..... did make use of the mails for the purpose of transmitting [or delivering] obscene [or indecent or scurrilous] matter to wit [specify item mailed] contrary etc.

**170 Parent or guardian procuring sexual activity**

A.B. on ..... at ..... being the parent [or guardian] of C.D., a person under the age of eighteen years, did procure the said C.D. for the purpose of engaging in

sexual activity to wit [*specify the prohibited sexual activity e.g. anal intercourse*] prohibited by section [*specify the section number e.g. 159*] of the Criminal Code, with E.F. contrary *etc.*

### **171 Householder permitting sexual activity**

A.B. on ..... at .....

(a) being the owner [*or occupier or manager*] of premises to wit [*specify*]  
*or*

(b) having control [*or assisting in the management (or control)*] of premises to wit [*specify*]  
did knowingly permit C.D., a person aged [*specify age under eighteen years*] to resort to [*or to be in or upon*] such premises for the purpose of engaging in sexual activity to wit [*specify the prohibited sexual activity e.g. anal intercourse*] prohibited by section [*specify the section number e.g. 159*] of the Criminal Code, thereby committing an offence contrary *etc.*

### **173(1) Indecent acts**

A.B. on ..... at ..... wilfully did an indecent act to wit [*specify act, e.g., expose his private person*]

(a) in a public place to wit [*specify*] in the presence of C.D. [*or of one or more persons*]  
contrary *etc.*

*or*

(b) at [*specify place*] with intent thereby to insult [*or offend*] C.D. contrary *etc.*

### **173(2) Exposure to person under age of fourteen years**

A.B. on ..... at ..... did for a sexual purpose expose his [*or her*] genital organs to C.D. a person under the age of fourteen years contrary *etc.*

### **174(1) Nudity**

A.B. on ..... at ....., without lawful excuse was

(a) nude in a public place to wit [*specify the place*] contrary *etc.*

*or*

(b) exposed to public view while nude on private property to wit [*specify the place*] contrary  
*etc.*

### **175(1) Causing disturbance; indecent exhibition; loitering**

A.B. on ..... at .....

(a) not being in a dwelling house did cause a disturbance in or near a public place to wit [*specify*]

(i) by fighting [*or screaming or shouting or swearing or singing or using insulting (or obscene) language*] contrary *etc.*

*or*

(ii) by being drunk contrary *etc.*

*or*

(iii) by impeding [*or molesting*] other persons contrary *etc.*

(b) did openly expose [*or exhibit*] an indecent exhibition to wit [*specify*] in a public place to wit [*specify*] contrary *etc.*

*or*

(c) did loiter in a public place to wit [*specify*] and obstruct persons who were there contrary  
*etc.*

*or*

(d) did disturb the peace and quiet of the occupants of a dwelling house to wit [*specify address*] by discharging firearms [*or specify type of disorderly conduct*] in a public place to wit [*specify*] contrary *etc.*

or

not being an occupant thereof did disturb the peace and quiet of the occupants of a dwelling house [*specify address*] comprised in a structure [*specify address*] by discharging firearms [*or specify disorderly conduct*] in a part of the said structure contrary *etc.*

**176(1)(a) Obstructing officiating clergyman**

A.B. on ..... at ..... did by threats [*or force*] unlawfully obstruct [*or prevent or endeavour to obstruct or endeavour to prevent*] C.D., a clergyman [*or minister*], from celebrating divine service [*or performing the function of*] ..... in connection with his calling] contrary *etc.*

**176(1)(b) Violence to or arrest of officiating clergyman**

A.B. on ..... at ..... did knowing that C.D., a clergyman [*or minister*], was about to perform [*or on his way to perform or returning from performing*] a divine service [*or the function of*] ..... in connection with his calling] assaulted [*or offered violence to or arrested upon a civil process or arrested under the pretense of executing a civil process*] the said C.D. contrary *etc.*

**177 Trespassing or prowling at night near dwelling**

A.B. on ..... at ..... without lawful excuse did loiter [*or prowl*] at night upon the property of C.D. situate at [*specify address*] near a dwelling house situated thereon contrary *etc.*

**178 Offensive volatile substances and stench bombs**

A.B. on ..... at ....., not being a peace officer engaged in the discharge of his duty, did have in his possession in a public place to wit [*specify*]

or

did unlawfully deposit [*or throw or inject or cause to be deposited or thrown or injected in or into or near (specify place, e.g., a theatre)*]

- (a) an offensive volatile substance that was likely to alarm [*or inconvenience or discommode or cause discomfort to*] [*or to cause damage to property*] contrary *etc.*
- (b) a stink or stench bomb [*or a device from which an offensive volatile substance was (or was capable of being) liberated*] contrary *etc.*

**179(1)(a) Vagrancy: Living off gaming or crime**

A.B. having no lawful profession or calling by which to maintain himself, did within the period between the ..... day of ..... 19 ..... and the ..... day of ..... 19 ..... support himself in whole [*or in part*] by gaming [*or crime*] contrary *etc.*

**180(1) Common nuisance**

- (a) A.B. on ..... at ..... did commit a common nuisance by [*specify unlawful act done or legal duty not complied with, e.g., by discharging a tear gas bomb in the Theatre on First St.*] and did thereby endanger the lives [*or safety or health or property or comfort*] of the public contrary *etc.*

or

- (b) A.B. on ..... at ..... did commit a common nuisance and thereby did cause physical injury to C.D. by [*specify unlawful act or legal duty not complied with*] contrary *etc.*

**182(a) Dead body: neglect duty**

A.B. on ..... at ..... did neglect, without lawful excuse, to perform a duty imposed upon him by law [*or that he undertook*] with reference to the burial of the human



remains of C.D. to wit [*specify legal duty or duty undertaken, e.g., to bury the body of his wife C.D.*] contrary *etc.*

### **182(b) Dead body: indignity to**

A.B. on ..... at ..... did improperly [*or indecently*] interfere with [*or offer an indignity to*] the human remains of C.D. by [*specify interference or indignity*] contrary *etc.*

### **184 Interception of private communication**

A.B. on ..... at ..... by means of an electromagnetic [*or acoustic or mechanical*] device to wit [*specify type etc.*] wilfully intercepted a private communication by telephone [*or radio-telephone or orally, etc.*] between C.D. and E.F. contrary *etc.*

### **191(1) Possession of devices for surreptitious interception of private communication**

A.B. on ..... at ..... unlawfully did possess [*or sell or purchase*] an electromagnetic device [*or acoustic device or mechanical device, or component of an electromagnetic device etc.*] knowing that the design thereof rendered it primarily useful for the surreptitious interception of private communications, to wit: [*describe device or component*], contrary *etc.*

### **193(1) Disclosure of private communication**

A.B. on ..... at ..... without the express consent of C.D. the originator thereof, or of E.F. the person C.D. intended to receive it, wilfully used [*or disclosed*] a private communication between the said C.D. and E.F. contrary *etc.*

### **201(1) Common gaming or betting house: keeping**

A.B. on ..... at ..... did keep a common gaming [*or betting*] house at [*specify address*] contrary *etc.*

### **201(2)(a) Common gaming or betting house: found in**

A.B. on ..... at ..... was found, without lawful excuse, in a common gaming [*or betting*] house to wit [*specify address*] contrary *etc.*

### **201(2)(b) Common gaming or betting house: owner, etc.**

A.B. on ..... at ..... being the owner [*or landlord or lessor or tenant or occupier or agent*] of a place known as [*specify address*] did knowingly permit such place to be let [*or used*] for the purposes of a common gaming [*or betting*] house contrary *etc.*

### **202(1) Betting, pool-selling, book-making, etc.**

A.B. on ..... at .....

(a) did use [*or allow to be used*] a place under his control to wit [*specify address*] for the purpose of recording [*or registering*] bets [*or selling a pool*] contrary *etc.*

*or*

(b) did import [*or make or buy or sell or rent or lease or hire or keep or exhibit or employ or knowingly allow to be kept or exhibited or employed in a place under his control to wit (specify address)*] a device [*or apparatus*] for the purpose of recording [*or registering*] bets [*or selling a pool*] [*or a machine or device for gambling or betting to wit (specify)*] contrary *etc.*

*or*

(c) did have under his control a sum of money [*or specify other property*] relating to [*specify an offence under s. 202(1), e.g., pool-selling*] contrary *etc.*

*or*

(d) did unlawfully record [*or register*] a bet [*or sell a pool*] to wit (*specify e.g., on the result of a horse race at .....*) ] contrary *etc.*

or

- (e) did engage in pool-selling [or book-making or the business or occupation of betting] [or did make an agreement for the purchase (or sale) of betting (or gaming) privileges or for the purchase (or sale) of information that was intended to assist in book-making (or pool-selling or betting) to wit (*specify subject matter of agreement*)] contrary *etc.*

**NOTE:** Section 202(1)(f) to (j) relate to offences as follows:

- (f) printing or providing book-making, pool-selling or betting information on horse-races, fights, games or sports;  
(g) importing information or writing to promote gambling, book-making, pool-selling or betting;  
(h) advertising, printing, publishing, exhibiting or posting up for contests;  
(i) sending, transmitting or delivering messages by radio, telegraph, telephone, mail or express that convey information relating to these matters;  
(j) aiding or assisting in anything that is an offence under this section.

**203(a) Betting: off-track**

A.B. on ..... at ..... did place [or offer to place or agree to place] a bet on behalf of C.D., to wit ..... for a consideration paid [or to be paid] by or on behalf of C.D. contrary *etc.*

**206(1)(a) Lottery scheme: publishing**

A.B. on ..... at ..... did make [or print or advertise or publish or cause to be made or printed or advertised or published] a proposal [or scheme or plan] for advancing [or lending or giving or selling] the disposal of property to wit [*specify property, e.g., an automobile*] by lots [or cards or tickets (*or specify other mode of chance*)] contrary *etc.*

**209 Cheating at play**

A.B. on ..... at ..... did, with intent to defraud C.D., cheat while playing the game of ..... [or in holding the stakes for a game of ..... or in betting (*specify, e.g., on a horse-race at etc.*)] contrary *etc.*

**210(1) Common bawdy-house: keeping**

A.B. on ..... at ..... did keep a common bawdy-house located at [*specify address*] contrary *etc.*

**210(2)(a) Common bawdy-house: Inmate**

A.B. on ..... at ..... was an inmate of a common bawdy-house at [*specify address*] contrary *etc.*

**210(2)(b) Common bawdy-house: Found in**

A.B. on ..... at ..... was found without lawful excuse in a common bawdy-house at [*specify address*] contrary *etc.*

**210(2)(c) Common bawdy-house: Owner, etc.**

A.B. on ..... at ..... being the owner [or landlord or tenant or occupier or having charge or control] of premises [*specify address*] did knowingly permit [a part of] such premises to be let [or used] for the purposes of a common bawdy-house contrary *etc.*

**211 Common bawdy-house: transporting person to**

A.B. on ..... at ..... did knowingly take [or transport or direct or offer to take or transport or direct] C.D. to a common bawdy-house at [*specify address*] contrary *etc.*

**212(1) Procuring**

A.B. on ..... at ..... did

- (a) procure [or attempt to procure or solicit] C.D. to have illicit sexual intercourse with E.F. at [specify address] contrary *etc.*
- (b) inveigle [or entice] C.D., not a prostitute [or not of known immoral character], to a common bawdy-house [or house of assignation] at [specify address] for the purpose of illicit sexual intercourse [or prostitution] contrary *etc.*
- (c) knowingly conceal C.D. in a common bawdy-house [or house of assignation] at [specify address] contrary *etc.*
- (d) procure [or attempt to procure] C.D. to become a prostitute contrary *etc.*
- (g) procure C.D. to enter [or leave] Canada for the purpose of prostitution contrary *etc.*
- (h) for the purpose of gain, exercise control [or direction or influence] over the movements of C.D. in such manner as to show that he was aiding [or abetting or compelling] C.D. to engage in [or carry on] prostitution with E.F. [or generally] contrary *etc.*
- (i) apply [or administer] to C.D. [or cause C.D. to take] a drug [or intoxicating liquor or specify item] with intent to stupefy [or overpower] him and to enable himself [or E.F.] to have illicit sexual intercourse with him contrary *etc.*

**212(1)(j) Living on avails of prostitution**

A.B. at ..... between the ..... day of ..... 19 ....., and the ..... day of ..... 19 ....., did live wholly [or partly] on the avails of prostitution of C.D. [a person under the age of eighteen years] contrary *etc.*

**212(4) Juvenile prostitution**

A.B. on ..... at ..... did obtain [or attempt to obtain] for consideration, the sexual services of C.D., a person under the age of eighteen years, contrary *etc.*

**213(1) Prostitution offences**

A.B. on ..... at ..... a public place [or a place open to public view] did

- (a) stop [or attempt to stop] motor vehicles  
or
- (b) impede the free flow of pedestrian traffic [or vehicular traffic or ingress to adjacent premises to wit ..... or egress from adjacent premises to wit .....]  
or
- (c) stop [or attempt to stop or communicate with or attempt to communicate with] another person  
for the purpose of engaging in prostitution [or of obtaining the sexual services of a prostitute] contrary *etc.*

**215(2)(a) Necessaries of life: failure to provide to child or spouse**

A.B. on ..... [or between the ..... day of ..... 19 ..... and the ..... day of ..... 19 ..... ] at ....., being the parent of C.D. a child under the age of sixteen years [or the spouse of E.F.], did fail without lawful excuse to provide the necessities of life to C.D. [or E.F.]

- (i) C.D. [or E.F.] then being in destitute [or necessitous] circumstances contrary *etc.*

or

- (ii) and did thereby endanger the life of C.D. [or E.F.] contrary *etc.*

or

thereby causing [or being likely to cause] the health of C.D. [or E.F.] to be endangered permanently contrary *etc.*

**215(2)(b) Necessaries of life: failure to provide to person under charge**

A.B. on ..... [or between the ..... day of ..... 19 ..... and the ..... day of ..... 19 ..... ] at ..... did fail without lawful excuse to provide the necessities of life to C.D., a person under his charge and unable, by reason of detention [or age or illness or insanity or specify other reason] to withdraw himself



from such charge, and to provide himself with such necessities and did thereby endanger the life of C.D. [or cause or likely cause the health of C.D. to be injured permanently] contrary *etc.*

**218 Abandoning child**

A.B. on ..... at ..... did unlawfully abandon [or expose] C.D., a child under the age of ten years, and did thereby endanger its life [or which abandoning or exposing was likely to endanger its life] contrary *etc.*

*or*

A.B. on ..... at ..... did unlawfully abandon [or expose] C.D., a child under the age of ten years, which abandoning [or exposing] permanently injured [or was likely to permanently injure] its health contrary *etc.*

**220 Criminal negligence causing death**

A.B. on ..... at ..... did by criminal negligence to wit [specify act done or duty not complied with, e.g., by operating a motor vehicle at an excessive rate of speed on First St.] cause the death of C.D. contrary *etc.*

**221 Criminal negligence causing bodily harm**

A.B. on ..... at ..... did by criminal negligence to wit [specify act done or duty not complied with, e.g., by administering drug "A" for drug "B"] cause bodily harm to C.D. contrary *etc.*

*or*

A.B. on ..... at ..... was criminally negligent in the operation of a motor vehicle on [name of street] and did thereby cause bodily harm to C.D. contrary *etc.*

**233 Infanticide**

A.B., a female person, on ..... at ..... did cause the death of her newly-born child by a wilful act [or omission] to wit [specify act or omission, e.g., by suffocation] contrary *etc.*

**234 Manslaughter**

A.B. on ..... at ..... did unlawfully kill C.D. and thereby commit manslaughter contrary *etc.*

**235(1) Murder**

A.B. on ..... at ..... did commit first degree [or second degree] murder on the person of C.D. contrary *etc.*

**239 Attempted murder**

A.B. on ..... at ..... did attempt to murder C.D. [specify means used] contrary *etc.*

**240 Accessory after fact to murder**

A.B. on ..... at ..... knowing that C.D. had murdered E.F. did receive [or comfort or assist] C.D. for the purpose of enabling C.D. to escape contrary *etc.*

**241(a) Suicide: counselling**

A.B. on ..... at ..... counsel C.D. to commit suicide contrary *etc.*

**241(b) Suicide: aiding or abetting**

A.B. on ..... at ..... did unlawfully aid [or abet] C.D. to commit suicide contrary *etc.*

**243 Concealing body of child**

A.B. on ..... at ..... did dispose of the dead body of a child with intent to conceal the fact that she [or C.D.] had been delivered of it by [*specify manner of disposal, e.g., secretly burying it*] contrary *etc.*

**244 Discharging firearm with intent**

A.B. on ..... at ..... with intent

(a) to wound [or maim or disfigure] C.D.

*or*

(b) to endanger the life of C.D.

*or*

(c) to prevent the arrest [or detention] of E.F.

did discharge a firearm [or air-gun or air pistol] at C.D. [or any other person] contrary *etc.*

**245 Bodily harm: administering noxious thing**

A.B. on ..... at ..... did administer [or cause to be administered] to C.D. [or cause C.D. to take] poison [or a destructive or noxious thing] to wit [*specify*] with intent thereby

(a) to endanger the life of [or cause bodily harm to] C.D. contrary *etc.*

*or*

(b) to aggrieve [or annoy] C.D. contrary *etc.*

**246 Bodily harm: overcoming resistance to commission of offence**

A.B. on ..... at ..... with intent to enable [or assist] himself [or C.D.] to commit the indictable offence of ..... did

(a) attempt to choke [or suffocate or strangle] C.D. by [*specify means used, e.g., a light cord*] contrary *etc.*

*or*

attempt to render C.D. insensible [or unconscious or incapable of resistance] by choking [or suffocating or strangling] C.D. with [*specify means used*] contrary *etc.*

*or*

(b) administer [or cause to be administered or attempt to administer] to C.D. [or cause or attempt to cause C.D. to take] a stupefying [or overpowering] drug [or *specify other matter or thing*] contrary *etc.*

**247 Bodily harm: setting trap likely to cause**

A.B. on ..... at ..... with intent to cause death [or bodily harm] to any person did set [or place or caused to be set or placed] a trap [or device] to wit [*specify or describe, e.g., a spring gun*] which trap [or device] was likely to cause death [or bodily harm] to such person contrary *etc.*

**249(1) Dangerous operation**

(a) A.B. on ..... at ..... did operate a motor vehicle on a street [or road or highway or public place] to wit [*specify time and place*] in a manner that was dangerous to the public contrary *etc.*

*or*

(b) A.B. on ..... at ..... did operate a vessel [or water skis or surf board or water sled or *specify other towed object*] on [or over] the internal waters of Canada [or the territorial sea of Canada] to wit [*specify, e.g., Lake Ontario*] in a manner that was dangerous to the public contrary *etc.*

or

(b),(d) A.B. on ..... at ..... did operate an aircraft *or* railway equipment in a manner that was dangerous to the public in that he did [*specify dangerous operation*] contrary *etc.*

**249(3) Dangerous operation causing bodily harm**

**NOTE:** Where the dangerous operation has caused bodily harm, prior to the word “contrary” in (a), (b), or (c), (d) insert “and thereby caused bodily harm to C.D.”

**249(4) Dangerous operation causing death**

**NOTE:** Where the dangerous operation has caused death, prior to the word “contrary” in (a), (b), or (c), (d) insert “and thereby caused the death of C.D.”

**250(1) Vessel: failure to keep watch on person being towed**

A.B. on ..... at ..... did navigate [*or operate*] a vessel on [*specify waters, e.g., Lake Ontario*] while towing C.D. on water skis [*or a surf board or a water sled or describe other towed object*] when there was not on board such vessel another responsible person keeping watch on C.D. contrary *etc.*

**250(2) Vessel: Towing person after dark**

A.B. on ..... at ..... did navigate [*or operate*] a vessel on [*specify waters*] while towing C.D. on water skis [*or a surf board or water sled or specify towed object*] during the period from one hour after sunset to sunrise to with at [*specify time*] contrary *etc.*

**252 Failure to stop at scene of accident**

A.B. on ..... at ..... having the care [*or charge or control*] of a vehicle [*or vessel or aircraft*] to wit [*describe vehicle, vessel or aircraft*] that was involved in an accident with C.D. [*or with a vehicle or with a vessel or with an aircraft or with cattle in the charge of C.D.*] at [*specify place of accident*] with intent to escape civil or criminal liability did fail to stop his vehicle [*or vessel or aircraft*] give his name and address [*and offer assistance to C.D. an injured party or offer assistance to E.F. a person who appeared to require assistance*] contrary *etc.*

**253(a); 255(2),(3) Operating while impaired**

A.B. on ..... at ..... while his ability to operate a motor vehicle [*or vessel or aircraft or railway equipment*] was impaired by alcohol [*or a drug*] did operate [*or did have the care or control of a vessel or did operate an aircraft or railway equipment or assist in the operation of an aircraft or railway equipment*] [*specify particulars of motor vehicle, vessel or aircraft*] contrary *etc.*

**NOTE:** Where the impaired operation caused bodily harm or death and the increased liability as provided by s. 255(2) or (3) is sought then prior to the word “contrary” insert the following “and thereby caused bodily harm to C.D. [*or the death of C.D.*]”

**253(b) Operation with over 80 mgs. of alcohol**

A.B. on ..... at ..... having consumed alcohol in such a quantity that the concentration thereof in his blood exceeded eighty milligrams of alcohol in one hundred millilitres of blood did operate a motor vehicle [*or did have care or control of a motor vehicle or did operate a vessel or did have care or control of a vessel or did operate an aircraft or railway equipment or did assist in the operation of an aircraft or railway equipment*], to wit .... contrary *etc.*

**254(2),(5) Approved screening: sample not provided on demand**

A.B. on ..... at ..... did without reasonable excuse fail [*or refuse*] to comply with a demand made to him by C.D., a peace officer under s. 254(2) of the Criminal Code



- [a] to provide forthwith a sample of his breath as in the opinion of C.D. was necessary to enable a proper analysis of his breath to be made by means of an approved screening device *etc.*

*or*

- [b] to accompany the said C.D. for the purpose of enabling a sample of the breath of the said A.B. as in the opinion of C.D. was necessary to be taken for analysis by means of an approved screening device *etc.*

**254(3),(5) Breath sample: not provided upon demand**

A.B. on ..... at ..... did without reasonable excuse fail [*or* refuse] to comply with a demand made to him by C.D., a peace officer

- (a) to provide then or as soon thereafter as was practicable samples of his breath as in the opinion of a qualified technician were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood contrary *etc.*

*or*

- (b) to accompany the said C.D. for the purpose of enabling samples of the breath of the said A.B. to be taken pursuant to s. 254(3) of the Criminal Code contrary *etc.*

**254(3), (5) Blood sample: not provided upon demand**

A.B. on ..... at ..... did without reasonable excuse fail [*or* refuse] to comply with a demand made to him by C.D. a peace officer

- [a] to provide then or as soon thereafter as is practicable samples of his blood as in the opinion of a qualified technician [*or* qualified medical practitioner] were necessary to enable a proper analysis to be made in order to determine the concentration, if any, of alcohol in his blood contrary *etc.*

*or*

- [b] to accompany the said C.D. for the purpose of enabling samples of the blood of the said A.B. to be taken pursuant to s. 254(3)(b) of the Criminal Code contrary *etc.*

**255(2) Impaired driving causing bodily harm**

A.B. on ..... at ..... while his ability to operate a motor vehicle [*or* vessel *or* aircraft *or* railway equipment] was impaired by alcohol [*or* a drug] did operate [*or* did have the care or control of a vessel *or* did operate an aircraft *or* railway equipment *or* assist in the operation of an aircraft *or* railway equipment] [*specify particulars of motor vehicle, vessel or aircraft*] and thereby caused bodily harm to C.D. contrary *etc.*

**255(3) Impaired driving causing death**

A.B. on ..... at ..... while his ability to operate a motor vehicle [*or* vessel *or* aircraft *or* railway equipment] was impaired by alcohol [*or* a drug] did operate [*or* did have the care or control of a vessel *or* did operate an aircraft *or* railway equipment *or* assist in the operation of an aircraft *or* railway equipment] [*specify particulars of motor vehicle, vessel or aircraft*] and thereby caused bodily harm to C.D. contrary *etc.*

**259(4) Operation while disqualified**

A.B. on ..... at ..... did operate a motor vehicle [*or* vessel *or* aircraft *or* railway equipment] [*specify*] while disqualified from so doing by reason of

- [a] an order pursuant to s. 259(1) [*or* (2)] of the Criminal Code contrary *etc.*

*or*

- [b] the legal disqualification [*or* restriction] in the Province of ..... of his right or privilege to operate a motor vehicle in that Province contrary *etc.*

*or*

the legal disqualification [*or* restriction] of his right or privilege to operate a vessel [*or* aircraft *or* railway equipment] in Canada contrary *etc.*

**263(2) Duty to safeguard excavation**

A.B. on ..... at ..... being the owner of [or being in charge of or being the supervisor of] certain land to wit [*here specify*] on which he left an excavation did fail to guard the excavation in a manner adequate to warn persons that the excavation [or to prevent persons from falling in by accident] contrary *etc.*

**264(1), (2) Criminal Harassment**

A.B. on ..... [or between ..... and .....] at ..... knowing that C.D. is harassed or being reckless as to whether C.D. is harassed did without lawful authority

(2)(a) repeatedly follow C.D. [or E.F., a person known to C.D.] from place to place  
*or*

(2)(b) repeatedly communicate directly or indirectly with C.D. [or E.F., a person known to C.D.]  
*or*

(2)(c) beset or watch

[i] the dwelling-house of C.D. [or residence of C.D. or place of work of C.D. or place where C.D. carries on business or place where C.D. happens to be] at ..... [*here specify the place e.g. by address*]  
*or*

[ii] the dwelling-house of E.F. a person known to C.D. [or residence of E.F. a person known to C.D. or place of work of E.F. a person known to C.D. or place where E.F. a person known to C.D. carries on business or place where E.F. a person known to C.D. happens to be] at ..... [*here specify the place e.g. by address*]  
*or*

(2)(d) engage in threatening conduct directed at C.D. [or G.H. a member of the family of C.D.]

thereby causing C.D. to reasonably, in all the circumstances, fear for her safety [or the safety of E.F. a person known to C.D.] contrary *etc.*

**264.1(1) Uttering threats**

A.B. on ..... at ..... did by [*specify means, e.g., telephone*] knowingly utter a threat to C.D. [or convey a threat to C.D. or cause C.D. to receive a threat] to

(a) cause death [or serious bodily harm] to C.D. [or E.F.] contrary *etc.*  
*or*

(b) burn [or destroy or damage] real [or personal] property of C.D. [or E.F.] to wit [*specify, e.g., his dwelling house or automobile*] contrary *etc.*  
*or*

(c) kill [or poison or injure] an animal [or bird] of C.D. to wit [*specify animal or bird, e.g., cattle*] contrary *etc.*

**266 Assault**

A.B. on ..... at ..... did commit an assault on C.D. contrary *etc.*

**267(1)(a) Assault with weapon**

A.B. on ..... at ..... did in committing an assault on C.D. carry [or use or threaten to use] a weapon [or an imitation of a weapon] to wit [*here specify*] contrary *etc.*

**267(1)(b) Assault causing bodily harm**

A.B. on ..... at ..... did in committing an assault upon C.D. cause bodily harm to him contrary *etc.*

**268 Aggravated assault**

A.B. on ..... at ..... did wound [*or maim or disfigure or endanger the life of*] C.D. thereby committing an aggravated assault contrary *etc.*

**269 Unlawfully causing bodily harm**

A.B. on ..... at ..... did unlawfully cause bodily harm to C.D. by [*e.g., throwing acid upon the person of C.D.*] contrary *etc.*

**270(1) Assaulting a peace officer****(a) Assaulting peace officer**

A.B. on ..... at ..... did assault C.D., a public [*or peace*] officer [*describe C.D.*] engaged in the execution of his duty [*or E.F. a person acting in aid of C.D. a public (or peace) officer engaged in the execution of his duty*] contrary *etc.*

**(b) Assault with intent to resist arrest**

A.B. on ..... at ..... did assault C.D. with intent to resist [*or prevent*] the lawful arrest [*or detention*] of himself [*or X.Y.*] contrary *etc.*

**(c) Assault to prevent execution of process**

A.B. on ..... at ..... did

(i) assault C.D., a person engaged in the lawful execution of a process against lands [*or goods*] [*or engaged in making a lawful distress or seizure*] contrary *etc.*

*or*

(ii) assault C.D. with intent to rescue property to wit [*specify*] taken under a lawful process [*or distress or seizure*] contrary *etc.*

**271 Sexual assault**

A.B. on ..... at ..... did commit a sexual assault on C.D. contrary *etc.*

**272 Miscellaneous sexual assaults****(a) Sexual assault with weapon**

A.B. on ..... at ..... did in committing a sexual assault on C.D. carry [*or use or threaten to use*] a weapon [*or an imitation of a weapon*] to wit [*here specify*] contrary *etc.*

**(b) Sexual assault with threat to third party**

A.B. on ..... at ..... did in committing a sexual assault on C.D. threaten to cause bodily harm to E.F. contrary *etc.*

**(c) Sexual assault causing bodily harm**

A.B. on ..... at ..... did in committing a sexual assault on C.D. cause bodily harm to him contrary *etc.*

**(d) Gang sexual assault**

A.B. on ..... at ..... did commit a sexual assault on C.D. to which sexual assault E.F. was also a party contrary to *etc.*

**NOTE:** To ensure that there is no doubt as to which form of sexual assault is charged it is strongly recommended that the particular Code section, subsection and paragraph be specified.

**273(1) Aggravated sexual assault**

A.B. on ..... at ..... did in committing a sexual assault on C.D. wound [*or maim or disfigure or endanger the life of*] the said C.D. thereby committing an aggravated sexual assault contrary *etc.*

**273.3 Removal of child from Canada**

(a) A.B. on ..... at ..... with the intention of committing an act outside Canada that if it were committed in Canada would be an offence against section 151 [*or*



152 or 160(3) or 173(2)] of the Criminal Code in respect of C.D. a person ordinarily resident in Canada, and under the age of fourteen years, did [*specify act done e.g. obtain false identification for C.D.*] for the purpose of removing C.D. from Canada contrary *etc.*

- (b) A.B. on ..... at ..... with the intention of committing an act outside Canada that if it were committed in Canada would be an offence against section 153 of the Criminal Code in respect of C.D. a person ordinarily resident in Canada, and over the age of fourteen years and under the age of eighteen years, did [*specify act done e.g. obtain false identification for C.D.*] for the purpose of removing C.D. from Canada contrary *etc.*
- (c) A.B. on ..... at ..... with the intention of committing an act outside Canada that if it were committed in Canada would be an offence against section 155 [*or 159 or 160(2) or 170 or 171 or 267 or 268 or 269 or 271 or 272 or 273*] of the Criminal Code in respect of C.D. a person ordinarily resident in Canada, and under the age of eighteen years, did [*specify act done e.g. obtain false identification for C.D.*] for the purpose of removing C.D. from Canada contrary *etc.*

## **279(1) Kidnapping**

A.B. on ..... at ..... did kidnap C.D. with intent

- (a) to cause him to be confined [*or imprisoned*] against his will contrary *etc.*  
*or*
- (b) to cause him to be unlawfully sent [*or transported*] out of Canada against his will contrary *etc.*  
*or*
- (c) to hold him for ransom [*or to service against his will*] contrary *etc.*

## **279(2) Forcible confinement etc.**

A.B. on ..... at ..... did without lawful authority confine [*or imprison or forcibly seize*] C.D. contrary *etc.*

## **279.1 Hostage taking**

A.B. on ..... at ..... did take hostage C.D. by confining [*or imprisoning or forcibly seizing or detaining*] C.D. and uttering [*or conveying or causing any person to receive*] a threat to cause the death of C.D. [*or cause bodily harm to C.D. or continue the confinement, imprisonment or detention of C.D.*] with the intent to induce E.F. [*or specify the group, state, etc.*] to [*specify the demand, e.g., release G.H. from Kingston Penitentiary*] as a condition of the release of C.D. contrary *etc.*

## **280 Abduction of person under sixteen**

A.B. on ..... at ..... without lawful authority did take [*or cause to be taken*] C.D., an unmarried person under the age of sixteen years, out of possession of and against the will of E.F., his parent [*or guardian or specify other person*], who had lawful care [*or charge*] of him contrary *etc.*

## **281 Abduction of person under fourteen**

A.B. not being the parent [*or guardian or specify other applicable person*] having lawful care [*or charge*] of E.F., a person under the age of fourteen years, on ..... at ..... with intent to deprive C.D., the parent [*or guardian or specify other applicable person*] of the said E.F. of the possession of E.F. did unlawfully

- [a] take [*or entice away or detain or conceal*] the said E.F. contrary *etc.*  
*or*
- [b] receive [*or harbour*] the said E.F. contrary *etc.*

**282(1) Abduction in contravention of custody order**

A.B. being the parent [or guardian or specify other applicable person] having lawful care [or charge] of E.F. a person under the age of fourteen years on ..... at ..... in contravention of the custody provisions of a custody order in relation to the said E.F. made by [specify full title of court] at [specify place where court order made] on [insert date of order] with intent to deprive C.D. the parent [or guardian or specify other applicable person] of E.F. of the possession of E.F. did

[a] take [or entice away or detain or conceal] the said E.F. contrary etc.

or

[b] receive [or harbour] the said E.F. contrary etc.

**283 Abduction**

A.B. being the parent [or guardian or specify other applicable person] having lawful care [or charge] of E.F. a person under the age of fourteen years on ..... at ..... with intent to deprive C.D. the parent [or guardian or specify other applicable person] having lawful care [or charge] of E.F. of the possession of E.F. did

[a] take [or entice away or detain or conceal] the said E.F. contrary etc.

or

[b] receive [or harbour] the said E.F. contrary etc.

**287(1) Procuring miscarriage of another**

A.B. on ..... at ..... with intent to procure the miscarriage of C.D., did [specify means used, e.g., use manipulation or an instrument or administer a drug] for such purpose contrary etc.

**287(2) Self-procured miscarriage**

A.B., a female person being pregnant, on ..... at ..... with intent to procure her own miscarriage did [specify means used, e.g., use an instrument or drug or noxious thing or manipulation] [or did permit (specify means, e.g., an instrument or drug or noxious thing or manipulation) to be used for such purpose] contrary etc.

**288 Supplying noxious things for purposes of miscarriage**

A.B. on ..... at ..... did supply [or procure] a drug [or noxious thing or an instrument or a thing] to wit [specify item supplied] to C.D. knowing that such [specify item] was intended to be used or employed to procure the miscarriage of C.D. [or E.F.] a female person contrary etc.

**291 Bigamy**

[a] A.B. on ..... at ..... then being married to C.D. [or knowing E.F. to be married to G.H.] did go through a form of marriage with E.F. and did thereby commit bigamy contrary etc.

or

A.B. on ..... at ..... did on the same day to wit [specify date] [or simultaneously] go through a form of marriage with C.D. and E.F. and did thereby commit bigamy contrary etc.

[b] A.B. on ..... at ....., being then married to C.D. and being a Canadian citizen resident in Canada, did leave Canada with intent to go through a form of marriage with E.F. and did on the ..... day of ..... 19 ....., [at the City of Reno in the State of Nevada, one of the United States of America] go through a form of marriage with E.F. and did thereby commit bigamy contrary etc.

**NOTE:** Charge [b] above may be adapted according to the facts to comply with the provisions of s. 290(1)(a)(ii) or (iii)

**292 Procuring feigned marriage**

A.B. on ..... at ..... did procure [or knowingly aid in procuring] a feigned marriage between himself and C.D. contrary *etc.*

**293 Polygamy**

A.B., a male person, on ..... at ..... with C.D., a female person, did practice [or enter into or agree to practice or enter into] a form of polygamy contract *etc.*

**294 Pretending to solemnize marriage**

(a) A.B. on ..... at ..... without lawful authority did [pretend to] solemnize a marriage between C.D. and E.F. contrary *etc.*

*or*

(b) A.B. on ..... at ..... did procure C.D. to solemnize a marriage between E.F. and G.H. knowing that C.D. was not lawfully authorized to solemnize the marriage contrary *etc.*

**295 Solemnizing marriage contrary to law**

A.B. on ..... at ....., being lawfully authorized to solemnize a marriage, did knowingly and wilfully solemnize a marriage between C.D. and E.F. in violation of the laws of the Province of ..... [specify violation, e.g., without publication of banns and without any licence] as required by section ..... of the [specify provincial Act in full] of the said province contrary *etc.*

**300 Defamatory libel known to be false**

A.B. on ..... at ..... did publish a defamatory libel, knowing that it was false, by [specify means e.g. delivering to C.D. a pamphlet entitled *etc.*] contrary *etc.*

**301 Defamatory libel**

A.B. on ..... at ..... did publish a defamatory libel by [specify means e.g. delivering to C.D. a pamphlet entitled *etc.*] contrary *etc.*

**302(1) Extortion by libel**

A.B. on ..... at ..... with intent

(a) to extort money from C.D.

*or*

(b) to induce C.D. to confer on E.F. [or procure for E.F.] an appointment [or office] of profit [or trust] to wit [specify appointment or office]

did publish [or threaten to publish or offer to abstain from publishing or offer to prevent the publication of] a defamatory libel, to wit [specify defamatory libel e.g. a pamphlet entitled *etc.*] contrary *etc.*

**318(1) Advocating genocide**

A.B. on ..... at ..... did advocate [or promote] genocide [specify means, e.g., by publishing a newsletter entitled " ..... " containing a statement " ..... " ] contrary *etc.*

**319(1) Public incitement of hatred**

A.B. on ..... at ....., in a public place to wit [specify], did by communicating statements [specify] incite hatred against an identifiable group to wit [specify the group] with a likelihood of leading to a breach of the peace contrary *etc.*

**319(2) Wilful promotion of hatred**

A.B. on ..... at ..... did by communicating statements [specify] wilfully promote hatred against an identifiable group to wit [specify the group] contrary *etc.*



**334 Theft**

A.B. on ..... at ..... did steal [*specify item*], the property of C.D. of a value [not] exceeding one thousand dollars contrary *etc.*

**NOTE:** It is suggested that this general form of charge may be used for the specific forms of theft referred to in ss. 323, 328, 329, 330, 331 and 332. The particular type of theft may be subsequently proved. Two alternate forms for the types of theft referred to in s. 326 follow.

*Theft of Electricity or Gas (s. 326(1)(a))*

A.B. on ..... at ..... did fraudulently [*or maliciously or without colour of right*] consume [*or abstract or use*] electricity [*or gas*] the property of ..... of a value [not] exceeding one thousand dollars and did thereby commit theft contrary *etc.*

*or*

*Theft of Telecommunications Service (s. 326(1)(b))*

A.B. on ..... at ..... did fraudulently [*or maliciously or without colour of right*] use a telecommunication wire [*or cable*] the property of ..... the value of such use [not] exceeding one thousand dollars and did thereby commit theft contrary *etc.*

**335(1) Taking motor vehicle or vessel without consent (joy-riding)**

A.B. on ..... at ..... did take a motor vehicle to wit [*specify vehicle*] without the consent of C.D., the owner thereof, with intent to drive [*or use*] it [*or cause it to be driven or used*] contrary *etc.*

*or*

A.B. on ..... at ..... did take a vessel to wit [*specify*] without the consent of C.D., the owner thereof, with intent to navigate [*or operate*] it [*or cause it to be navigated or operated*] contrary *etc.*

**341 Fraudulent concealment**

A.B. on ..... at ..... did for a fraudulent purpose take [*or obtain or remove or conceal*] certain property of C.D. to wit [*specify property, e.g., a bicycle*] contrary *etc.*

**342(1) Theft, forgery, etc. of credit card**

(a) A.B. on ..... at ..... did steal a credit card [*specify credit card, e.g., a Toronto-Dominion VISA card #x*] from C.D. contrary *etc.*

*or*

(b) A.B. on ..... at ..... did forge [*or falsify*] a credit card [*specify credit card*] by [*specify means, e.g., by altering the numbers on the said card*] contrary *etc.*

*or*

(i) A.B. on ..... at ..... did have in his possession [*or used or dealt with*] a credit card [*specify credit card*] knowing that the said card was obtained by the commission in Canada of an offence contrary *etc.*

*or*

(ii) A.B. on ..... at ..... did have in his possession [*or used or dealt with*] a credit card [*specify credit card*] knowing that the said card was obtained in [*specify, e.g., the State of New York*] by the commission of an offence which had it occurred in Canada would have constituted an offence contrary *etc.*

*or*

(d) A.B. on ..... at ..... used a credit card [*specify credit card*] knowing that the said credit card had been revoked [*or cancelled*] contrary *etc.*

**342.1(1) Unauthorized Use of Computer**

A.B. on ..... at ..... did fraudulently and without colour of right

- (a) obtain, directly or indirectly a computer service to wit [*specify computer service e.g., the data processing facility at the University of Toronto*] contrary etc.
- (b) by means of an electromagnetic [*or acoustic or mechanical*] device to wit [*specify type etc.*] intercepted [*or caused to be intercepted*], directly or indirectly, a function of a computer system to wit [*specify computer system e.g. the mainframe computer facility of the Public Utilities Commission*] contrary etc.
- (c) used [*or caused to be used*] directly or indirectly, a computer system [*specify computer system*] with intent to
  - [i] obtain, directly or indirectly a computer service to wit [*specify computer service*] contrary etc.
  - [ii] intercept [*or cause to be intercepted*], directly or indirectly a function of a computer system to wit [*specify computer system*] by means of an electromagnetic [*or acoustic or mechanical*] device to wit [*specify type etc.*] contrary etc.
  - [iii] commit the offence contrary to [*specify offence contrary to s. 430 in relation to data or a computer system e.g. s. 430(1.1)(a) of the Criminal Code*] by wilfully destroying data to wit [*specify data*] contrary etc.

### **344 Robbery**

A.B. on ..... at ..... did steal [*specify property stolen, e.g., the sum of fifty dollars*] from C.D. and at the time thereof did use violence [*or threats of violence*] to C.D. contrary etc.

*or*

A.B. on ..... at ..... did steal [*specify property stolen, e.g., a gold wrist watch*] from C.D. and at the time thereof [*or immediately before or immediately thereafter*] did wound [*or beat or strike or specify personal violence used*] C.D. contrary etc.

*or*

A.B. on ..... at ..... did assault C.D. with intent to steal from him contrary etc.

*or*

A.B. on ..... at ..... did steal from C.D. [*specify property stolen, e.g., the sum of fifty dollars*] while armed with an offensive weapon [*or imitation of an offensive weapon*] to wit [*specify weapon*] contrary etc.

NOTE: Robbery is defined in s. 343(a)-(d), with which the above four charges comply.

*or*

(General Charge)

A.B. on ..... at ..... did rob C.D. of [*specify property taken, e.g., a wallet containing personal papers and the sum of fifty dollars*] contrary etc.

### **345 Stopping mail with intent**

A.B. on ..... at ..... did stop a mail conveyance to wit [*specify type of conveyance, e.g., truck or train*] with intent to rob [*or search*] it contrary etc.

### **346(1) Extortion**

A.B. on ..... at ..... without reasonable justification or excuse and with intent to obtain [*specify item requested, e.g., the sum of \$1,000*] did induce [*or attempt to induce*] C.D. by threats [*or accusations or menaces or violence*] to [*specify act done or caused to be done by C.D., e.g., pay the said sum of \$1,000 to A.B.*] contrary etc.

*or*

A.B. on ..... at ..... without reasonable justification or excuse and with intent to obtain ..... dollars from C.D. did [accuse C.D. of committing the offence of bigamy] and did receive from C.D. the said sum of ..... dollars contrary etc.

**347(1) Criminal interest rate**

(a) A.B. on ..... at ..... entered into an agreement [or arrangement] with C.D. to wit [specify agreement, e.g., for a loan of \$1,000 secured by a promissory note dated Aug. 1, 1981] to receive interest at a criminal rate, namely [specify rate, e.g., an effective annual rate of interest of 75 per cent on the sum of \$1,000 advanced under the agreement] contrary etc.

or

(b) A.B. on ..... at ..... received a payment [or partial payment] of interest of [specify amount, e.g., \$750] from C.D. at a criminal rate to wit, [specify rate and transaction, e.g., an effective annual rate of interest of 75 per cent on the advance of \$1,000 on Aug. 1, 1981] contrary etc.

**348(1)(a) Breaking and entering with intent**

A.B. on ..... at ..... did break and enter a certain place to wit [specify type of place, e.g., a dwelling house or store or factory] situate at ..... with intent to commit an indictable offence therein contrary etc.

**348(1)(b) Breaking, entering and committing**

A.B. on ..... at ..... did break and enter a certain place to wit [specify type of place, e.g., a dwelling house, store, factory etc.] situate at ..... and did commit therein the indictable offence of ..... contrary etc.

**348(1)(c) Breaking out**

A.B. on ..... at ..... did break out of a certain place to wit [specify type of place, e.g., a dwelling house, store etc.] situate at ..... after committing therein the indictable offence of ..... contrary etc.

or

A.B. on ..... at ..... did break out of a certain place to wit [specify type of place] situate at ..... after having entered the said place with intent to commit an indictable offence therein contrary etc.

**349(1) Being unlawfully in dwelling house**

A.B. on ..... at ..... without lawful excuse did enter [or was in] the dwelling house of C.D. situate at ..... with intent to commit an indictable offence therein contrary etc.

**351(1) Possession of break-in instruments**

A.B. on ..... at ..... without lawful excuse did have in his possession [an] instrument[s] suitable for the purpose of breaking into a place [or into vehicle or vault or safe] to wit [specify instrument(s), e.g., nitro-glycerine etc.] under circumstances [specify, e.g., mode of concealment, type of instrument] that gave rise to a reasonable inference that the said instrument had been used [or was intended to be used] for such purpose contrary etc.

**351(2) Disguise with intent**

A.B. on ..... at ..... with intent to commit an indictable offence did have his face masked [or coloured or specify manner of disguise] contrary etc.

**352 Possession of coin-operated device breaking instrument**

A.B. on ..... at ..... did without lawful excuse have in his possession an instrument, to wit ..... suitable for breaking into a coin-operated device [or a currency exchange device] under circumstances [specify, e.g., mode of concealment, type of instrument] that gave rise to a reasonable inference that the said instrument had been used [or was intended to be used] for breaking into a coin-operated device [or a currency exchange device] contrary etc.



**353(1)(a) Automobile master key: selling or advertising**

A.B. on ..... at ..... did sell [or offer for sale or advertise] in the Province of ..... an automobile master key, to wit ..... other than under the authority of a licence issued by the Attorney General of that province contrary *etc.*

**353(1)(b) Automobile master key: buying or possessing**

A.B. on ..... at ..... did purchase [or have in his possession] in the Province of ..... an automobile master key, to wit ..... other than under the authority of a licence issued by the Attorney General of that province contrary *etc.*

**353(4) Automobile master key: record of sale**

A.B. on ..... at ..... did, having sold an automobile master key, to wit ..... fail to

- [a] keep a record of the said transaction showing the name [and address] of the purchaser [and the particulars of the licence issued to the purchaser as described in s. 353(1)(b) of the Criminal Code] contrary *etc.*

*and*

- [b] produce at the request of C.D., a peace officer, the record described in s. 353(3)(a) of the Criminal Code of the said transaction contrary *etc.*

**354(1) Possession of property obtained by crime**

- (a) A.B. on ..... at ..... did have in his possession property [or proceeds of property] [specify item(s)] of a value [not] exceeding one thousand dollars knowing that all [or part] of the property [or proceeds of the property] was obtained [or derived directly or indirectly] by the commission in Canada of an offence punishable by indictment contrary *etc.*

*or*

- (b) A.B. on ..... at ..... did have in his possession property [or proceeds of property] [specify item(s)] of a value [not] exceeding one thousand dollars knowing that all [or part] of the property [or proceeds of the property] was obtained [or derived directly or indirectly] by the commission of the offence of ..... in [the State of New York] [set out method of obtaining that would constitute an indictable offence in Canada], which offence had it occurred in Canada would have been punishable by indictment, contrary *etc.*

**356(1)(a) Theft from mail**

A.B. on ..... at ..... did steal

- (i) [specify item, e.g., a letter or parcel] sent by post, after it was deposited at a post office and before it was delivered contrary *etc.*

*or*

- (ii) a bag [or sack or container or covering] in which mail is conveyed [or containing mail] contrary *etc.*

*or*

- (iii) a key suited to a lock adopted for use by the Canada Post Office contrary *etc.*

**356(1)(b) Theft from mail: possession of article stolen from mail**

A.B. on ..... at ..... did have in his possession [specify item set out in s. 356(1)(a)] knowing that an offence under section 356(1)(a) of the Criminal Code had been committed with respect thereto contrary *etc.*

**357 Bringing into Canada property obtained by crime**

A.B. on ..... at ..... did bring into [or have in] Canada [specify item, e.g., an automobile] that he had obtained outside of Canada by an act that if committed in Canada

would have been the offence of theft [or an offence under s. 354 of the Criminal Code] contrary *etc.*

**362(1)(a) Obtaining by false pretences**

A.B. on ..... at ..... did by a false pretence [with intent to defraud] [or through the medium of a contract obtained by false pretence] obtain from C.D. [*specify item obtained, e.g., a car radio*] of a value [not] exceeding one thousand dollars contrary *etc.*

*or*

A.B. on ..... at ..... did by a false pretence [with intent to defraud] [or through the medium of a contract obtained by false pretence] cause C.D. to deliver to E.F. [*specify item*] of a value [not] exceeding one thousand dollars contrary *etc.*

**362(1)(b) Obtaining credit by fraud or false pretence**

A.B. on ..... at ..... did by a false pretence [or by fraud] obtain credit from C.D. in the amount of ..... dollars contrary *etc.*

**362(1)(c) False statement in writing**

A.B. on ..... at ..... did knowingly make [or cause to be made] directly [or indirectly] a false statement in writing with intent that it should be relied upon to wit [*specify type of statement, e.g., a statement of assets and liabilities*] respecting his [or E.F.'s] financial position for the purpose of procuring from C.D. for his own benefit [or for the benefit of E.F.]

(i) the delivery of personal property to wit [*specify, e.g., an automobile*] contrary *etc.*

*or*

(ii) the payment of money to wit [*specify sum*] contrary *etc.*

*or*

(iii) the making of a loan [*specify amount*] contrary *etc.*

*or*

(iv) the grant [or extension] of credit to the value of [*specify amount*] [or *specify item referred to in s. 362(1)(c)(v) and (vi)*] contrary *etc.*

**363 Obtaining execution of valuable security by fraud**

A.B. on ..... at ..... with intent to defraud [or injure] C.D. did by a false pretence, cause [or induce] C.D. [or E.F.]

(a) to execute [or make or accept or endorse or destroy the whole (or any part of)] a valuable security to wit [*specify, e.g., a promissory note, bond etc.*] contrary *etc.*

*or*

(b) to write [or impress or affix] a name [or seal] on a paper (or parchment) to wit [*specify document*] in order that it might afterwards be made into [or converted into or used or dealt with as] a valuable security contrary *etc.*

**364 Fraudulently obtaining food and lodging**

A.B. on ..... at ..... did fraudulently obtain food [or lodging or other accommodation] from C.D. at [*specify restaurant, hotel etc.*] situate at ..... contrary *etc.*

**365(b) Pretending to practice witchcraft, etc.: fortune telling**

A.B. on ..... at ..... did fraudulently undertake for a consideration to wit [*specify, e.g., two dollars*] to tell the fortune of C.D. contrary *etc.*

*or*

A.B. on ..... at ..... did fraudulently undertake for a consideration to wit [*specify*] to tell fortunes contrary *etc.*

### **367 Forgery**

A.B. on ..... at ..... did knowingly make a false document to wit [*specify, e.g., a cheque dated ..... for \$100 payable to C.D. and signed E.F.*] with intent that it be acted upon as genuine and did thereby commit forgery contrary *etc.*

*or*

A.B. on ..... at ..... did knowingly make a false document to wit [*specify, e.g., a cheque dated ..... for \$100 payable to C.D. and signed E.F.*] by forging the endorsement of C.D. thereon with intent that it be acted upon as genuine and did thereby commit forgery contrary *etc.*

### **368(1) Uttering forged document**

A.B. on ..... at ..... did knowingly

(a) use [*or deal with or act upon*] a forged document to wit [*specify, e.g., a cheque and give particulars thereof*] as if it were genuine contrary *etc.*

*or*

(b) cause [*or attempt to cause*] C.D. to use [*or deal with or act upon*] a forged document to wit [*specify, e.g., a cheque and give particulars thereof*] as if it were genuine contrary *etc.*

*or*

A.B. on ..... at ..... knowing a [*specify document, e.g., vacation-with-pay stamp book*] in the name of C.D. to be forged did cause E.F. to act upon such book as if it were genuine contrary *etc.*

### **369(a) Exchequer bill or bank note paper**

A.B. on ..... at ..... did make [*or use or knowingly have in his possession*]

(i) exchequer bill paper [*or revenue paper or paper that is used to make bank notes*] contrary *etc.*

*or*

(ii) paper that was intended to resemble exchequer bill paper [*or revenue paper or paper that is used to make bank notes*] contrary *etc.*

### **369(b) Instruments for forgery**

A.B. on ..... at ..... did make [*or offer or dispose of or knowingly have in his possession*] a plate [*or die or machinery or instrument or specify other writing or material*] that was adapted and intended to be used to commit forgery contrary *etc.*

### **371 Telegram, etc., in false name**

A.B. on ..... at ..... did with intent to defraud C.D. cause [*or procure*] a telegram [*or cablegram or radio message*] to be sent [*or delivered*] to C.D. requesting [*specify subject matter of message*] signed in the name of E.F. while knowing such message was not sent with E.F.'s authority and with the intent that it should be acted upon as genuine contrary *etc.*

### **372(1) False message**

A.B. on ..... at ..... did with intent to injure [*or alarm*] C.D. convey [*or cause or procure to be conveyed*] by letter [*or telegram or telephone or cable or radio or otherwise*] to C.D. information that he knew to be false to wit [*specify information*] contrary *etc.*

### **372(2) Indecent telephone calls**

A.B. on ..... at ..... did with intent to alarm [*or annoy*] C.D. make an indecent telephone call to C.D. contrary *etc.*

### **372(3) Harassing telephone calls**

A.B. on ..... at ..... did, without lawful excuse and with intent to harass C.D., make [*or cause to be made*] repeated telephone calls, to wit ..... to C.D. contrary *etc.*



**374 Drawing Document without Authority**

- (a) A.B. on ..... at ..... with intent to defraud and without lawful authority did make [or execute or draw or sign or except or endorse] a document to wit [specify] in the name [or on the account] of C.D. contrary *etc.*
- (b) A.B. on ..... at ..... did make use of [or utter] a document to wit [specify] knowing that it had been made [or executed or signed or excepted or endorsed] with intent to defraud and without lawful authority, in the name [or on the account] of C.D. contrary *etc.*

**375 Obtaining, etc., by instrument based on Forged Document**

A.B. on ..... at ..... did demand [or receive or obtain] goods [or specify] under [or on or by virtue of] an instrument issued under the authority of law, knowing that the instrument was based on a forged document to wit [specify document] contrary *etc.*

*or*

A.B. on ..... at ..... did cause [or procure] goods [or specify] to be delivered [or paid] to C.D. under [or on or by virtue of] an instrument issued under the authority of law, knowing that the instrument was based on a forged document contrary *etc.*

**376(1) Counterfeiting Stamp**

A.B. on ..... at ..... did

- (a) fraudulently use [or mutilate or affix or remove or counterfeit] a stamp [or part of a stamp] to wit [specify] contrary *etc.*

*or*

- (b) knowingly and without lawful excuse have in his possession a counterfeit stamp [or a stamp that has been fraudulently mutilated or a document bearing a stamp of which a part has been fraudulently erased (or removed or concealed) or without lawful excuse made or knowingly had in his possession a die or instrument capable of making the impression of a stamp or part of a stamp] contrary *etc.*

*or*

- (c) without lawful excuse make [or knowingly have in his possession] a die [or instrument] capable of making the impression of a stamp [or a part of a stamp] to wit [specify] contrary *etc.*

**377(1)(b) False entry in official register**

A.B. on ..... at ..... did unlawfully insert in a register of births [or baptisms or marriages or deaths or burials] that was required by law to be kept in Canada, an entry that he knew to be false relating to the birth [or baptism or marriage or death or burial] of C.D. to wit [specify entry made] contrary *etc.*

**380(1) Fraud**

A.B. on ..... at ..... did by deceit, falsehood or other fraudulent means defraud C.D. of [specify property, money or valuable security, e.g., the sum of \$1,000] by [specify fraud] contrary *etc.*

**380(2) Fraud: affecting public market**

A.B. on ..... at ..... did by deceit, falsehood or other means, with intent to defraud, affect the public market price of stocks [or shares, merchandise, securities, articles] by [specify act done, e.g., publishing false reports of the value of mineral rights leased by United Moose Pastures Limited, whose common stock was then traded on the Toronto Stock Exchange] contrary *etc.*

**381 Using mails to defraud**

A.B. on ..... at ..... did make use of the mails for the purpose of transmitting [or delivering] letters [or circulars] concerning schemes devised [or intended] to

defraud [or for the purpose of obtaining money under false pretences from] the public by [e.g., posting to divers members of the public letters soliciting subscriptions for the common stock of United Moose Pastures Limited] contrary *etc.*

### **382 Fraudulent manipulation of stock exchange transactions**

A.B. and C.D. on ..... at ..... did through the facility of a stock exchange [or curb market or over the counter market] with intent to create a false [or misleading] appearance of active public trading in [*specify security*] [or with intent to create a false (or misleading) appearance with respect to the market price of (*specify security*)],

(a) effect a transaction in the said security that involved no change in the beneficial ownership thereof contrary *etc.*

*or*

(b) enter an order for the purchase of [*specify security*] knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the sale of the said security had been [would be] entered by [for] the said A.B. and C.D. [or other persons] contrary *etc.*

*or*

(c) enter an order for the sale of [*specify security*] knowing that an order of substantially the same size at substantially the same time and at substantially the same price for the purchase of the said security had been [would be] entered by [for] the said A.B. and C.D. [or other persons] contrary *etc.*

### **390(a) Fraudulent Receipts under Bank Act**

A.B. on ..... at ..... did wilfully make a false statement in a receipt [or certificate or acknowledgement] for property that may be used for a purpose mentioned in the *Bank Act* contrary *etc.*

### **392 Defrauding creditors**

#### **(a) Disposing of property**

A.B. on ..... at ..... did with intent to defraud his creditors

(i) make [or cause to be made] a gift [or conveyance or assignment or sale or transfer or delivery] of his property to wit [*specify property transferred*] to C.D. contrary *etc.*

*or*

(ii) remove [or conceal or dispose of] his property to wit [*specify property concealed etc.*] contrary *etc.*

#### **(b) Receiving property**

A.B. on ..... at ..... with intent that C.D. should defraud his creditors did receive from C.D. certain property of C.D. to wit [*specify property received*] by means of [or in relation to] which an offence under s. 372(a) of the Criminal Code had been committed contrary *etc.*

### **393(1) Fraud in relation to fares etc.**

A.B. on ..... at ..... being under the duty to collect a fare [or toll or ticket or admission] did wilfully

(a) fail to collect it from C.D. contrary *etc.*

*or*

(b) collect less than the proper amount payable in respect thereof from C.D. contrary *etc.*

*or*

(c) accept a valuable consideration to wit [*specify consideration received*] for failing to collect such fare [or for collecting less than the proper amount payable in respect thereof] from C.D. contrary *etc.*

**393(3) Obtaining transportation by fraud**

A.B. on ..... at ..... did by a false pretence [or fraud] to wit [*specify false pretence or fraud*] obtain transportation by land [or water or air] to wit [*specify, e.g., by taxi-cab*] to the value of ..... dollars from C.D. contrary *etc.*

**394(1)(b) Sale or purchase of stolen minerals**

A.B. on ..... at ....., not being the owner, agent of the owner, nor acting under the lawful authority of the owner, did sell [or purchase] rock [or mineral or *specify*] that contained precious metal [or unsmelted precious metal or untreated precious metal or unmanufactured precious metal or partly smelted precious metal or partly treated precious metal or partly manufactured precious metal] contrary *etc.*

**396 Offences in relation to mines**

(a) A.B. on ..... at ..... with the fraudulent intent to affect the result of an assay, [or test or valuation] that has been made [or was to be made] with respect to a mine [or prospective mine or mining claim or oil well] to wit [*specify*] did add [*specify e.g. gold ore*] to [or remove (*specify*) from] the mine [or mining claim or oil well] contrary *etc.*

*or*

(b) A.B. on ..... at ..... did add [*specify e.g. gold ore*] to [or remove (*specify*) from or tamper with] a sample [or material] that was taken [or about to be taken] from a mine [or prospective mine or mining claim or oil well] to wit [*specify*] for the purpose of being assayed [or tested or otherwise valued] with the fraudulent intent to affect the result of the assay [or test or valuation] contrary *etc.*

**397(1) Falsification of books and documents**

A.B. on ..... at ..... with intent to defraud C.D. did

(a) destroy [or mutilate or alter or falsify or make a false entry in]

*or*

(b) omit a material particular from [or alter a material particular in] to wit [*specify item omitted or altered*]

a book [or paper or writing or valuable security or document] to wit [*specify book etc.*] contrary *etc.*

**398 Falsifying employment record**

A.B. on ..... at ..... with intent to deceive did falsify an employment record to wit [*specify, e.g., company pay sheet*] by [*specify means used*] contrary *etc.*

**400(1) False prospectus**

A.B. on ..... at ..... did make [or circulate or publish] a prospectus [or statement or account] which he knew was false in a material particular to wit [*specify false particular*] with intent

(a) to induce persons to become shareholders or partners in [*specify company*] contrary *etc.*

*or*

(b) to deceive [or defraud] the member [or shareholders or creditors] of [*specify company*] contrary *etc.*

*or*

(c) to induce C.D. to entrust [or advance] a sum of money [or *specify*] to [*specify company*] contrary *etc.*

*or*

(d) to enter into a security for the benefit of [*specify company*] contrary *etc.*

**401(1) Obtaining carriage by false billing**

A.B. on ..... at ..... did knowingly, by means of a false [or misleading] representation to wit [*specify*], obtain [or attempt to obtain] the carriage of [*specify goods*] by



[specify carrier] into [specify province, country or district or other place], the transportation [or importation] of those goods into the said province [or country or district or as the case may be] being unlawful contrary *etc.*

**402(1) Trader failing to keep accounts**

A.B. on ..... at ..... being a trader [or in business] and indebted in an amount exceeding one thousand dollars and unable to pay his creditors in full did fail to keep books of account that in the ordinary course of his business would be necessary to exhibit or explain his transactions contrary *etc.*

**403 Personation with intent**

A.B. on ..... at ..... did fraudulently personate C.D.

(a) with intent to gain advantage for himself [or E.F.] to wit [specify advantage expected] contrary *etc.*

*or*

(b) with intent to obtain certain [or an interest in] property to wit [specify property] contrary *etc.*

*or*

(c) with intent to cause disadvantage to C.D. [or E.F.] contrary *etc.*

**404 Personation at examination**

A.B. on ..... at ..... did falsely with intent to gain advantage for himself [or C.D.] personate C.D. [or E.F.] a candidate at a competitive [or qualifying] examination held under the authority of law [or in connection with a university or college or school] to wit [specify examination] contrary *etc.*

*or*

A.B. on ..... at ..... did knowingly avail himself of the results of the personation of himself by C.D. at a competitive [or qualifying] examination held under the authority of law [or in connection with a university or college or school] to wit [specify examination] contrary *etc.*

**419 Unlawful use of military uniforms or certificates**

A.B. on ..... at ..... without lawful excuse did

(a) wear a uniform of the Canadian [or name other country, e.g., American] Forces to wit [specify uniform worn, e.g., the uniform of a Captain in the Canadian (or American) Army] contrary *etc.*

[or wear a uniform so similar to the uniform of the Canadian [or name other country] Forces to wit [specify] that it was likely to be mistaken therefor contrary *etc.*]

*or*

(b) wear [an imitation of] a distinctive mark relating to wounds received [or a military medal or ribbon or badge or chevron or decoration or order] to wit [specify item worn, e.g., the Victoria Cross] contrary *etc.* [or wear a mark [or device or thing] that was likely to be mistaken for [specify item imitated] contrary *etc.*]

*or*

(c) have in his possession a certificate of discharge [or certificate of release or statement of service or identity card] from the Canadian Forces [or specify other country] that was not issued to and did not belong to him contrary *etc.*

**422 Criminal breach of contract**

A.B. on ..... at ..... wilfully broke a contract with [or between (specify)] knowing or having reasonable cause to believe that the probable consequence of doing so would be

(a) to endanger human life contrary *etc.*

*or***(b)** to cause serious bodily injury contrary *etc.**or***(c)** to expose valuable property to destruction or serious injury contrary *etc.**or***(d)** to deprive the inhabitants of the City of [*or specify*] wholly or to a great extent, of their supply of light [*or power or gas or water*] contrary *etc.**or***(e)** to delay or prevent the running of a locomotive engine [*or tender or freight or passenger train or car*] on the [*specify railway which is common carrier*] contrary *etc.***423(1) Intimidation**

A.B. on ..... at ..... did wrongfully and without lawful authority for the purpose of compelling C.D. to abstain from [*or to do*] [*specify act, e.g., work at the X.Y.Z. Plant*] which C.D. had a lawful right to do [*or to abstain from doing*]

**(a)** use violence [*or threats of violence*] to the person of C.D. [*or to the wife or husband or children of C.D.*] [*or did injure his property to wit (specify property damaged)*] contrary *etc.*

*or***(c)** persistently follow C.D. about from place to place contrary *etc.**or***(e)** with E.F. and G.H. follow C.D. in a disorderly manner, on a highway to wit [*specify highway*] contrary *etc.***424 Threat to commit offence against internationally protected person**

A.B. on ..... at ..... did threaten to commit the offence of murder contrary to s. 235 [*or specify offence contrary to s. 266, 279 or 279.1*] of the Criminal Code against C.D. an internationally protected person contrary *etc.*

*or*

A.B. on ..... at ..... did threaten to commit the offence contrary to s. 431 of the Criminal Code by threatening to attack the official premises [*or private accommodation or means of transport*] of C.D. an internationally protected person, such attack being likely to endanger the life or liberty of C.D. contrary *etc.*

**426(1)(a) Bribery of agent**

A.B. on ..... at ..... did corruptly

**[a]** give [*or offer or agree to give or offer*] to C.D. an agent for X.Y.

*or*

**[b]** being an agent for X.Y. demand [*or accept or offer or agree to accept*] from C.D.

**[i]** a reward [*or advantage or benefit*] to wit [*specify, e.g., the sum of one hundred dollars*] as consideration for doing [*or forbearing to do or for having done or forborne to do*] an act relating to the affairs or business of X.Y. to wit [*specify act done or to be done or as care may be*] contrary *etc.*

*or*

**[ii]** a reward [*or advantage or benefit*] to wit [*specify, e.g., the sum of one hundred dollars*] for showing [*or forbearing to show*] favour [*or disfavour*] to A.B. [*or C.D.*] with relation to the affairs [*or business*] of X.Y. contrary *etc.*

**426(1)(b) False account to deceive a principal**

A.B. on ..... at ..... with intent to deceive X.Y. did give to C.D., an agent for X.Y. [*or A.B., being an agent for X.Y. did use with intent to deceive X.Y.*] a receipt [*or account or other writing*] to wit [*specify document*] in which X.Y. had an interest that

contained a false [or erroneous or defective] statement in a material particular that was intended to mislead X.Y. to wit [specify incorrect statement in document] contrary etc.

**430(2) Mischief endangering life**

A.B. on ..... at ..... did commit mischief by wilfully damaging without legal justification or excuse and without colour of right the [specify property damaged, e.g., the dwelling house of C.D. situate at ..... ] by [specify means used, e.g., planting an explosive] and did thereby endanger the life of C.D. contrary etc.

**430(3) Mischief over \$1,000: to testamentary instrument**

A.B. on ..... at ..... did commit mischief by wilfully ..... [specify act of mischief as described in subsec. (1), e.g., damaging] without legal justification or excuse and without colour of right property to wit

[a] [specify property damaged etc., e.g., the automobile] of C.D. the value of which exceeded one thousand dollars contrary etc.

or

[b] [specify testamentary document, e.g., the codicil dated January 1st, 1986 to the last will and testament] of C.D.

**430(4) Mischief not exceeding \$1,000**

A.B. on ..... at ..... did commit mischief by wilfully ..... [specify act of mischief as described in subsec. (1), e.g., damaging] without legal justification or excuse and without colour of right property to wit [specify property damaged etc., e.g., the bicycle] of C.D. the value of which did not exceed one thousand dollars contrary etc.

**430(5) Mischief to data**

A.B. on ..... at ..... did commit mischief in relation to data by wilfully without legal justification or excuse and without colour of right [specify act of mischief as described in subsec. (1.1), e.g., destroying or rendering meaningless, useless or ineffective] data to wit [specify data] contrary etc.

**431 Attack on premises, residence or transport of internationally protected person**

A.B. on ..... at ..... did attack the official premises [or private accommodation or means of transport] of C.D. an internationally protected person, in manner likely to endanger the life or liberty of C.D. contrary etc.

**433 Arson: disregard for human life**

(a) A.B. on ..... at ..... did intentionally or recklessly cause damage by fire [or explosion] to [specify property damaged, e.g., a dwelling house] situate at ..... knowing that or being reckless with respect whether the said property was inhabited or occupied contrary etc.

or

(b) A.B. on ..... at ..... did intentionally or recklessly cause damage by fire [or explosion] to [specify property damaged, e.g., a dwelling house] situate at ..... which fire [or explosion] did cause bodily harm to C.D. contrary etc.

**434 Arson: damage to property**

A.B. on ..... at ..... did intentionally or recklessly cause damage by fire [or explosion] to [specify property damaged, e.g., a dwelling house] the property of C.D. situate at .. contrary etc.

**434.1 Arson: damage to own property**

A.B. on ..... at ..... did intentionally or recklessly cause damage by fire [or explosion] to [specify property damaged, e.g., a dwelling house] owned by the said A.B. situate



at ..... which fire [or explosion] seriously threatened the health [or safety, or property situate at .....] of C.D. contrary *etc.*

#### **435(1) Arson for fraudulent purpose**

A.B. on ..... at ..... did with intent to defraud C.D. cause damage by fire [or explosion] to [specify property damaged, e.g., a dwelling house] the property of C.D. situate at ..... contrary *etc.*

#### **436(1) Arson by negligence**

A.B. on ..... at ..... did as a result of a marked departure from the standard of care that a reasonably prudent person would use to prevent or control the spread of fires [or to prevent explosions] cause a fire [or explosion] in [specify property damaged, e.g., a dwelling house] owned [or controlled] by the said A.B. situate at ..... which fire [or explosion] did cause bodily harm to [or damage the property of] C.D. contrary *etc.*

#### **436.1 Possession of incendiary material**

A.B. on ..... at ..... did possess an incendiary material [or incendiary device or explosive substance] to wit [specify material, device or substance] for the purpose of committing the offence of [specify an offence contrary to s. 433 to 436, e.g., arson contrary to s. 433(a)] contrary *etc.*

#### **437 False alarm of fire**

A.B. on ..... at ..... did wilfully without reasonable cause by outcry [or ringing bells or using a fire alarm or telephone or telegraph or specify other means used] make [or circulate or cause to be made or circulated] an alarm of fire at [specify premises where fire purported to be] contrary *etc.*

*or*

A.B. on ..... at ..... did wilfully without reasonable cause make an alarm of fire by using a fire alarm signal box on ..... Street contrary *etc.*

#### **444 Killing or injuring cattle**

A.B. on ..... at ..... did wilfully

- (a) kill [or maim or wound or poison or injure] cattle to wit [specify cattle (see definition in s. 2)] the property of C.D. contrary *etc.*

*or*

- (b) place poison in such a position that it might be consumed by the cattle of C.D. to wit [specify where poison placed] contrary *etc.*

#### **445 Killing or injuring animals other than cattle**

A.B. on ..... at ..... did wilfully and without lawful cause

- (a) kill [or maim or wound or poison or injure] [specify bird or animal other than cattle, e.g., a dog] the property of C.D. that was kept for a lawful purpose contrary *etc.*

*or*

- (b) place poison in such a position that it might easily be consumed by dogs, birds, or animals other than cattle that were kept for a lawful purpose to wit [specify where poison placed, e.g., at the base of a tree on the front lawn of the premises situate at .....] contrary *etc.*

#### **446(1) Cruelty to animals**

A.B. on ..... at .....

- (a) did wilfully cause [or being the owner did wilfully permit to be caused] unnecessary pain [or suffering or injury] to [specify animal or bird, e.g., a horse] by [specify means used, e.g., excessive whipping] contrary *etc.*

or

- (b) by wilful neglect did cause damage [or injury] to [specify animals or birds] while they were being driven [or conveyed] by A.B. to wit by [specify neglect, e.g., failure to water them] contrary etc.

or

- (c) being the owner [or the person having the custody or control] of a domestic animal [or bird or an animal or bird wild by nature that was in captivity] to wit [specify, e.g., a dog] did wilfully neglect [or fail] to provide suitable and adequate food [or water or shelter or care] for such [specify animal or bird] contrary etc.

**446(6) Animals: breach of order prohibiting keeping**

A.B. on ..... at ..... did, while prohibited from doing so by an order made under s. 446(5) of the Criminal Code, own [or have the custody of or have control of] an animal [or bird] to wit ..... contrary etc.

**449 Counterfeit money: making**

A.B. on ..... at ..... did [or did begin to] make counterfeit money to wit [specify, e.g., a counterfeit ten dollar Bank of Canada bill] contrary etc.

**450 Counterfeit money: buying, receiving, possessing or importing**

A.B. on ..... at ..... without lawful justification or excuse did

- (a) buy [or receive or offer to buy or receive] from C.D.

or

- (b) have in his custody [or possession]

or

- (c) introduce into Canada

counterfeit money to wit: [specify coin or paper] contrary etc.

**452 Counterfeit money: uttering, using and exporting**

A.B. on ..... at ..... without lawful justification or excuse did

- (a) utter [or offer to utter or use] counterfeit money to wit [specify, e.g., a counterfeit ten dollar Bank of Canada bill] as if it were genuine contrary etc.

or

- (b) export [or send or take] counterfeit money to wit [specify, e.g., counterfeit ten dollar Bank of Canada bills] out of Canada contrary etc.

**453(a) Coin not current: uttering**

A.B. on ..... at ..... with intent to defraud C.D. did knowingly utter a coin that was not current contrary etc.

**453(b) Counterfeit coin: uttering**

A.B. on ..... at ..... with intent to defraud C.D. did knowingly utter a piece of metal [or mixed metals] that resembled in size, figure and colour a current gold [or silver] coin but of less value than the current coin for which it was uttered to wit [specify, e.g., a current twenty-five cent piece] contrary etc.

**454 Fraudulent use of slugs**

A.B. on ..... at ..... did

- (a) manufacture [or produce or sell]

or

- (b) have in his possession

a [specify article] that was intended to be fraudulently used in substitution for a coin [or token of value] that any coin- [or token-] operated device is designed to receive contrary etc.

**456 Defacing current coin**

A.B. on ..... at ..... did

(a) deface [*specify*], a current coin contrary *etc.*

*or*

(b) utter [*specify*], a current coin that had been defaced contrary *etc.*

**457 Printing circulars etc. in likeness of notes**

(1) A.B. on ..... at ..... did design [*or engrave or print or make or execute or issue or distribute or circulate or use*] a business [*or professional*] card [*or notice or placard or circular or handbill or advertisement*] in the likeness [*or appearance*] of [*specify*]

(a) a current bank-note [*or paper money*] contrary *etc.*

*or*

(b) an obligation [*or security*] of the Government of [*specify*] [*or the Bank of (specify)*] contrary *etc.*

(2) A.B. on ..... at ..... did publish [*or print*] [*specify*] in the likeness [*or appearance*] of [*specify*] being

(a) a current bank-note [*or paper money*] contrary *etc.*

*or*

(b) an obligation [*or security*] of the Government of [*specify*] [*or the Bank of (specify)*] contrary *etc.*

**458 Counterfeiting: instruments for**

A.B. on ..... at ..... without lawful justification or excuse did

(a) make [*or repair*]

*or*

(b) begin [*or proceed*] to make [*or repair*]

*or*

(c) buy [*or sell*]

*or*

(d) have in his custody [*or possession*]

a machine [*or engine or tool or instrument or material or thing*] that he knew had been used [*or had been adapted and intended for use*] in making counterfeit money [*or counterfeit tokens of value*] contrary *etc.*

**462.2 Promoting illicit drug use**

A.B. on ..... at ..... did knowingly

[a] import into Canada [*or export from Canada or manufacture or promote or sell*] an instrument to wit [*specify instrument*] which instrument was designed primarily [*or intended*] under the circumstances for consuming [*or facilitating the consumption of*] an illicit drug to wit [*specify illicit drug*] contrary *etc.*

*or*

[b] import into Canada [*or export from Canada or manufacture or promote or sell*] literature to wit [*specify literature*] which literature describes [*or depicts*] the production [*or preparation or consumption*] of an illicit drug and is designed primarily [*or intended*] under the circumstances to promote [*or encourage or advocate*] the production [*or preparation or consumption of*] an illicit drug to wit [*specify illicit drug*] contrary *etc.*

**462.31 Laundering proceeds of crime**

(1) A.B. on ..... at ..... did use [*or transfer the possession of or transport or transmit or dispose of or otherwise deal with*] property [*or proceeds of any property*] to wit [*specify property*] with intent to conceal or convert that property [*or those proceeds*] knowing that all [*or part*] of the property [*or proceeds of the property*] was obtained [*or derived directly or indirectly*] as a result of



(a) the commission in Canada of the enterprise crime [or designated drug offence] of [specify enterprise crime or designated drug offence] contrary etc.

or

(b) an act [or omission] in [specify place e.g. State of New York] namely [specify act or omission e.g. uttering counterfeit money which would constitute enterprise crime or designated drug offence if committed in Canada] which offence had it occurred in Canada would have constituted the enterprise crime [or designated drug offence] of [specify enterprise crime or designated drug offence], contrary etc.

or

(2) A.B. on ..... at ..... did send [or deliver] to [specify person or place] property [or proceeds of any property] to wit [specify property] with intent to conceal or convert that property [or those proceeds] knowing that all [or part] of the property [or proceeds of the property] was obtained [or derived directly or indirectly] as a result of

(a) the commission in Canada of the enterprise crime [or designated drug offence] of [specify enterprise crime or designated drug offence] contrary etc.

or

(b) an act [or omission] in [specify place e.g. State of New York] namely [specify act or omission e.g. uttering counterfeit money which would constitute enterprise crime or designated drug offence if committed in Canada] which offence had it occurred in Canada would have constituted the enterprise crime [or designated drug offence] of [specify enterprise crime or designated drug offence], contrary etc.

#### **464 Counselling offence that is not committed: indictable and summary**

##### **(a) Indictable offence**

A.B. on ..... at ..... did counsel C.D. to commit the indictable offence ..... which offence was not committed contrary etc.

##### **(b) Summary offence**

A.B. on ..... at ..... did counsel C.D. to commit an offence punishable on summary conviction to wit [specify offence, e.g., pretend to use witchcraft] which offence was not committed contrary etc.

#### **465(1)(a) Conspiracy to murder**

A.B. and C.D. on ..... at ..... did conspire together to murder E.F. [or to cause E.F. to be murdered] contrary etc.

#### **465(1)(c) Conspiracy to commit indictable offence**

A.B. and C.D. on ..... at ..... did conspire together to commit the indictable offence of ..... by [state sufficient particulars to enable accused to identify the agreement and know nature of charge he has to meet] contrary etc.

#### **465(1)(d) Conspiracy to commit summary conviction offence**

A.B. and C.D. on ..... at ..... did conspire together to commit the summary conviction offence of ..... by [state sufficient particulars to enable accused to identify the agreement and know nature of charge they have to meet] contrary etc.

#### **740(1) Probation order: non-compliance**

A.B. on [or between] ..... at ..... did, while bound by a probation order made by [insert full title of the court making the order] ..... on [insert date of order]....., wilfully fail [or refuse] to comply with such order, to wit [here recite the non-complied with condition of the order] ..... contrary etc.

**810(1) Fear of injury or damage by another person**

A.B. fears that X.Y. will cause personal injury to him [or to his spouse or to his children] in that X.Y. did on ..... at ..... utter the words [*specify, e.g., "I will kill you"*] contrary *etc.*

*or*

A.B. fears that X.Y. will cause personal injury to his property [*specify, e.g., dwelling house situate at 4 Main Street*] in that X.Y. did on ..... at ..... utter the words [*specify, e.g., "I will burn your house down"*] contrary *etc.*

**810.1 Where fear of sexual offence**

A.B. fears that X.Y. will commit an offence under section 151 [or 152 or 155 or 159 or 160(2) or (3) or 170 or 171 or 173(2) or 271 or 272 or 273] of the Criminal Code in respect of C.D. a person under the age of fourteen years in that X.Y. did on ..... at ..... [*specify grounds for fear*]









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# MARTIN'S

## ANNUAL CRIMINAL CODE

# 1997

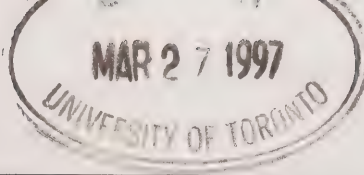
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### NOTICE

#### Coming into Force

An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof, 1995, c. 22, brought into force **September 3, 1996**, except for ss. 718.3(5) and 747 to 747.8 (Hospital orders).



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# MARTIN'S

## ANNUAL CRIMINAL CODE

# 1997

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### SECOND (CUMULATIVE) SUPPLEMENT

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This Supplement, which is supplied FREE to all subscribers, is to be inserted in the pocket provided at the back of the 1997 volume.

**CANADA LAW BOOK INC.**  
240 EDWARD STREET, AURORA, ONTARIO

## INDEX

When using the INDEX, references in *italics* referring to sections 717 to 751.1 are now in force (except for ss. 718.3(5) and 747 to 747.8). Corresponding references in regular type refer to sections that have been repealed and should be disregarded.

## IN FORCE

### PART XXIII

PART XXIII - PUNISHMENT (ss. 717 to 751, pages CC/1119 to CC/1180) has been repealed and is replaced by:

PART XXIII - SENTENCING (ss. 717 to 751.1, pages CC/1181 to CC/1214, in force September 3, 1996 except for ss. 718.3(5) and 747 to 747.8 (Hospital orders)).

## CRIMINAL CODE CORRECTIONS

Page CC/666

Section 462.3

In the definition "enterprise crime offence" strike out the following:  
(viii.1) section 347 (criminal interest rate)

Page CC/1042

Section 673

Part XXI/INDICTABLE OFFENCES – The current definition of sentence reads as follows:

"sentence" includes

- (a) a declaration made under subsection 199(3),
- (b) an order made under subsection 100(1) or (2), 194(1) or 259(1) or (2), section 261 or 462.37, subsection 491.1(2) or 730(1) or section 737, 738, 739, 742.3 or 745.2, and
- (c) a disposition made under section 731 or 732 or subsection 732.2(3) or (5), 742.4(3) or 742.6(9);

Page CC/1193

Section 734

Substitute the word "minimum" for the word "maximum" in subsec. (1).

## INDEX

Page IN/104

Under heading "STOCKS, SHARES ETC.," substitute 382 for 582 after subheading "wash trading".

## FORMS OF CHARGES

Page A/20



**Section 147(a)**

Substitute the word "lawful" for the word "unlawful" in the second line.

**Page A/32****Section 267**

Delete "(1)" in bold face headings "267(1)(a)" and "267(1)(b)".

**Page A/37****Section 334**

Substitute "five thousand dollars" for the sum "one thousand dollars" wherever it appears.

**Page A/40****Section 354(1)**

Substitute "five thousand dollars" for the sum "one thousand dollars" wherever it appears.

**Page A/41****Section 362(1)(a)**

Substitute "five thousand dollars" for the sum "one thousand dollars" wherever it appears.

**Page A/44****Section 392(b)**

Substitute "392(a)" for "372(a)" in the third line.

**Page A/48****Section 430(3) and (4)**

Substitute "five thousand dollars" for the sum "one thousand dollars" wherever it appears.

**Page A/52**

"Section 740(1) Probation order: non-compliance" form should read as follows:

**733.1(1) Probation order: non-compliance**

A.B. on [or between]..... at ..... did, while bound by a probation order made by [insert full title of the court making the order] ..... on [insert date of order] ....., fail [or refuse] without reasonable excuse to comply with such order, to wit [here recite the non-complied with condition of the order] ..... contrary etc.

---

**CRIMINAL CODE AMENDMENTS**

The Criminal Code has been amended by the following:

1. "An Act to establish the Department of Health Act and to amend and repeal certain other Acts", 1996, c. 8, s. 32(1)(d); to come into force by order of the Governor in Council.
2. "An Act to establish the Department of Public Works and Government Services and to amend and repeal certain Acts", 1996, c. 16, s. 60(1)(d); in force June 20, 1996.

2. "An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof", 1996, c. 19, ss. 65 to 76; to come into force by order of the Governor in Council.

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### Section 100

Subsec. (2)(c) replaced 1996, c. 19, s. 65. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (c) *an offence described in subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act.*
- 

### Section 109

Subsec. (1)(c), as enacted by 1995, c. 39, s. 139, replaced by 1996, c. 19, s. 65.1. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (c) *an offence relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act, or*
- 

### Section 183

Definition "offence" amended by 1996, c. 19, s. 66. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (a) *by striking out the reference to "section 4 (trafficking), 5 (importing or exporting), 19.1 (possession of property obtained by certain offences) or 19.2 (laundering proceeds of certain offences) of the Narcotic Control Act," and by replacing it with a reference to "section 5 (trafficking), 6 (importing and exporting), 7 (production), 8 (possession of property obtained by designated substance offences) or 9 (laundering proceeds of designated substance offences) of the Controlled Drugs and Substances Act"; and*
  - (b) *by striking out the reference to "section 39 (trafficking), 44.2 (possession of property obtained by trafficking in controlled substances), 44.3 (laundering proceeds of trafficking in controlled substances), 48 (trafficking), 50.2 (possession of property obtained by trafficking in restricted drugs) or 50.3 (laundering proceeds of trafficking in restricted drugs) of the Food and Drugs Act,".*
- 

### Section 287

Subsec. (5) amended, 1996, c. 8, s. 32(1)(d) by replacing the expression "Minister of National Health and Welfare" with the expression "Minister of Health".

Subsec. (6) amended 1996, c. 8, s. 32(1)(d) by replacing the reference to the "Minister of National Health and Welfare" with a reference to the "Minister of Health".

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### Section 462.1

Definitions "illicit drug" and "illicit drug use" replaced by 1996, c. 19, s. 67. The amendment, which is not yet in force, is printing in *lightface italics* and reads as follows:

*"illicit drug" means a controlled substance or precursor the import, export, production, sale or possession of which is prohibited or restricted pursuant to the Controlled Drugs and Substances Act.*

*"illicit drug use" means the importation, exportation, production, sale or possession of a controlled substance or precursor contrary to the Controlled Drugs and Substances Act or a regulation made under that Act;*

### Section 462.3 to 462.48

Sections amended 1996, c. 19, s. 70(a) to (k) by replacing the expression "designated drug offence" with the expression "designated substance offence" in the following subsections. The amendments, which are not yet in force, are printed in *lightface italics* and read as follows:

- (a) *subparagraphs (b)(i) and (ii) of the definition "enterprise crime offence" in section 462.3;*
- (b) *paragraphs (a) and (b) of the definition "proceeds of crime" in section 462.3;*
- (c) *paragraphs 462.31(1)(a) and (b);*
- (d) *subparagraph 462.34(6)(a)(i);*
- (e) *paragraph 462.34(6)(b);*
- (f) *section 462.39;*
- (g) *paragraph 462.41(3)(a);*
- (h) *paragraph 462.42(1)(a);*
- (i) *subsection 462.42(4);*
- (j) *section 462.47; and*
- (k) *paragraphs 462.48(1)(a) and (b).*

### Section 462.3

Definition "designated drug offence" repealed by 1996, c. 19, s. 68(1).

Definition "designated substance offence" enacted 1996, c. 19, s. 68(2). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*"designated substance offence" means*

- (a) *an offence under Part I of the Controlled Drugs and Substances Act, except subsection 4(1) of that Act, or*
- (b) *a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);*

### Section 462.33(3.1)

Amended 1996, c. 16, s. 60(1)(d) by replacing the reference to the "Minister of Supply and Services" with a reference to the "Minister of Public Works and Government Services".

### Section 462.34

Subsec. (7) replaced by 1996, c. 19, s. 69. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*Saving Provision.*

*(7) Section 354 of this Act and subsection 8(1) of the Controlled Drugs and Substances Act do not apply to a person who comes into possession of any property or thing that, pursuant to an order made under paragraph (4)(c), was returned to any person after having been seized or was excluded from the application of a restraint order made under subsection 462.33(3).*



**Section 515**

Subsec. (4.1) replaced by 1996, c. 19, s. 71(1). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*Additional Conditions.*

*(4.1) before making an order under subsection (2), in the case of an accused who is charged with an offence in the commission of which violence against a person was used, threatened or attempted or an offence described in section 264 of this Act, or in subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act, the justice shall consider whether it is desirable, in the interests of the safety of the accused or of any other person, to include as a condition of the order that the accused be prohibited from possessing any firearm or any ammunition or explosive substance for any period of time specified in the order and that the accused surrender any firearms acquisition certificate that the accused possesses, and where the justice decides that it is not desirable, in the interests of the safety of the accused or of any other person, for the accused to possess any of those things, the justice may add the appropriate condition to the order.*

---

**Section 515**

Subsec. (4.1) replaced 1996, c. 19, s. 93.3 (to come into force on the later of the day on which 1995, c. 39, s. 153 comes into force and 1996, c. 19 s. 71(1) comes into force). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*Additional Conditions.*

*(4.1) When making an order under subsection (2), in the case of an accused who is charged with*

- (a) an offence in the commission of which violence against a person was used, threatened or attempted,*
  - (b) an offence under section 264 (criminal harassment),*
  - (c) an offence relating to the contravention of subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act, or*
  - (d) an offence that involves, or the subject-matter of which is, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition, prohibited ammunition or an explosive substance, the justice shall add to the order a condition prohibiting the accused from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, until the accused is dealt with according to law unless the justice considers that such a condition is not required in the interests of the safety of the accused or of any other person.*
- 

**Section 515**

Subsec. (6)(d) replaced by 1996, c. 19, s. 71(2). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (d) with having committed an offence punishable by imprisonment for life under subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence.*
- 

**Section 553**

Para. (c) amended 1996, c. 19, s. 72 by striking out the word "or" at the end of subpara. (viii) and adding new subparas. (x) and (xi). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (x) *paragraph 4(4)(a) of the Controlled Drugs and Substances Act, or*  
 (xi) *subsection 5(4) of the Controlled Drugs and Substances Act.*

## Schedule to Part XX.1

Items 73 to 77, with heading, as enacted by 1991, c. 43, s. 4, are replaced by 1996, c. 19, s. 73. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

### CONTROLLED DRUGS AND SUBSTANCES ACT

73. *Subsections 4(3) and (4) – possession*

74. *Subsections 5(3) and (4) – trafficking*

75. *Subsection 6(3) – importing and exporting*

76. *Subsection 7(2) – production.*

## Section 673

Definition “sentence” amended 1996, c. 19, s. 74(1) by striking out the word “and” at the end of para. (b), adding the word “and” at the end of para. (c) and adding new para. (d). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (d) *and order made under subsection 16(1) of the Controlled Drugs and Substances Act;*

## Section 673

Section 673 definition “sentence”, as enacted by 1991, c. 43, s. 5, amended 1996, c. 19, s. 74(2) by striking out the word “and” at the end of para. (b), adding the word “and” at the end of para. (c) and adding new para. (d). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (d) *an order made under subsection 16(1) of the Controlled Drugs and Substances Act;*

## Section 727.9 (no longer applicable)

Subsec. (1) amended 1996, c. 19, s. 75 by replacing that portion before para. (a). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*Victim Fine Surcharge.*

*727.9 (1) Subject to subsection (2), where an offender is convicted or discharged under section 736 of an offence under this Act or the Controlled Drugs and Substances Act, the court imposing sentence on or discharging the offender shall, in addition to any other punishment imposed on the offender, order the offender to pay a victim fine surcharge in an amount not exceeding.*

## Section 785

Definition “sentence” amended 1996, c. 19, s. 76 by striking out the word “and” at the end of para. (b), adding the word “and” at the end of para. (c) and adding new para. (d). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

- (d) *an order made under subsection 16(1) of the Controlled Drugs and Substances Act;*

## CONSEQUENTIAL AMENDMENTS

Due to consequential amendments, the following sections read as follows:

### Section 743.5

743.5 (1) Where a person is sentenced for an offence while subject to a disposition made under paragraph 20(1)(f), (k) or (k.1) of the Young Offenders Act, on the application of the Attorney General or the Attorney General's agent, a court of criminal jurisdiction may, unless to so order would bring the administration of justice into disrepute, order that the remaining portion of the disposition made under that Act be dealt with, for all purposes under this Act or any other Act of Parliament, as if it had been a sentence imposed under this Act.

(2) Where an order is made under subsection (1), in respect of a disposition made under paragraph 20(1)(k) or (k.1) of the Young Offenders Act, the remaining portion of the disposition to be served pursuant to the order shall be served concurrently with the sentence referred to in subsection (1), where it is a term of imprisonment, unless the court making the order orders that it be served consecutively.

(3) For greater certainty, the remaining portion of the disposition referred to in subsection (2) shall, for the purposes of section 139 of the Corrections and Conditional Release Act and section 743.1 of this Act, be deemed to constitute one sentence of imprisonment.

---

### Section 745.1

#### PERSONS UNDER EIGHTEEN

745.1 The sentence to be pronounced against a person who was under the age of eighteen at the time of the commission of the offence for which the person was convicted of first degree murder or second degree murder and who is to be sentenced to imprisonment for life shall be that the person be sentenced to imprisonment for life without eligibility for parole until the person has served

- (a) such a period between five and seven years of the sentence as specified by the judge presiding at the trial, or if no period is specified by the judge presiding at the trial, five years, in the case of a person who was under the age of sixteen at the time of the commission of the offence;
- (b) ten years, in the case of a person convicted of first degree murder who was sixteen or seventeen years of age at the time of the commission of the offence; and
- (c) seven years, in the case of a person convicted of second degree murder who was sixteen or seventeen years of age at the time of the commission of the offence.

---

### Section 745.3

#### PERSONS UNDER SIXTEEN

745.3 Where a jury finds an accused guilty of first degree murder or second degree murder and the accused was under the age of sixteen at the time of the commission of the offence, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of first degree murder (or second degree murder) and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with



respect to the period of imprisonment that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining the period of imprisonment that is between five years and seven years that the law would require the accused to serve before the accused is eligible to be considered for release on parole.

---

### Section 745.5

#### IDEM

745.5 At the time of the sentencing under section 745.1 of an offender who is convicted of first degree murder or second degree murder and who was under the age of sixteen at the time of the commission of the offence, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court, may, having regard to the age and character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 745.3, by order, decide the period of imprisonment the offender is to serve that is between five years and seven years without eligibility for parole, as the judge deems fit in the circumstances.

---

### Section 746

#### TIME SPENT IN CUSTODY

746. In calculating the term of imprisonment served for the purposes of section 745, 745.1, 745.4, 745.5 or 745.6, there shall be included any time spent in custody between

- (a) in the case of a sentence of imprisonment for life after July 25, 1976, the day on which the person was arrested and taken into custody in respect of an offence for which that person was sentenced to imprisonment for life and the day the sentence was imposed; or
- (b) in the case of a sentence of death that has been or is deemed to have been commuted to a sentence of imprisonment for life, the day on which the person was arrested and taken into custody in respect of the offence for which that person was sentenced to death and the day the sentence was commuted or deemed to have been commuted to a sentence of imprisonment for life.

---

## FOOD AND DRUGS ACT AMENDMENTS

The Food and Drugs Act has been amended by:

1. "An Act to establish the Department of Health and to amend and repeal certain Acts", 1996, c. 8, ss. 23.1, 23.2, 32(1)(g) and 34(1)(a) (to come into force by order of the Governor in Council)
  2. "An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof", 1996, c. 19, ss. 77 to 81 (to come into force by order of the Governor in Council)
- 

### Section 2

Definition "inspector" replaced by 1996, c. 8, s. 23.1. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

“inspector” means any person designated as an inspector for the purpose of the enforcement of this Act under subsection 22(1) of this Act or the Department of Agriculture and Agri-Food Act;

Definition “Department” amended 1996, c. 8, s. 34(1)(a) by replacing “Department of National Health and Welfare” with “Department of Health” 1996, c. 8, s. 34(1)(a).

---

## Section 27

Replaced by 1996, c. 8, s. 23.2. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

### *Destruction with consent.*

27. (1) *Where an inspector has seized an article under this Part and its owner or the person in whose possession the article was at the time of seizure consents to its destruction, the article is thereupon forfeited to Her Majesty and may be destroyed or otherwise disposed of as the Minister or the Minister of Agriculture and Agri-Food may direct.*

(2) *Where a person has been convicted of a contravention of this Act or the regulations, the court or judge may order that any article by means of or in relation to which the offence was committed, and any thing of a similar nature belonging to or in the possession of the accused or found with the article, be forfeited and, on the making of the order, the article and thing are forfeited to Her Majesty and may be disposed of as the Minister or the Minister of Agriculture and Agri-Food may direct.*

(3) *Without prejudice to subsection (2), a judge of a superior court of the province in which any article is seized under this Part may, on the application of an inspector and on such notice to such persons as the judge directs, order that the article and any thing of a similar nature found therewith be forfeited to Her Majesty, to be disposed of as the Minister or the Minister of Agriculture and Agri-Food may direct, if the judge finds, after making such inquiry as the judge considers necessary, that the article is one by means of or in relation to which any of the provisions of this Act or the regulations have been contravened.*

---

## Section 31

Section amended 1996, c. 19, s. 77 by replacing that portion before para. (a). The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

### *Contravention of Act and Regulations.*

31. *Every person who contravenes any of the provisions of this Act or of the regulations made under this Part is guilty of an offence and liable*

---

## Section 32

Subsec. 2 definition “Minister” amended 1996, c. 8, s. 32(1)(g) by replacing the expression “Minister of National Health and Welfare” with the expression “Minister of Health”.

---

## Section 35

Subsec. (1) replaced by 1996, c. 19, s. 78. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

### *Certificate of Analyst.*

35. (1) *Subject to this section, in any prosecution for an offence under section 31, a certificate purporting to be signed by an analyst and stating that an article, sample or substance has been*

*submitted to, and analysed or examined by, the analyst and stating the results of the analysis or examination is admissible in evidence and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or official character of the person appearing to have signed it.*

---

### Section 36

Subsec. (1) replaced by 1996, c. 19, s. 79. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

*Proof as to manufacturer or packager.*

36. (1) *In a prosecution for a contravention of this Act or of the regulations made under this Part, proof that a package containing any article to which this Act or the regulations apply bore a name or address purporting to be the name or address of the person by whom it was manufactured or packaged is, in the absence of evidence to the contrary, proof tht the article was manufactured or packaged, as the case may be, by the person whose name or address appeared on the package.*

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### Parts III and IV (Sections 38 to 51)

*Repealed 1996, c. 19, s. 81.*

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### Section 80

*Subsec. (2) repealed 1996, c. 19, s. 80.*

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### Schedules G and H

*Repealed 1996, c. 19, s. 82.*

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## NARCOTIC CONTROL ACT AMENDMENTS

The Narcotic Control Act has been amended by:

“An Act to establish the Department of Health and to amend and repeal certain Acts”, 1996, c. 8, s. 32(1)(j)

The Narcotic Control Act has been repealed by:

“An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof”, 1996, c. 19, s. 94.

---

### Section 2

Para. (a) definition “Minister amended 1996, c. 8, s. 32(1)(j) by replacing the expression “Minister of National Health and Welfare” with the expression “Minister of Health”.

---

## YOUNG OFFENDERS ACT AMENDMENTS

The Young Offenders Act has been amended by:

“An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof”, 1996, c. 19, s. 93.1

---



## Schedule

Item 4 replaced 1996, c. 19, s. 93.1. The amendment, which is not yet in force, is printed in *lightface italics* and reads as follows:

4. *An offence under any of the following provisions of the Controlled Drugs and Substances Act;*

- (a) section 5 (trafficking);*
- (b) section 6 (importing and exporting); and*
- (c) section 7 (production of substance).*

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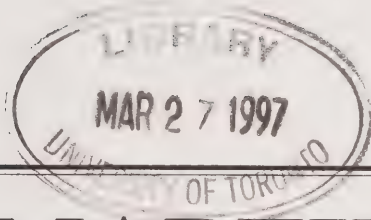
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### SPECIAL SUPPLEMENT

CONTROLLED DRUGS AND SUBSTANCES ACT, 1996, c. 19, ss. 1 to 60

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## CONTROLLED DRUGS AND SUBSTANCES ACT

1996, Chap. 19, ss. 1 to 60 (to come into force by order of the Governor in Council) (but see ss. 61 to 63). The Act, which is not yet in force, is printed in lightface italics.

**EDITOR'S NOTE:** The Controlled Drugs and Substances Act creates a new scheme for the regulation of certain dangerous drugs and narcotics, now known as "controlled substances". In effect, the Act replaces the Narcotic Control Act, R.S.C. 1985, c. N-1 and Part III [Controlled Drugs] and Part IV [Restricted Drugs] of the Food and Drugs Act, R.S.C. 1985, c. F-27. The essential scheme of the legislation is similar to the former Narcotic Control Act and the Food and Drugs Act.

**Schedules** – An important part of the legislation is the schedules to the Act: Schedule I - includes the most dangerous drugs and narcotics, such as phencyclidine, heroin and cocaine. Schedule II - lists cannabis and its derivatives. Schedule III - includes many of the more dangerous drugs which previously were included in schedules G and H to the Food and Drugs Act, such as the amphetamines and lysergic acid diethylamide (LSD). Schedule IV - includes many of the drugs formerly included in Schedule G to the Food and Drugs Act. These drugs, such as the barbiturates, while dangerous, have therapeutic uses. As was the case under Part III of the Food and Drugs Act, simple possession of Schedule IV drugs is not an offence.

**Possession** – Under s. 4(1), simple possession of any of the drugs and narcotics listed in Schedules I, II and III of the Controlled Drugs and Substances Act is an offence unless the person is authorized to be in possession by the regulations. The offence under s. 4(1) is a Crown option offence. The penalty for breach of s. 4(1) depends upon the Schedule in which the substance is included. In addition, a special penalty scheme has been included for possession of small quantities of Schedule II [cannabis] offences. Where the subject matter of the offence is a Schedule II substance in an amount that does not exceed the amount set out in Schedule VIII, then the accused is guilty only of a summary conviction offence and the maximum penalty is a \$1,000 fine and/or six months' jail. Further, even where the amounts exceed the Schedule VIII amounts and the Crown proceeds by indictment, the offence is within the absolute jurisdiction of the provincial court where the substance is listed in Schedule II,

**"Double-doctoring"** – Under s. 4(2), it is an offence to seek or obtain any of the scheduled substances from a practitioner, such as a physician, without disclosing particulars relating to the acquisition of any of the scheduled substances within the preceding 30 days. This is the so-called "double-doctoring" offence which was found in both the Food and Drugs Act and the Narcotic Control Act. Again, this is a Crown option offence. The maximum penalty for the offence where the Crown proceeds by indictment depends upon the schedule in which the substance is found. If the Crown proceeds by way of summary conviction, then the penalty is the same irrespective of the schedule.

**Trafficking** – Under s. 5(1), it is an offence to traffic in any of the scheduled substances and under s. 5(2) it is an offence to be in possession for the purpose of trafficking. The definition of "traffic", which of course includes sell, when combined with the definition of "sell" is very broad and covers virtually the same activity as was

prohibited under the predecessor legislation. These definitions are found in s. 2. The penalty and classification of the offence depend upon the schedule in which the substance is found. For the Schedule I and II substances, it is a pure indictable offence with a maximum punishment of life imprisonment, except where the offence relates to trafficking in smaller amounts of the Schedule II (cannabis) substance. Under s. 5(4), where the amount of the Schedule II substance does not exceed the amount listed in Schedule VII, the maximum penalty is five years less one day. This offence is also listed in s. 553(c) of the Criminal Code and thus is within the absolute jurisdiction of the provincial court. For the Schedule III and IV offences, the offence is a Crown-option offence with lesser maximum punishments.

**Importing** – Section 6 creates the importing offence for substances included in Schedules I to VI. Schedules V and VI list chemicals which can be employed in the manufacture of substances listed in the earlier Schedule. Where the substance is listed in Schedules I and II, the offence is indictable and punishable by life imprisonment. Where the substance is listed in the other schedules, the offence is a Crown-option offence with the maximum penalty depending upon the schedule in which the substance is found.

**Production** – Section 7 prohibits the production of any of the substances in Schedules I to IV except as authorized by regulations. The term “produce” is defined in s. 2 and includes manufacture and cultivation. For Schedule I and II substances, the offence is indictable with a maximum punishment of life imprisonment unless the substance is marihuana in which case the maximum is seven years. Where the substance is listed in Schedule III or IV, the offence is Crown-option with lesser maximum punishments.

**Proceeds of Crime** – Sections 8 and 9 recreate the proceeds of crime and money-laundering offences in terms similar to the former provisions of the Narcotic Control Act and the Food and Drugs Act.

**Sentencing** – Section 10 sets out the principles of sentencing and includes a list of aggravating circumstances such as that the accused used a weapon in relation to the commission of the offence or committed the trafficking offence near a school. Where one of these aggravating circumstances exists but the judge does not impose a prison term, the judge is required to give reasons for that decision.

**Search and Seizure** – Sections 11 to 13 set out the powers of search and seizure in respect of offences under this Act. The terms are similar to those found in the Criminal Code. In addition, special provision is made in s. 11(7) for a warrantless search in exigent circumstances.

**Restraint and Forfeiture** – Sections 14 to 23 deal with restraint orders and forfeiture orders in terms similar to Part XII.2 of the Criminal Code. This is a departure from the scheme under the Narcotic Control Act and the Food and Drugs Act which had simply adopted the provisions of Part XII.2 with the necessary modifications. A significant difference between the procedure under this Act and the procedure under the Criminal Code is that the Attorney General is not required to give an undertaking as to damages and costs when seeking a restraint order under the Act.

**Disposal of seized substances** – Part III of the Act deals with the disposal of substances seized or found by a peace officer or inspector. Part IV sets out the scheme for appointment of inspectors and the administrative enforcement of the Act and regulations in terms similar to Part II of the Food and Drugs Act. Part V sets out a special scheme for enforcement of “designated regulations”. Under this Part, the Minister



may make an emergency order where there is a substantial risk of immediate danger to the health or safety of any person.

**Miscellaneous** – Part VI contains a number of miscellaneous provisions. Most important are those relating to the admissibility of certificates of analysis [ss. 51 and 52], continuity of exhibits [s. 53], admissibility of copies of records seized under the Act or regulations [s. 54], and the limitation period of one year where the Crown proceeds by way of summary conviction [s. 47]. Under s. 48, the evidentiary burden is initially upon the accused to show that any certificate, licence, permit or other qualification operates in the accused's favour. Section 55 gives the Governor in Council wide regulation-making powers.

Section 60 permits the Governor in Council to add or delete items from any of the Schedules. An important innovation in this Act is the concept of "analogue" defined in s. 2 as a substance that, in relation to a controlled substance, has "a substantially similar chemical structure". Thus, for example, Schedule III lists amphetamines, their salts, derivatives, isomers and "analogues". This concept was apparently added to attempt to deal with the problem of chemists manufacturing drugs with a slightly different chemical structure than those actually listed in the schedule. Previously, the government would have been required to amend the schedules to prohibit or regulate the trafficking or production of such substances.

**"Controlled substance"** – It should also be noted that s. 2(2)(b) provides that a reference to a "controlled substance" includes a reference to all synthetic and natural forms of the substances. This specifically meets an argument which had been made under the former Narcotic Control Act that certain synthetic forms of narcotics were not covered by the Act.

*An act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof*

## SHORT TITLE

SHORT TITLE.

1 *This Act may be cited as the Controlled Drugs and Substances Act.*

## INTERPRETATION

DEFINITIONS / "adjudicator" / "analogue" / "analyst" / "Attorney General" / "controlled substance" / "designated substance offence" / "inspector" / "judge" / "justice" / "Minister" / "offence-related property" / "possession" / "practitioner" / "precursor" / "prescribed" / "produce" / "provide" / "sell" / "traffic" / Interpretation / Idem.

2 (1) *In this Act,*

"adjudicator" means a person appointed or employed under the Public Service Employment Act who performs the duties and functions of an adjudicator under this Act and the regulations;

"analogue" means a substance that, in relation to a controlled substance, has a substantially similar chemical structure;

"analyst" means a person who is designated as an analyst under section 44;

*"Attorney General" means*

- (a) *the Attorney General of Canada, and includes their lawful deputy, or*
- (b) *with respect to proceedings commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General of that province, and includes their lawful deputy;*

*"controlled substance" means a substance included in Schedule I, II, III, IV or V;*

*"designated substance offence" means*

- (a) *an offence under Part I, except subsection 4(1), or*
- (b) *a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a);*

*"inspector" means a person who is designated as an inspector under section 30;*

*"judge" means a judge as defined in section 552 of the Criminal Code or a judge of a superior court of criminal jurisdiction;*

*"justice" has the same meaning as in section 2 of the Criminal Code;*

*"Minister" means the Minister of National Health and Welfare;*

*"offence-related property" means any property, within or outside Canada,*

- (a) *by means of or in respect of which a designated substance offence is committed,*
- (b) *that is used in any manner in connection with the commission of a designated substance offence, or*
- (c) *that is intended for use for the purpose of committing a designated substance offence,*

*but does not include a controlled substance or real property, other than real property built or significantly modified for the purpose of facilitating the commission of a designated substance offence;*

*"possession" means possession within the meaning of subsection 4(3) of the Criminal Code;*

*"practitioner" means a person who is registered and entitled under the laws of a province to practise in that province the profession of medicine, dentistry or veterinary medicine, and includes any other person or class or persons prescribed as a practitioner;*

*"precursor" means a substance included in Schedule VI;*

*"prescribed" means prescribed by the regulations;*

*"produce" means, in respect of a substance included in any of Schedules I to IV, to obtain the substance by any method or process including*

- (a) *manufacturing, synthesizing or using any means of altering the chemical or physical properties of the substance, or*
- (b) *cultivating, propagating or harvesting the substance or any living thing from which the substance may be extracted or otherwise obtained,*

*and includes offer to produce;*

*"provide" means to give, transfer or otherwise make available in any manner, whether directly or indirectly and whether or not for consideration;*

*"sell" includes offer for sale, expose for sale, have in possession for sale and distribute, whether or not the distribution is made for consideration;*

*"traffic" means, in respect of a substance included in any of Schedules I to IV,*

- (a) *to sell, administer, give, transfer, transport, send or deliver the substance,*
- (b) *to sell an authorization to obtain the substance, or*
- (c) *to offer to do anything mentioned in paragraph (a) or (b),*

*otherwise than under the authority of the regulations.*

*(2) For the purposes of this Act,*

- (a) a reference to a controlled substance includes a reference to any substance that contains a controlled substance; and*
- (b) a reference to a controlled substance includes a reference to*
  - (i) all synthetic and natural forms of the substance, and*
  - (ii) any thing that contains or has on it a controlled substance and that is used or intended or designed for use*
    - (A) in producing the substance, or*
    - (B) in introducing the substance into a human body.*

*(3) For the purposes of this Act, where a substance is expressly named in any of Schedules I to VI, it shall be deemed not to be included in any other of those Schedules.*

#### INTERPRETATION / Idem.

*3 (1) Every power or duty imposed under this Act that may be exercised or performed in respect of an offence under this Act may be exercised or performed in respect of a conspiracy, or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence under this Act.*

*(2) For the purposes of sections 16 and 20, a reference to a person who is or was convicted of a designated substance offence includes a reference to an offender who is discharged under section 736 of the Criminal Code.*

## Part I/OFFENCES AND PUNISHMENT

### Particular Offences

*POSSESSION OF SUBSTANCE / Obtaining substance / Punishment / Punishment / Punishment / Punishment / Punishment / Determination of amount.*

*4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.*

*(2) No person shall seek or obtain*

- (a) a substance included in Schedule I, II, III or IV, or*
- (b) an authorization to obtain a substance included in Schedule I, II, III or IV*

*from a practitioner, unless the person discloses to the practitioner particulars relating to the acquisition by the person of every substance in those Schedules, and of every authorization to obtain such substances, from any other practitioner within the preceding thirty days.*

*(3) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule I*

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or*
- (b) is guilty of an offence punishable on summary conviction and liable*
  - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and*
  - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.*

*(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II*



- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or
  - (b) is guilty of an offence punishable on summary conviction and liable
    - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and
    - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.
- (5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.
- (6) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule III
- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years; or
  - (b) is guilty of an offence punishable on summary conviction and liable
    - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and
    - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.
- (7) Every person who contravenes subsection (2)
- (a) is guilty of an indictable offence and liable
    - (i) to imprisonment for a term not exceeding seven years, where the subject-matter of the offence is a substance included in Schedule I,
    - (ii) to imprisonment for a term not exceeding five years less a day, where the subject-matter of the offence is a substance included in Schedule II,
    - (iii) to imprisonment for a term not exceeding three years, where the subject-matter of the offence is a substance included in Schedule III, or
    - (iv) to imprisonment for a term not exceeding eighteen months, where the subject-matter of the offence is a substance included in Schedule IV; or
  - (b) is guilty of an offence punishable on summary conviction and liable
    - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and
    - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.
- (8) For the purposes of subsection (5) and Schedule VIII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

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TRAFFICKING IN SUBSTANCE / Possession for purpose of trafficking / Punishment / Punishment in respect of specified substance / Interpretation / Idem.

5 (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

(3) Every person who contravenes subsection (1) or (2)

- (a) subject to subsection (4), where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

- (b) where the subject-matter of the offence is a substance included in Schedule III,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and
- (c) where the subject-matter of the offence is a substance included in Schedule IV,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

(4) Every person who contravenes subsection (1) or (2), where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day.

(5) For the purposes of applying subsection (3) or (4) in respect of an offence under subsection (1), a reference to a substance included in Schedule I, II, III or IV includes a reference to any substance represented or held out to be a substance included in that Schedule.

(6) For the purposes of subsection (4) and Schedule VII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

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IMPORTING AND EXPORTING / Possession for the purpose of exporting / Punishment.

6 (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

(3) Every person who contravenes subsection (1) or (2)

- (a) where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;
- (b) where the subject-matter of the offence is a substance included in Schedule III or VI,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and
- (c) where the subject-matter of the offence is a substance included in Schedule IV or V,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

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PRODUCTION OF SUBSTANCE / Punishment.

7.(1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.

2) Every person who contravenes subsection (1)

- (a) where the subject-matter of the offence is a substance included in Schedule I or II, other than cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for life;
- (b) where the subject-matter of the offence is cannabis (marihuana), is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years;

- (c) where the subject-matter of the offence is a substance included in Schedule III,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and
- (d) where the subject-matter of the offence is a substance included in Schedule IV,
  - (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
  - (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

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POSSESSION OF PROPERTY OBTAINED BY CERTAIN OFFENCES / Punishment.

8.(1) No person shall possess any property or any proceeds of any property knowing that all or part of the property or proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under this Part except subsection 4(1) and this subsection;
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a); or
- (c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or an act or omission referred to in paragraph (b).

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, where the value of the property or the proceeds exceeds one thousand dollars; or
- (b) is guilty
  - (i) of an indictable offence and liable to imprisonment for a term not exceeding two years, or
  - (ii) of an offence punishable on summary conviction and liable to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both,

where the value of the property or the proceeds does not exceed one thousand dollars.

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LAUNDERING PROCEEDS OF CERTAIN OFFENCES / Punishment.

9.(1) No person shall use, transfer the possession of, send or deliver to any person or place, transport, transmit, alter, dispose of or otherwise deal with, in any manner or by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or part of that property or those proceeds was obtained by or derived directly or indirectly as a result of

- (a) the commission in Canada of an offence under this Part except subsection 4(1);
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an offence referred to in paragraph (a); or
- (c) a conspiracy or an attempt to commit, being an accessory after the fact in relation to, or any counselling in relation to, an offence referred to in paragraph (a) or an act or omission referred to in paragraph (b).

(2) Every person who contravenes subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction and liable to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both.



## Sentencing

PURPOSE OF SENTENCING / Factors to be considered / Reasons of court.

10 (1) *Without restricting the generality of the Criminal Code, the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community.*

(2) *Where a person is convicted of a designated substance offence, the court imposing sentence on the person shall consider as an aggravating factor that the person*

- (a) *in relation to the commission of the offence,*
  - (i) *carried, used or threatened to use a weapon,*
  - (ii) *used or threatened to use violence,*
  - (iii) *trafficked in a substance included in Schedule I, II, III or IV or possessed such a substance for the purpose of trafficking, in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years, or*
  - (iv) *trafficked in a substance included in Schedule I, II, III or IV, or possessed such a substance for the purpose of trafficking, to a person under the age of eighteen years;*
- (b) *was previously convicted of a designated substance offence; or*
- (c) *used the services of a person under the age of eighteen years to commit, or involved such a person in the commission of, a designated substance offence.*

(3) *Where, pursuant to subsection (1), the court is satisfied of the existence of one or more of the aggravating factors enumerated in that subsection, but decides not to sentence the person to imprisonment, the court shall give reasons for that decision.*

## Part II/ENFORCEMENT

### Search, Seizure and Detention

INFORMATION FOR SEARCH WARRANT / Application of section 487.1 of the Criminal Code / Execution in another province / Effect of endorsement / Search of person and seizure / Seizure of things not specified / Where warrant not necessary / Seizure of additional things.

11 (1) *A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that*

- (a) *a controlled substance or precursor in respect of which this Act has been contravened,*
- (b) *any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,*
- (c) *offence-related property, or*
- (d) *any thing that will afford evidence in respect of an offence under this Act*

*is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.*

(2) *For the purposes of subsection (1), an information may be submitted by telephone or other means of telecommunication in accordance with section 487.1 of the Criminal Code, with such modifications as the circumstances require.*

(3) *A justice may, where a place referred to in subsection (1) is in a province other than that*

*in which the justice has jurisdiction, issue the warrant referred to in that subsection and the warrant may be executed in the other province after it has been endorsed by a justice having jurisdiction in that other province.*

*(4) An endorsement that is made on a warrant as provided for in subsection (3) is sufficient authority to any peace officer to whom it was originally directed and to all peace officers within the jurisdiction of the justice by whom it is endorsed to execute the warrant and to deal with the things seized in accordance with the law.*

*(5) Where a peace officer who executes a warrant issued under subsection (1) has reasonable grounds to believe that any person found in the place set out in the warrant has on their person any controlled substance, precursor, property or thing set out in the warrant, the peace officer may search the person for the controlled substance, precursor, property or thing and seize it.*

*(6) A peace officer who executes a warrant issued under subsection (1) may seize, in addition to the things mentioned in the warrant,*

- (a) any controlled substance or precursor in respect of which the peace officer believes on reasonable grounds that this Act has been contravened;*
- (b) any thing that the peace officer believes on reasonable grounds to contain or conceal a controlled substance or precursor referred to in paragraph (a);*
- (c) any thing that the peace officer believes on reasonable grounds is offence-related property; or*

*(d) any thing that the peace officer believes on reasonable grounds will afford evidence in respect of an offence under this Act.*

*(7) A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances it would be impracticable to obtain one.*

*(8) A peace officer who executes a warrant issued under subsection (1) or exercises powers under subsection (5) or (7) may seize, in addition to the things mentioned in the warrant and in subsection (6), any thing that the peace officer believes on reasonable grounds has been obtained by or used in the commission of an offence or that will afford evidence in respect of an offence.*

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#### ASSISTANCE AND USE OF FORCE.

*12. For the purpose of exercising any of the powers described in section 11, a peace officer may*

- (a) enlist such assistance as the officer deems necessary; and*
  - (b) use as much force as is necessary in the circumstances.*
- 

SECTIONS 489.1 AND 490 OF THE CRIMINAL CODE APPLICABLE / *Idem* / Provisions of this Act applicable / Report to justice / *Idem* / Recognizance.

*13 (1) Subject to subsections (2) and (3), sections 489.1 and 490 of the Criminal Code apply to any thing seized under this Act.*

*(2) Where a thing seized under this Act is offence-related property, sections 489.1 and 490 of the Criminal Code apply subject to sections 16 to 22 of this Act.*

*(3) Where a controlled substance is seized under this Act or any other Act of Parliament or pursuant to a power of seizure at common law, this Act and the regulations apply in respect of that substance.*

*(4) Subject to the regulations, every peace officer who, pursuant to section 11, seizes a controlled substance shall, as soon as is reasonable in the circumstances after the seizure,*

- (a) prepare a report identifying the place searched, the controlled substance and the location where it is being detained;
- (b) cause the report to be filed with the justice who issued the warrant or another justice for the same territorial division or, where by reason of exigent circumstances a warrant was not issued, a justice who would have had jurisdiction to issue a warrant; and
- (c) cause a copy of the report to be sent to the Minister.

(5) A report in Form 5.2 of the Criminal Code may be filed as a report for the purposes of subsection (4).

(6) Where, pursuant to this section, an order is made under paragraph 490(9)(c) of the Criminal Code for the return of any offence-related property seized under this Act, the judge or justice making the order may require the applicant for the order to enter into a recognizance before the judge or justice, with or without sureties, in such amount and with such conditions, if any, as the judge or justice directs and, where the judge or justice considers it appropriate, require the applicant to deposit with the judge or justice such sum of money or other valuable security as the judge or justice directs.

## Restraint Orders

APPLICATION FOR RESTRAINT ORDER / Procedure / Restraint order / Minister of Supply and Services / Conditions / Order in writing / Service of order / Registration of order / Order continues in force / Offence.

14 (1) The Attorney General may make an application in accordance with this section for a restraint order under this section in respect of any offence-related property.

(2) An application made under subsection (1) for a restraint order in respect of any offence-related property may be made *ex parte* and shall be made in writing to a judge and be accompanied by an affidavit sworn on the information and belief of the Attorney General or any other person deposing to the following matters:

- (a) the offence against this Act to which the offence-related property relates;
- (b) the person who is believed to be in possession of the offence-related property; and
- (c) a description of the offence-related property.

(3) Where an application for a restraint order is made to a judge under subsection (1), the judge may, if satisfied that there are reasonable grounds to believe that the property is offence-related property, make a restraint order

- (a) prohibiting any person from disposing of, or otherwise dealing with any interest in, the offence-related property specified in the order otherwise than in such manner as may be specified in the order; and
- (b) at the request of the Attorney General, where the judge is of the opinion that the circumstances so require,
  - (i) appointing a person to take control of and to manage or otherwise deal with all or part of that property in accordance with the directions of the judge, and
  - (ii) requiring any person having possession of that property to give possession of the property to the person appointed under subparagraph (i).

(4) Where the Attorney General so requests, a judge appointing a person under subparagraph (3)(b)(i) shall appoint the Minister of Supply and Services.

(5) A restraint order made by a judge under this section may be subject to such reasonable conditions as the judge thinks fit.

(6) A restraint order made under this section shall be made in writing.



(7) *A copy of a restraint order made under this section shall be served on the person to whom the order is addressed in such manner as the judge making the order directs or in accordance with the rules of the court.*

(8) *A copy of a restraint order made under this section shall be registered against any property in accordance with the laws of the province in which the property is situated.*

(9) *A restraint order made under this section remains in effect until*

(a) *an order is made under subsection 490(9) or (11) of the Criminal Code in relation to the property; or*

(b) *an order of forfeiture of the property is made under subsection 16(1) or 17(2) of this Act or section 490 of the Criminal Code.*

(10) *Any person on whom a restraint order made under this section is served in accordance with this section and who, while the order is in force, acts in contravention of or fails to comply with the order is guilty of an indictable offence or an offence punishable on summary conviction.*

#### SECTIONS 489.1 AND 490 OF THE CRIMINAL CODE APPLICABLE / Recognizance.

15 (1) *Subject to sections 16 to 22, sections 489.1 and 490 of the Criminal Code apply, with such modifications as the circumstances require, to any offence-related property that is the subject-matter of a restraint order made under section 14.*

(2) *Where, pursuant to subsection (1), an order is made under paragraph 490(9)(c) of the Criminal Code for the return of any offence-related property that is the subject of a restraint order under section 14, the judge or justice making the order may require the applicant for the order to enter into a recognizance before the judge or justice, with or without sureties, in such amount and with such conditions, if any, as the judge or justice directs and, where the judge or justice considers it appropriate, require the applicant to deposit with the judge or justice such sum of money or other valuable security as the judge or justice directs.*

## Forfeiture of Offence-related Property

### ORDER OF FORFEITURE OF PROPERTY ON CONVICTION / Property related to other offences / Appeal.

16 (1) *Subject to sections 18 and 19, where a person is convicted of a designated substance offence and, on application of the Attorney General, the court is satisfied, on a balance of probabilities, that any property is offence-related property and that the offence was committed in relation to that property, the court shall*

(a) *in the case of a substance included in Schedule VI, order that the substance be forfeited to Her Majesty in right of Canada and disposed of by the Minister as the Minister thinks fit; and*

(b) *in the case of any other offence-related property,*

(i) *where the prosecution of the offence was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and*

(ii) *in any other case, order that the property be forfeited to Her Majesty in right of Canada and disposed of by such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph in accordance with the law.*

(2) *Where the evidence does not establish to the satisfaction of the court that the designated*

substance offence of which a person has been convicted was committed in relation to property in respect of which an order of forfeiture would otherwise be made under subsection (1) but the court is satisfied, beyond a reasonable doubt, that that property is offence-related property, the court may make an order of forfeiture under subsection (1) in relation to that property.

(3) A person who has been convicted of a designated substance offence or the Attorney General may appeal to the court of appeal from an order or a failure to make an order under subsection (1) as if the appeal were an appeal against the sentence imposed on the person in respect of the offence.

APPLICATION FOR IN REM FORFEITURE / Order of forfeiture of property / Accused deemed absconded / Who may dispose of forfeited property.

17 (1) Where an information has been laid in respect of a designated substance offence, the Attorney General may make an application to a judge for an order of forfeiture under subsection (2).

(2) Subject to sections 18 and 19, where an application is made to a judge under subsection (1) and the judge is satisfied

- (a) beyond a reasonable doubt that any property is offence-related property,
- (b) that proceedings in respect of a designated substance offence in relation to the property referred to in paragraph (a) were commenced, and
- (c) that the accused charged with the designated substance offence has died or absconded,

the judge shall order that the property be forfeited and disposed of in accordance with subsection (4).

(3) For the purposes of subsection (2), an accused shall be deemed to have absconded in connection with a designated substance offence if

- (a) an information has been laid alleging the commission of the offence by the accused,
- (b) a warrant for the arrest of the accused has been issued in relation to that information, and
- (c) reasonable attempts to arrest the accused pursuant to the warrant have been unsuccessful during a period of six months beginning on the day on which the warrant was issued,

and the accused shall be deemed to have so absconded on the last day of that six month period.

4) For the purposes of subsection (2),

- (a) in the case of a substance included in Schedule VI, the judge shall order that the substance be forfeited to Her Majesty in right of Canada and disposed of by the Minister as the Minister thinks fit; and
- (b) in the case of any other offence-related property,
  - (i) where the proceedings referred to in paragraph (2)(b) were commenced at the instance of the government of a province, the judge shall order that the property be forfeited to Her Majesty in right of that province and disposed of by the Attorney General or Solicitor General of that province in accordance with the law, and
  - (ii) in any other case, the judge shall order that the property be forfeited to Her Majesty in right of Canada and disposed of by such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph in accordance with the law.

VOIDABLE TRANSFERS.

8 A court may, before ordering that offence-related property be forfeited under subsection 6(1) or 17(2), set aside any conveyance or transfer of the property that occurred after the

*seizure of the property, or the making of a restraint order in respect of the property, unless the conveyance or transfer was for valuable consideration to a person acting in good faith.*

*NOTICE / Manner of giving notice / Order of restoration of property.*

*19 (1) Before making an order under subsection 16(1) or 17(2) in relation to any property, a court shall require notice in accordance with subsection (2) to be given to, and may hear, any person who, in the opinion of the court, appears to have a valid interest in the property.*

*(2) A notice given under subsection (1) shall*

- (a) be given or served in such manner as the court directs or as may be specified in the rules of the court;*
- (b) be of such duration as the court considers reasonable or as may be specified in the rules of the court; and*
- (c) set out the designated substance offence charged and a description of the property.*

*(3) Where a court is satisfied that any person, other than*

- (a) a person who was charged with a designated substance offence, or*
- (b) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) under circumstances that give rise to a reasonable inference that the title or right was transferred for the purpose of avoiding the forfeiture of the property,*

*is the lawful owner or is lawfully entitled to possession of any property or any part of any property that would otherwise be forfeited pursuant to an order made under subsection 16(1) or 17(2) and that the person appears innocent of any complicity in an offence referred to in paragraph (a) or of any collusion in relation to such an offence, the court may order that the property or part be returned to that person.*

*APPLICATION / Fixing day for hearing / Notice / Order declaring interest not affected by forfeiture / Appeal from order made under subsection (4) / Return of property.*

*20 (1) Where any offence-related property is forfeited to Her Majesty pursuant to an order made under subsection 16(1) or 17(2), any person who claims an interest in the property other than*

- (a) in the case of property forfeited pursuant to an order made under subsection 16(1), a person who was convicted of the designated substance offence in relation to which the property was forfeited,*
- (b) in the case of property forfeited pursuant to an order made under subsection 17(2), a person who was charged with the designated substance offence in relation to which the property was forfeited, or*
- (c) a person who acquired title to or a right of possession of the property from a person referred to in paragraph (a) or (b) under circumstances that give rise to a reasonable inference that the title or right was transferred from that person for the purpose of avoiding the forfeiture of the property,*

*may, within thirty days after the forfeiture, apply by notice in writing to a judge for an order under subsection (4).*

*(2) The judge to whom an application is made under subsection (1) shall fix a day not less than thirty days after the date of the filing of the application for the hearing of the application.*

*(3) An applicant shall serve a notice of the application made under subsection (1) and of the hearing of it on the Attorney General at least fifteen days before the day fixed for the hearing.*



(4) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the applicant

- (a) is not a person referred to in paragraph (1)(a), (b) or (c) and appears innocent of any complicity in any designated substance offence that resulted in the forfeiture of the property or of any collusion in relation to such an offence, and
- (b) exercised all reasonable care to be satisfied that the property was not likely to have been used in connection with the commission of an unlawful act by the person who was permitted by the applicant to obtain possession of the property or from whom the applicant obtained possession or, where the applicant is a mortgagee or lienholder, by the mortgagor or lien-giver,

the judge may make an order declaring that the interest of the applicant is not affected by the forfeiture and declaring the nature and the extent or value of the interest.

(5) An applicant or the Attorney General may appeal to the court of appeal from an order made under subsection (4), and the provisions of Part XXI of the Criminal Code with respect to procedure on appeals apply, with such modifications as the circumstances require, in respect of appeals under this subsection.

(6) The Minister shall, on application made to the Minister by any person in respect of whom a judge has made an order under subsection (4), and where the periods with respect to the taking of appeals from that order have expired and any appeal from that order taken under subsection (5) has been determined, direct that

- (a) the property, or the part of it to which the interest of the applicant relates, be returned to the applicant; or
- (b) an amount equal to the value of the interest of the applicant, as declared in the order, be paid to the applicant.

#### APPEALS FROM ORDERS UNDER SUBSECTION 17(2).

21 Any person who, in their opinion, is aggrieved by an order made under subsection 17(2) may appeal from the order as if the order were an appeal against conviction or against a judgment or verdict of acquittal, as the case may be, under Part XXI of the Criminal Code, and that Part applies, with such modifications as the circumstances require, in respect of such an appeal.

#### SUSPENSION OF ORDER PENDING APPEAL.

22 Notwithstanding anything in this Act, the operation of an order made in respect of property under subsection 16(1), 17(2) or 20(4) is suspended pending

- (a) any application made in respect of the property under any of those provisions or any other provision of this or any other Act of Parliament that provides for restoration or forfeiture of the property, or
- (b) any appeal taken from an order of forfeiture or restoration in respect of the property,

and the property shall not be disposed of or otherwise dealt with until thirty days have expired after an order is made under any of those provisions.

### Forfeiture of Proceeds of Crime

#### APPLICATION OF SECTIONS 462.3 AND 462.32 TO 462.5 OF THE CRIMINAL CODE RESPECTING PROCEEDS / Idem.

23 (1) Sections 462.3 and 462.32 to 462.5 of the Criminal Code apply, with such modifications as the circumstances require, in respect of proceedings for a designated substance offence.

(2) *For the purposes of subsection (1),*

- (a) *a reference in section 462.37 or 462.38 or subsection 462.41(2) of the Criminal Code to an enterprise crime offence shall be deemed to be a reference to a designated substance offence;*
- (b) *a reference in subsection 462.37(1) or 462.42(6), paragraph 462.43(c) or section 462.5 of the Criminal Code to the Attorney General in relation to the manner in which forfeited property is to be disposed of or otherwise dealt with shall be deemed to be a reference to*
  - (i) *where the prosecution of the offence in respect of which the property was forfeited was commenced at the instance of the government of a province and conducted by or on behalf of that government, the Attorney General or Solicitor General of that province, and*
  - (ii) *in any other case, such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph; and*
- (c) *a reference in subsection 462.38(2) of the Criminal Code to the Attorney General in relation to the manner in which forfeited property is to be disposed of or otherwise dealt with shall be deemed to be a reference to*
  - (i) *where the prosecution of the offence in respect of which the property was forfeited was commenced at the instance of the government of a province, the Attorney General or Solicitor General of that province, and*
  - (ii) *in any other case, such member of the Queen's Privy Council for Canada as may be designated for the purposes of this subparagraph.*

### Part III/DISPOSAL OF CONTROLLED SUBSTANCES

APPLICATION FOR RETURN OF SUBSTANCE / Order to return substance forthwith  
 / Order to return substance at specified time / Order to return substance refused /  
 Payment of compensation in lieu.

24.(1) *Where a controlled substance has been seized, found or otherwise acquired by a peace officer or an inspector, any person may, within sixty days after the date of the seizure, finding or acquisition, on prior notification being given to the Attorney General in the prescribed manner, apply, by notice in writing to a justice in the jurisdiction in which the substance is being detained, for an order to return that substance to the person.*

(2) *Where, on the hearing of an application made under subsection (1), a justice is satisfied that an applicant is the lawful owner or is lawfully entitled to possession of the controlled substance and the Attorney General does not indicate that the substance or a portion of it may be required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament, the justice shall, subject to subsection (5), order that the substance or the portion not required for the purposes of the proceeding be returned forthwith to the applicant.*

(3) *Where, on the hearing of an application made under subsection (1), a justice is satisfied that an applicant is the lawful owner or is lawfully entitled to possession of the controlled substance but the Attorney General indicates that the substance or a portion of it may be required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament, the justice shall, subject to subsection (5), order that the substance or the portion required for the purposes of the proceeding be returned to the applicant*

- (a) *on the expiration of one hundred and eighty days after the application was made, no proceeding in relation to the substance has been commenced before that time; or*
- (b) *on the final conclusion of the proceeding or any other proceeding in relation to the substance, where the applicant is not found guilty in those proceedings of an offence committed in relation to the substance.*

4) Where, on the hearing of an application made under subsection (1), a justice is not satisfied that an applicant is the lawful owner or is lawfully entitled to possession of the controlled substance, the justice shall order that the substance or the portion not required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

5) Where, on the hearing of an application made under subsection (1), a justice is satisfied that an applicant is the lawful owner or is lawfully entitled to possession of a controlled substance, but an order has been made under subsection 26(2) in respect of the substance, the justice shall make an order that an amount equal to the value of the substance be paid to the applicant.

#### DISPOSAL BY MINISTER WHERE NO APPLICATION.

5 Where no application for the return of a controlled substance has been made under subsection 24(1) within sixty days after the date of the seizure, finding or acquisition by a peace officer or inspector and the substance or a portion of it is not required for the purposes of any preliminary inquiry, trial or other proceeding under this Act or any other Act of Parliament, the substance or the portion not required for the purposes of the proceeding shall be delivered to the Minister to be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

#### SECURITY, HEALTH OR SAFETY HAZARD / Idem.

6 (1) Where the Minister has reasonable grounds to believe that a controlled substance that has been seized, found or otherwise acquired by a peace officer or inspector constitutes a potential security, public health or safety hazard, the Minister may, on prior notification being given to the Attorney General in the prescribed manner, at any time, make an application, ex parte, to a justice for an order that the substance or a portion of it be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

2) Where, on the hearing of an application made under subsection (1), a justice is satisfied that there are reasonable grounds to believe that the controlled substance constitutes a potential security, public health or safety hazard, the justice shall order that the substance or any portion not required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

#### DISPOSAL FOLLOWING PROCEEDINGS.

7 Subject to section 24, where, pursuant to a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament, the court before which the proceedings have been brought is satisfied that any controlled substance that is the subject of proceedings before the court is no longer required by that court or any other court, the court

##### (a) shall

(i) where it is satisfied that the person from whom the substance was seized came into possession of the substance in accordance with the regulations and continued to deal with it in accordance with the regulations, order that the substance be returned to the person, or

(ii) where it is satisfied that possession of the substance by the person from whom it was seized is unlawful and the person who is lawfully entitled to its possession is



- known, order that the substance be returned to the person who is the lawful owner or is lawfully entitled to its possession; and
- (b) may, where it is not satisfied that the substance should be returned pursuant to subparagraph (i) or (ii) or where possession of the substance by the person from whom it was seized is unlawful and the person who is the lawful owner or is lawfully entitled to its possession is not known, order that the substance be forfeited to Her Majesty to be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

#### DISPOSAL WITH CONSENT.

28 Where a controlled substance has been seized, found or otherwise acquired by a peace officer or inspector under this Act or the regulations and the substance or a portion of it is not required for the purposes of a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament, the person who is the lawful owner or is lawfully entitled to its possession may consent to its disposal, and on such consent being given the substance or portion is thereupon forfeited to Her Majesty and may be disposed of or otherwise dealt with in accordance with the regulations or, if there are no applicable regulations, in such manner as the Minister directs.

#### DESTRUCTION OF PLANT.

29 The Minister may, on prior notification being given to the Attorney General, cause to be destroyed any plant from which a substance included in Schedule I, II, III or IV may be extracted that is being produced otherwise than under the authority of and in accordance with a licence issued under the regulations.

### Part IV/ADMINISTRATION AND COMPLIANCE

#### Inspectors

##### DESIGNATION OF INSPECTORS / Certificate of designation.

30 (1) The Minister may designate, in accordance with the regulations made pursuant to paragraph 55(1)(n), any person as an inspector for the purposes of this Act and the regulations.

(2) An inspector shall be furnished with a prescribed certificate of designation, and on entering any place pursuant to subsection 31(1) shall, on request, produce the certificate to the person in charge of the place.

##### POWERS OF INSPECTOR / Warrant required to enter dwelling-place / Authority to issue warrant / Use of force / Assistance to inspector / Storage of substances seized / Notice / Return by inspector / Return or disposal by Minister.

31 (1) Subject to subsection (2), an inspector may, to ensure compliance with the regulations, at any reasonable time enter any place the inspector believes on reasonable grounds is used for the purpose of conducting the business or professional practice of any person licensed or otherwise authorized under the regulations to deal in a controlled substance or a precursor and may for that purpose

- (a) open and examine any receptacle or package found in that place in which a controlled substance or a precursor may be found;
- (b) examine any thing found in that place that is used or may be capable of being used for the production, preservation, packaging or storage of a controlled substance or a precursor;
- (c) examine any labels or advertising material or records, books, electronic data or other

documents found in that place with respect to any controlled substance or precursor, other than the records of the medical condition of persons, and make copies thereof or take extracts therefrom;

- (d) use or cause to be used any computer system at that place to examine any electronic data referred to in paragraph (c);
- (e) reproduce any document from any electronic data referred to in paragraph (c) or cause it to be reproduced, in the form of a printout or other output;
- (f) take the labels or advertising material or records, books or other documents referred to in paragraph (c) or the printout or other output referred to in paragraph (e) for examination or copying;
- (g) use or cause to be used any copying equipment at that place to make copies of any document;
- (h) examine any substance found in that place and take, for the purpose of analysis, such samples thereof as are reasonably required; and
- (i) seize and detain in accordance with this Part, any controlled substance or precursor the seizure and detention of which the inspector believes on reasonable grounds is necessary.

(2) Where a place referred to in subsection (1) is a dwelling-place, an inspector may not enter the dwelling-place without the consent of an occupant thereof except under the authority of a warrant issued under subsection (3).

- (3) Where, on ex parte application, a justice is satisfied by information on oath that
  - (a) a place referred to in subsection (1) is a dwelling-place but otherwise meets the conditions for entry described in that subsection,
  - (b) entry to the dwelling-place is necessary for the purpose of ensuring compliance with the regulations, and
  - (c) entry to the dwelling-place has been refused or there are reasonable grounds to believe that entry will be refused,

the justice may issue a warrant authorizing the inspector named in it to enter that dwelling-place and exercise any of the powers mentioned in paragraphs (1)(a) to (i), subject to such conditions as may be specified in the warrant.

(4) In executing a warrant issued under subsection (3), an inspector shall not use force unless the inspector is accompanied by a peace officer and the use of force is specifically authorized in the warrant.

(5) The owner or other person in charge of a place entered by an inspector under subsection (1) and every person found there shall give the inspector all reasonable assistance in the power of that person and furnish the inspector with such information as the inspector may reasonably require.

(6) Where an inspector seizes and detains a controlled substance or a precursor, the substance or precursor may, at the discretion of the inspector, be kept or stored at the place where it was seized or, at the direction of the inspector, be removed to any other proper place.

(7) An inspector who seizes a controlled substance or a precursor shall take such measures as are reasonable in the circumstances to give to the owner or other person in charge of the place where the seizure occurred notice of the seizure and of the location where the controlled substance or precursor is being kept or stored.

(8) Where an inspector determines that to ensure compliance with the regulations it is no longer necessary to detain a controlled substance or a precursor seized by the inspector under paragraph (1)(i), the inspector shall notify in writing the owner or other person in charge of

*the place where the seizure occurred of that determination and, on being issued a receipt for it, shall return the controlled substance or precursor to that person.*

*(9) Notwithstanding sections 24, 25 and 27, where a period of one hundred and twenty days has elapsed after the date of a seizure under paragraph (1)(i) and the controlled substance or precursor has not been returned in accordance with subsection (8), the controlled substance or precursor shall be returned, disposed of or otherwise dealt with in such manner as the Minister directs, in accordance with any applicable regulations.*

#### OBSTRUCTING INSPECTOR / False statements / Interference.

*32 (1) No person shall, by act or omission, obstruct an inspector who is engaged in the performance of duties under this Act or the regulations.*

*(2) No person shall knowingly make any false or misleading statement verbally or in writing to an inspector who is engaged in the performance of duties under this Act or the regulations.*

*(3) No person shall, without the authority of an inspector, remove, alter or interfere in any way with anything seized, detained or taken under section 31.*

## Part VI/ADMINISTRATIVE ORDERS FOR CONTRAVENTIONS OF DESIGNATED REGULATIONS

### DESIGNATION OF REGULATIONS.

*33. The Governor in Council may, by regulation, designate any regulation made under this Act (in this Part referred to as a "designated regulation") as a regulation the contravention of which shall be dealt with under this Part.*

### CONTRAVENTION OF DESIGNATED REGULATION.

*34 Where the Minister has reasonable grounds to believe that a person has contravened a designated regulation, the Minister shall*

- (a) in the prescribed manner, serve a notice to appear on the person; and*
- (b) send a copy of the notice to appear to an adjudicator and direct the adjudicator to conduct a hearing to determine whether the contravention has occurred and to notify the Minister of the adjudicator's determination.*

### INTERIM ORDER / Idem.

*35 (1) Where the Minister has reasonable grounds to believe that a person has contravened a designated regulation and the Minister is of the opinion that, as a result of that contravention, there is a substantial risk of immediate danger to the health or safety of any person, the Minister may, without giving prior notice to the person believed to have contravened the designated regulation, make an interim order in respect of the person*

- (a) prohibiting the person from doing anything that the person would otherwise be permitted to do under their licence, permit or authorization, or*
- (b) subjecting the doing of anything under the designated regulation by the person to the terms and conditions specified in the interim order,*

*and may, for that purpose, suspend, cancel or amend the licence, permit or authorization issued or granted to the person or take any other measures set out in the regulations.*

*(2) Where the Minister makes an interim order under subsection (1), the Minister shall forthwith*

- (a) in the prescribed manner, serve the interim order on the person;*
- (b) in the prescribed manner, serve a notice to appear on the person; and*
- (c) send a copy of the interim order and the notice to appear to an adjudicator and direct*



*the adjudicator to conduct a hearing to determine whether the contravention has occurred and to notify the Minister of the adjudicator's determination.*

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HEARING BY ADJUDICATOR / Change of hearing date / Proceedings on default / Time and place.

36 (1) *Where an adjudicator receives from the Minister a copy of a notice to appear under paragraph 34(b) or 35(2)(c), the adjudicator shall conduct a hearing on a date to be fixed by the adjudicator at the request of the person on whom the notice was served, on two days notice being given to the adjudicator, which hearing date may not*

*(a) in the case of a notice served under paragraph 34(a), be less than thirty days, or more than forty-five days, after the day of service of the notice; or*

*(b) in the case of a notice served under paragraph 35(2)(b), be less than three days, or more than forty-five days, after the day of service of the notice.*

*(2) Where the adjudicator is unable to conduct a hearing on the date referred to in subsection (1), the adjudicator shall forthwith notify the person and fix, for the purpose of holding the hearing, the earliest possible date to which the adjudicator and the person agree.*

*(3) Where an adjudicator has received a copy of a notice to appear referred to in subsection (1) and where the person on whom the notice is served has not requested a date for a hearing within forty-five days after the notice was served on that person, or where the person, having requested a hearing, fails to appear for the hearing, the adjudicator shall proceed to make a determination in the absence of the person.*

*(4) An adjudicator may, subject to the regulations, determine the time and place of any hearing or other proceeding under this Part.*

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NOTICE TO APPEAR.

37 *A notice to appear served on a person under paragraph 34(a) or 35(2)(b) shall*  
*(a) specify the designated regulation that the Minister believes the person has contravened;*

*(b) state the grounds on which the Minister believes the contravention has occurred;*

*(c) state that the matter has been referred to an adjudicator for a hearing to be conducted on a date within the applicable period described in paragraph 36(1)(a) or (b); and*

*(d) set out such other information as is prescribed.*

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PROOF OF SERVICE.

38 *Proof of service of any notice, order or interim order under this Part shall be given in the prescribed manner.*

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POWERS OF ADJUDICATOR.

39 *For the purposes of this Act, an adjudicator has and may exercise the powers of a person appointed as a commissioner under Part I of the Inquiries Act.*

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HEARING PROCEDURE.

40 *An adjudicator shall deal with all matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit.*

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DETERMINATION BY ADJUDICATOR / Notice of determination / Ministerial orders / Idem.

41 (1) *An adjudicator shall, after the conclusion of a hearing referred to in subsection 36(1) or a proceeding referred to in subsection 36(3), within the prescribed time, make a determination that the person who is the subject of the hearing or proceeding contravened or did not contravene the designated regulation.*

(2) *Where an adjudicator has made a determination under subsection (1), the adjudicator shall*

- (a) *forthwith notify the person and the Minister of the adjudicator's determination and the reasons; and*
- (b) *where the adjudicator has determined that the person has contravened the designated regulation, notify the person of the opportunity to make representations to the Minister in writing in accordance with the regulations and within the prescribed time.*

(3) *Where an adjudicator has made a determination referred to in paragraph (2)(b) and the Minister has considered the determination and any representations referred to in that paragraph, the Minister shall forthwith make an order*

- (a) *prohibiting the person from doing anything that they would, if they were in compliance with the designated regulation, be permitted to do, or*
- (b) *subjecting the doing of anything under the designated regulation by the person to the terms and conditions specified in the order,*

*and may, for that purpose, suspend, cancel or amend any licence, permit or authorization issued or granted to the person under the regulations or take any other measures set out in the regulations.*

(4) *An order made under subsection (3) shall be served on the person to whom it is directed in the prescribed manner.*

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EFFECT OF ORDER / Cessation of effect / Application to revoke order / Revocation of order.

42 (1) *An interim order made under subsection 35(1) and an order made under subsection 41(3) have effect from the time that they are served on the person to whom they are directed.*

(2) *An interim order that was made in respect of a person believed to have contravened a designated regulation ceases to have effect*

- (a) *where the Minister makes an order under subsection 41(3), at the time the order is served on the person; and*
- (b) *where an adjudicator has determined that the person did not contravene the designated regulation, at the time the adjudicator makes the determination.*

(3) *A person in respect of whom an order was made under subsection 41(3) may make an application in writing to the Minister in accordance with the regulations to revoke the order.*

(4) *The Minister may, in the prescribed circumstances, revoke, in whole or in part, any order made under subsection 41(3).*

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OFFENCE FOR CONTRAVENTION OF ORDER.

43 *Every person commits an offence who contravenes an order or an interim order made under this Part.*

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## Part VII/GENERAL

### Analysis

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DESIGNATION OF ANALYSTS.

44 *The Minister may designate, in accordance with the regulations made pursuant to paragraph 55(1)(o), any person as an analyst for the purposes of this Act and the regulations.*

## ANALYSIS / Report.

5 (1) An inspector or peace officer may submit to an analyst for analysis or examination any substance or sample thereof taken by the inspector or peace officer.

2) An analyst who has made an analysis or examination under subsection (1) may prepare a certificate or report stating that the analyst has analysed or examined a substance or a sample thereof and setting out the results of the analysis or examination.

## Offence and Punishment.

### PENALTY.

6 Every person who contravenes a provision of this Act for which punishment is not otherwise provided or a regulation, other than a designated regulation within the meaning of Part V,

(a) is guilty of an indictable offence and liable to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding three years, or to both; or

(b) is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

## Evidence and Procedure

### IMITATION / Venue.

7 (1) No summary conviction proceedings in respect of an offence under subsection 4(2) or 2(2), section 43 or the regulations shall be commenced after the expiration of one year after the time when the subject-matter of the proceedings arose.

2) Proceedings in respect of a contravention of any provision of this Act or the regulations may be held in the place where the offence was committed or where the subject-matter of the proceedings arose or in any place where the accused is apprehended or happens to be located.

### BURDEN OF PROVING EXCEPTION, ETC. / Idem.

8 (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Act or the regulations or under section 463, 464 or 465 of the Criminal Code in respect of such an offence.

2) In any prosecution under this Act, the prosecutor is not required, except by way of rebuttal, to prove that a certificate, licence, permit or other qualification does not operate in favour of the accused, whether or not the qualification is set out in the information or indictment.

### COPIES OF DOCUMENTS / Authentication / Evidence inadmissible under this section.

9 (1) A copy of any document filed with a department, ministry, agency, municipality or other body established by or pursuant to a law of a province, or of any statement containing information from the records kept by any such department, ministry, agency, municipality or body, purporting to be certified by any official having custody of that document or those records, is admissible in evidence in any prosecution for an offence referred to in subsection 8(1) and, in the absence of evidence to the contrary, is proof of the facts contained in that document or statement, without proof of the signature or official character of the person purporting to have certified it.



(2) For the purposes of subsection (1), an engraved, lithographed, photocopied, photographed, printed or otherwise electronically or mechanically reproduced facsimile signature of an official referred to in that subsection is sufficient authentication of any copy referred to in that subsection.

(3) Nothing in subsection (1) renders admissible in evidence in any legal proceeding such part of any record as is proved to be a record made in the course of an investigation or inquiry.

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CERTIFICATE ISSUED PURSUANT TO REGULATIONS / *Idem*.

50 (1) Subject to subsection (2), any certificate or other document issued pursuant to regulations made under paragraph 55(2)(c) is admissible in evidence in a preliminary inquiry, trial or other proceeding under this or any other Act of Parliament and, in the absence of evidence to the contrary, is proof that the certificate or other document was validly issued and of the facts contained in it, without proof of the signature or official character of the person purporting to have certified it.

(2) The defence may, with leave of the court, require that the person who issued the certificate or other document

(a) produce an affidavit or solemn declaration attesting to any of the matters deemed to be proved under subsection (1); or

(b) appear before the court for examination or cross-examination in respect of the issuance of the certificate or other document.

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CERTIFICATE OF ANALYST / Attendance of analyst / Notice.

51 (1) Subject to this section, a certificate or report prepared by an analyst under subsection 45(2) is admissible in evidence in any prosecution for an offence under this Act or the regulations or any other Act of Parliament and, in the absence of evidence to the contrary, is proof of the statements set out in the certificate or report, without proof of the signature or official character of the person appearing to have signed it.

(2) The party against whom a certificate or report of an analyst is produced under subsection (1) may, with leave of the court, require the attendance of the analyst for the purpose of cross-examination.

(3) Unless the court otherwise orders, no certificate or report shall be received in evidence under subsection (1) unless the party intending to produce it has, before its production at trial, given to the party against whom it is intended to be produced reasonable notice of that intention, together with a copy of the certificate or report.

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PROOF OF NOTICE / *Idem*.

52 (1) For the purposes of this Act and the regulations, the giving of any notice, whether orally or in writing, or the service of any document may be proved by the oral evidence of, or by the affidavit or solemn declaration of, the persons claiming to have given that notice or served that document.

(2) Notwithstanding subsection (1), the court may require the affiant or declarant to appear before it for examination or cross-examination in respect of the giving of notice or proof of service.

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CONTINUITY OF POSSESSION / Alternative method of proof.

53 (1) In any proceeding under this Act or the regulations, continuity of possession of any exhibit tendered as evidence in that proceeding may be proved by the testimony of, or the affidavit or solemn declaration of, the person claiming to have had it in their possession.

(2) Where an affidavit or solemn declaration is offered in proof of continuity of possession under subsection (1), the court may require the affiant or declarant to appear before it for examination or cross-examination in respect of the issue of continuity of possession.

#### COPIES OF RECORDS, BOOKS OR DOCUMENTS.

54 Where any record, book, electronic data or other document is examined or seized under this Act or the regulations, the Minister, or the officer by whom the record, book, electronic data or other document is examined or seized, may make or cause to be made one or more copies thereof, and a copy of any such record, book, electronic data or other document purporting to be certified by the Minister or a person authorized by the Minister is admissible in evidence and, in the absence of evidence to the contrary, has the same probative force as the original record, book, electronic data or other document would have had if it had been proved in the ordinary way.

### Regulations, Exemptions and Disqualifications

REGULATIONS / Regulations pertaining to law enforcement / Incorporation by reference.

55 (1) The Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act and, without restricting the generality of the foregoing, may make regulations

- (a) governing, controlling, limiting, authorizing the importation into Canada, exportation from Canada, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining of or other dealing in any controlled substances or precursor or any class thereof;
- (b) respecting the circumstances in which, the conditions subject to which and the persons or classes of persons by whom any controlled substances or precursor or any class thereof may be imported into Canada, exported from Canada, produced, packaged, sent, transported, delivered, sold, provided, administered, possessed, obtained or otherwise dealt in, as well as the means by which and the persons or classes of persons by whom such activities may be authorized;
- (c) respecting the issuance, suspension, cancellation, duration and terms and conditions of any class of licence for the importation into Canada, exportation from Canada, production, packaging, sale, provision or administration of any substance included in Schedule I, II, III, IV, V or VI or any class thereof;
- (d) respecting the issuance, suspension, cancellation, duration and terms and conditions of any permit for the importation into Canada, exportation from Canada or production of a specified quantity of a substance included in Schedule I, II, III, IV, V or VI or any class thereof;
- (e) prescribing the fees payable on application for any of the licences or permits provided for in paragraphs (c) and (d);
- (f) respecting the method of production, preservation, testing, packaging or storage of any controlled substance or precursor or any class thereof;
- (g) respecting the premises, processes or conditions for the production or sale of any controlled substance or any class thereof, and deeming such premises, processes or conditions to be or not to be suitable for the purposes of the regulations;
- (h) respecting the qualifications of persons who are engaged in the production, preservation, testing, packaging, storage, selling, providing or otherwise dealing in any controlled substance or precursor or any class thereof and who do so under the supervision of a person licensed under the regulations to do any such thing;

- (i) *prescribing standards of composition, strength, concentration, potency, purity or quality or any other property of any controlled substance or precursor;*
- (j) *respecting the labelling, packaging, size, dimensions, fill and other specifications of packages used for the importation into Canada, exportation from Canada, sending, transportation, delivery, sale or provision of or other dealing in any substance included in Schedule I, II, III, IV, V or VI or any class thereof;*
- (k) *respecting the distribution of samples of any substance included in Schedule I, II, III, IV, V or VI or any class thereof;*
- (l) *controlling and limiting the advertising for sale of any controlled substance or precursor or any class thereof;*
- (m) *respecting the records, books, electronic data or other documents in respect of controlled substances and precursors that are required to be kept and provided by any person or class of persons who imports into Canada, exports from Canada, produces, packages, sends, transports, delivers, sells, provides, administers, possesses, obtains or otherwise deals in any controlled substance or precursor or any class thereof;*
- (n) *respecting the qualifications for inspectors and their powers and duties in relation to the enforcement of, and compliance with, the regulations;*
- (o) *respecting the qualifications for analysts and their powers and duties;*
- (p) *respecting the detention and disposal of or otherwise dealing with any controlled substance;*
- (q) *respecting the disposal of or otherwise dealing with any precursor;*
- (r) *respecting the taking of samples of substances under paragraph 31(1)(h);*
- (s) *respecting the communication of any information obtained under this Act or the regulations from or relating to any person or class of persons who is or may be authorized to import into Canada, export from Canada, produce, package, send, transport, deliver, sell, provide, administer, possess, obtain or otherwise deal in any controlled substance or precursor or any class thereof*
  - (i) *to any provincial professional licensing authority, or*
  - (ii) *to any person or class of persons where, in the opinion of the Governor in Council, it is necessary to communicate that information for the proper administration or enforcement of this Act or the regulations;*
- (t) *respecting the making, serving, filing and manner of proving service of any notice, order, report or other document required or authorized under this Act or the regulations;*
- (u) *prescribing the circumstances in which an order made under subsection 41(3) may be revoked by the Minister pursuant to subsection 42(4);*
- (v) *prescribing forms for the purposes of this Act or the regulations;*
- (w) *establishing classes or groups of controlled substances or precursors;*
- (x) *conferring powers or imposing duties and functions on adjudicators in relation to hearings conducted and determinations made by them under Part V;*
- (y) *governing the practice and procedure of hearings conducted and determinations made by adjudicators under Part V;*
- (z) *exempting, on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application of this Act or regulations; and*
- (z.1) *prescribing anything that, by this Act, is to be or may be prescribed.*

(2) *The Governor in Council, on the recommendation of the Solicitor General of Canada, may make regulations that pertain to investigations and other law enforcement activities conducted under this Act by a member of a police force and other persons acting under the direction and control of a member and, without restricting the generality of the foregoing, may make regulations*

- (a) *authorizing the Solicitor General of Canada, or the provincial minister responsible*



for policing in a province, to designate a police force within the Solicitor General's jurisdiction or the minister's jurisdiction, as the case may be, for the purposes of this subsection;

- (b) exempting, on such terms and conditions as may be specified in the regulations, a member of a police force that has been designated pursuant to paragraph (a) and other person acting under the direction and control of the member from the application of any provision of Part I or the regulations;
- (c) respecting the issuance, suspension, cancellation, duration and terms and conditions of a certificate, other document or, in exigent circumstances, an approval to obtain a certificate or other document, that is issued to a member of a police force that has been designated pursuant to paragraph (a) for the purpose of exempting the member from the application of this Act or the regulations;
- (d) respecting the detention, storage, disposal or otherwise dealing with any controlled substance or precursor;
- (e) respecting records, reports, electronic data or other documents in respect of a controlled substance or precursor that are required to be kept and provided by any person or class of persons; and
- (f) prescribing forms for the purposes of the regulations.

(3) Any regulations made under this Act incorporating by reference a classification, standard, procedure or other specification may incorporate the classification, standard, procedure or specification as amended from time to time, and, in such a case, the reference shall be read accordingly.

#### EXEMPTION BY MINISTER.

56 The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

#### POWERS, DUTIES AND FUNCTIONS OF MINISTER OR SOLICITOR GENERAL OF CANADA.

57 Any power, duty or function of

- (a) the Minister under this Act or the regulations, or
- (b) the Solicitor General of Canada under the regulations

may be exercised or performed by any person designated, or any person occupying a position designated, by the Minister or the Solicitor General, as the case may be, for that purpose.

#### PARAMOUNTCY OF THIS ACT AND THE REGULATIONS.

58 In the case of any inconsistency or conflict between this Act or the regulations made under it, and the Food and Drugs Act or the regulations made under that Act, this Act and the regulations made under it prevail to the extent of the inconsistency or conflict.

#### OFFENCE OF MAKING FALSE OR DECEPTIVE STATEMENTS.

59 No person shall knowingly make, or participate in, assent to or acquiesce in the making of, a false or misleading statement in any book, record, return or other document however recorded, required to be maintained, made or furnished pursuant to this Act or the regulations.

## *Amendments to Schedules*

### *SCHEDULES.*

60 *The Governor in Council may, by order, amend any of Schedules I to VIII by adding to them or deleting from them any item or portion of an item, where the Governor in Council deems the amendment to be necessary in the public interest.*

## **SCHEDULE I**

### **(Sections 2 to 7, 29, 55 and 60)**

1. **Opium Poppy** (*Papaver somniferum*), its preparations, derivatives, alkaloids and salts, including:

- (1) **Opium**
- (2) **Codeine** (methylmorphine)
- (3) **Morphine** (7,8-didehydro-4,5-epox-17-methylmorphinan-3,6-diol)
- (4) **Thebaine** (paramorphine), and the salts, derivatives and salts of derivatives of substances set out in subitems (1) to (4), including:
- (5) **Acetorphine** (acetyletorphine)
- (6) **Acetyldihydrocodeine** (4,5-epoxy-3-methoxy-17-methylmorphinan-6-ol acetate)
- (7) **Benzylmorphine** (7,8-didehydro-4,5-epoxy-17-methyl-3-(phenylmethoxy)morphinan-6-ol)
- (8) **Codoxime** (dihydrocodeinone O-(carboxymethyl) oxime)
- (9) **Desomorphine** (dihydrodeoxymorphine)
- (10) **Diacetylmorphine** (heroin)
- (11) **Dihydrocodeine** (4,5-epoxy-3-methoxy-17-methylmorphinan-6-ol)
- (12) **Dihydromorphine** (4,5-epoxy-17-methylmorphinan-3,6-diol)
- (13) **Ethylmorphine** (7,8-didehydro-4,5-epoxy-3-ethoxy-17-methylmorphinan-6-ol)
- (14) **Etorphine** (tetrahydro-7 $\alpha$ -(1-hydroxy-1-methylbutyl)-6,14-endo-enthenooripavine)
- (15) **Hydrocodone** (dihydrocodeinone)
- (16) **Hydromorphinol** (dihydro-14-hydroxymorphine)
- (17) **Hydromorphone** (dihydromorphinone)
- (18) **Methyl-desorphine** ( $\Delta^6$ -deoxy-6-methylmorphine)
- (19) **Methyldihydromorphine** (dihydro-6-methylmorphine)
- (20) **Metopon** (dihydromethylmorphinone)
- (21) **Morphine-N-oxide** (morphine oxide)
- (22) **Myrophine** (benzylmorphine myristate)
- (23) **Nalorphine** (N-allylnormorphine)
- (24) **Nicocodine** (6-nicotinylcodeine)
- (25) **Nicomorphine** (dinicotinylmorphine)
- (26) **Norcodeine** (N-desmethylcodeine)
- (27) **Normorphine** (N-desmethylmorphine)
- (28) **Oxycodone** (dihydrohydroxycodeinone)
- (29) **Oxymorphone** (dihydrohydroxymorphinone)
- (30) **Pholcodine** (3-[2-(4-morpholinyl)ethyl]morphine)
- (31) **Thebacon** (acetyldihydrocodeinone)

but not including

- (32) **Apomorphine**  
(5,6,6a,7-tetrahydro-6-methyl-4H-dibenzo[de,g]-quinoline-10,11-diol)

- (33) Cyrenorphine  
(N-(cyclopropylmethyl)-6,7,8,14-tetrahydro-7 $\alpha$ -(1-hydroxy-1-methylethyl)-6,14-endo-ethenonororipavine)
- (34) Naloxone (4,5 $\alpha$ -epoxy-3,14-dihydroxy-17-(2-propenyl)morphinan-6-one)
- (35) Narcotine  
(6,7-dimethoxy-3-(5,6,7,8-tetrahydro-4-methoxy-6-methyl-1,3-dioxolos[4,5-g]isoquinolin-5-yl)-1(3H)-isobenzofuranone)
- (36) Papaverine  
(1-[(3,4-dimethoxyphenyl)methyl]-6,7-dimethoxyisoquinoline)
- (37) Poppy seed

2. Coca (Erythroxylon), its preparations, derivatives, alkaloids and salts, including:

- (1) Coca leaves
- (2) Cocaine (benzoylmethylecgonine)
- (3) Ecgonine (3-hydroxy-2-tropane carboxylic acid)

3. Phenylpiperidines, their intermediates, salts, derivatives and analogues and salts of intermediates, derivatives and analogues, including:

- (1) Allylprodine (3-allyl-1-methyl-4-phenyl-4-piperidinol propionate)
- (2) Alphameprodine ( $\alpha$ -3-ethyl-1-methyl-4-phenyl-4-piperidinol propionate)
- (3) Alphaprodine ( $\alpha$ -1,3-dimethyl-4-phenyl-4-piperidinol propionate)
- (4) Anileridine (ethyl 1-[2-(p-aminophenyl)-4-phenylpiperidine-4-carboxylate])
- (5) Betameprodine  $\beta$ -3-ethyl-1-methyl-4-phenyl-4-piperidinol propionate)
- (6) Betaprodine ( $\beta$ -1,3-dimethyl-4-phenyl-4-piperidinol propionate)
- (7) Benzethidine (ethyl 1-(2-benzyloxyethyl)-4-phenylpiperidine-4-carboxylate)
- (8) Diphenoxylate (ethyl 1-(3-cyano-3,3-diphenylpropyl)-4-phenylpiperidine-4-carboxylate)
- (9) Difenoxin  
(1-(3-cyano-3,3-diphenylpropyl)-4-phenylpiperidine-4-carboxylate)
- (10) Etoxidine (ethyl 1-[2-(2-hydroxyethoxy) ethyl]-4-phenylpiperidine-4-carboxylate)
- (11) Furethidine (ethyl 1-(2-tetrahydrofurfuryloxyethyl)-4-phenylpiperidine-4-carboxylate)
- (12) Hydroxypethidine (ethyl 4-(m-hydroxyphenyl)-1-methylpiperidine-4-carboxylate)
- (13) Ketobemidone  
(1-[4-(m-hydroxyphenyl)-1-methyl-4-piperidyl]-1-propanone)
- (14) Methylphenylisonipeconitrile (4-cyano-1-methyl-4-phenylpiperidine)
- (15) Morpheridine (ethyl 1-(2-morpholinoethyl)-4-phenylpiperidine-4-carboxylate)
- (16) Norpethidine (ethyl 4-phenylpiperidine-4-carboxylate)
- (17) Pethidine (ethyl 1-methyl-4-phenylpiperidine-4-carboxylate)
- (18) Phenoperidine (ethyl 1-(3-hydroxy-3-phenylpropyl)-4-phenylpiperidine-4-carboxylate)
- (19) Piminodine (ethyl 1-[3-(phenylamino)propyl]-4-phenylpiperidine-4-carboxylate)
- (20) Properidine (isopropyl 1-methyl-4-phenylpiperidine-4-carboxylate)
- (21) Trimeperidine (1,2,5-trimethyl-4-phenyl-4-piperidinol propionate)
- (22) Pethidine Intermediate C (1-methyl-4-phenylpiperidine-4-carboxylate)

but not including

- (23) Carbamethidine (ethyl  
1-(2-hydroxy-2-phenyl-ethyl)-4-phenylpiperidine-4-carboxylate)



- (24) Oxpheneridine (ethyl 1-(2-hydroxy-2,2-phenyl ethyl)-4-phenylpiperidine-4-carboxylate)
4. Phenazepines, their salts, derivatives and salts of derivatives including:
- (1) Proheptazine (hexahydro-1,3-dimethyl-4-phenyl-1H-azepin-4-ol propionate)
- but not including
- (2) Ethoheptazine (ethyl hexahydro-1-methyl-4-phenyl-azepine-4-carboxylate)
- (3) Metethoheptazine (ethyl hexahydro-1,3-dimethyl-4-phenylazepine-4-carboxylate)
- (4) Metheptazine (ethyl hexahydro-1,2-dimethyl-4-phenylazepine-4-carboxylate)
5. Amidones, their intermediates, salts, derivatives and salts of intermediates and derivatives including:
- (1) Dimethylaminodiphenylbutanonitrile (4-cyano-2-dimethylamino-4,4-diphenylbutane)
- (2) Dipipanone (4,4-diphenyl-6-piperidino-3-heptanone)
- (3) Isomethadone (6-dimethylamino-5-methyl-4,4-diphenyl-3-hexanone)
- (4) Methadone (6-dimethylamino-4,4-diphenyl-3-heptanone)
- (5) Normethadone (6-dimethylamino-4,4-diphenyl-3-hexanone)
- (6) Norpipanone (4,4-diphenyl-6-piperidino-3-hexanone)
- (7) Phenadoxone (6-morpholino-4,4-diphenyl-3-heptanone)
6. Methadols, their salts, derivatives and salts of derivatives including:
- (1) Acetylmethadol (6-dimethylamino-4,4-diphenyl-3-heptanyl acetate)
- (2) Alphacetylmethadol ( $\alpha$ -6-dimethylamino-4,4-diphenyl-3-heptanol acetate)
- (3) Alphamethadol ( $\alpha$ -6-dimethylamino-4,4-diphenyl-3-heptanol)
- (4) Betacetylmethadol ( $\beta$ -6-dimethylamino-4,4-diphenyl-3-heptanol acetate)
- (5) Betamethadol ( $\beta$ -6-dimethylamino-4,4-diphenyl-3-heptanol)
- (6) Dimepheptanol (6-dimethylamino-4,4-diphenyl-3-heptanol)
- (7) Noracymethadol ( $\alpha$ -6-methylamino-4,4-diphenyl-3-heptanol acetate)
7. Phenalkoxams, their salts, derivatives and salts of derivatives including:
- (1) Dimenoxadol (dimethylaminoethyl 1-ethoxy-1,1-diphenylacetate)
- (2) Dioxaphetylbutyrate (ethyl 2,2-diphenyl-4-morpholino butyrate)
- (3) Dextropropoxyphene ([S-(R\*,S\*)]-( $\alpha$ -[2-(dimethylamino)-methylethyl]-( $\alpha$ -phenylbenzene-ethanol, propanoate ester))
8. Thiambutenes, their salts, derivatives and salts of derivatives including:
- (1) Diethylthiambutene (N,N-diethyl-1-methyl-3,3-di-2-thienylallylamine)
- (2) Dimethylthiambutene (N,N,1-trimethyl-3,3-di-2-thienylallylamine)
- (3) Ethylmethylthiambutene (N-ethyl-N,1-dimethyl-3,3-di-2-thienylallylamine)
9. Moramides, their intermediates, salts, derivatives and salts of intermediates and derivatives including:
- (1) Dextromoramide (d-1-(3-methyl-4-morpholino-2,2-diphenylbutyryl)pyrrolidine)
- (2) Diphenylmorpholinoisovaleric acid (2-methyl-3-morpholino-1,1-diphenylpropionic acid)
- (3) Levomoramide (l-1-(3-methyl-4-morpholino-2,2-diphenylbutyryl)pyrrolidine)
- (4) Racemoramide (d,1-1(3-methyl-4-morpholino-2,2-diphenylbutyryl)pyrrolidine)
10. Morphinans, their salts, derivatives and salts of derivatives including:

- (1) Buprenorphine (17-(cyclopropylmethyl)-(α-(1,1-dimethylethyl)-4,5-epoxy-18,19-dihydro-3-hydroxy-6-methoxy-(α-methyl-6,14-ethenomorphinan-7-methanol)
- (2) Drotebanol (6(β,14-dihydroxy-3,4-dimethoxy-17-methylmorphinan)
- (3) Levomethorphan (1-3-methoxy-17-methylmorphinan)
- (4) Levorphanol (1-3-hydroxy-17-methylmorphinan)
- (5) Levophenacymorphan (1-3-hydroxy-17-phenacyl-morphinan)
- (6) Norlevorphanol (1-3-hydroxymorphinan)
- (7) Phenomorphan (3-hydroxy-17-(2-phenylethyl) morphinan)
- (8) Racemethorphan (d,1-3-methoxy-17-methylmorphinan)
- (9) Racemorphan (3-hydroxy-N-methylmorphinan)

but not including

- (10) Dextromethorphan (d-1,2,3,9,10,10a-hexahydro-6-methoxy-11-methyl-4H-10,4a-iminoethano-phenanthren)
- (11) Dextrorphan (d-1,2,3,9,10,10a-hexahydro-11-methyl-4H-10,4a-iminoethanophenanthren-6-ol)
- (12) Levallorphan (1-11-allyl-1,2,3,9,10,10a-hexahydro-4H-10,4a-iminoethanophenanthren-6ol)
- (13) Levangorphan (1-11-propargyl-1,2,3,9,10,10a-hexahydro-4H-10,4a-iminoethanophenanthren-6-ol)
- (14) Butorphanol (17-(cyclobutylmethyl)morphinan-3,14-diol)
- (15) Nalbuphine (17-(cyclobutylmethyl)-4,5α-epoxymorphinan-3,6α,14-triol)
11. Benzazocines, their salts, derivatives and salts of derivatives including:
  - (1) Phenazocine (1,2,3,4,5,6-hexahydro-6,11-dimethyl-3-phenethyl-2,6-methano-3-benzazocin-8-ol)
  - (2) Metazocine (1,2,3,4,5,6-hexahydro-3,6,11-trimethyl-2,6-methano-3-benzazocin-8-ol)
  - (3) Pentazocine (1,2,3,4,5,6-hexahydro-6,11-dimethyl-3-(3-methyl-2-butenyl)-2,6-methano-3-benzazocin-8-ol)

but not including

- (4) Cyclazocine (1,2,3,4,5,6-hexahydro-6,11-dimethyl-3-(cyclopropylmethyl)-2,6-methano-3-benzazocin-8-ol)
12. Ampromides, their salts, derivatives and salts of derivatives including:
  - (1) Diampromide (N-[2-(methylphenethylamino) propyl] propionanilide)
  - (2) Phenampromide (N-(1-methyl-2-piperidino) ethyl) propionanilide)
  - (3) Propiram (N-(1-methyl-2-piperidinoethyl)-N-2-pyridylpropionamide)
13. Benzimidazoles, their salts, derivatives and salts of derivatives including:
  - (1) Clonitazene (2-(p-chlorobenzyl)-1-diethylaminoethyl-5-nitrobenzimidazole)
  - (2) Etonitazene (2-(p-ethoxybenzyl)-1-diethylaminoethyl-5-nitrobenzimidazole)
  - (3) Bezitramide (1-(3-cyano-3,3-diphenylpropyl)-4-(2-oxo-3-propionyl-1-benzimidazolyl)-piperidine)
14. Phencyclidine (1-(1-phenylcyclohexyl)piperidine), its salts, derivatives and analogues and salts of derivatives and analogues
15. Piritramide (1-(3-cyano-3,3-diphenylpropyl)-4-(1-piperidino)piperidine-4-carboxylic acid amide), its salts, derivatives and salts of derivatives
16. Fentanyls, their salts, derivatives, and analogues and salts of derivatives and analogues, including:
  - (1) Accetyl-α-methylfentanyl (N-[1-(α-methylphenethyl)-4-piperidyl] acetanilide)

- (2) Alfentanil (N-[1-[2-(4-ethyl-4,5-dihydro-5-oxo-1H-tetrazol-1-yl)ethyl]-4-(methoxymethyl)-4-piperidyl]propionanilide)
- (3) Carfentanil (methyl 4-[(1-oxopropyl)phenylamino]-1-(2-phenethyl)-4-piperidinecarboxylate)
- (4) p-Fluorofentanyl (4'fluoro-N-(1-phenethyl-4-piperidyl) propionanilide)
- (5) Fentanyl (N-(1-phenethyl-4-piperidyl) propionanilide)
- (6)  $\beta$ -Hydroxyfentanyl (N-[1-( $\beta$ -hydroxyphenethyl)-4-piperidyl] propionanilide)
- (7)  $\beta$ -Hydroxy-3-methylfentanyl (N-[1-( $\beta$ -hydroxyphenethyl)-3-methyl-4-piperidyl] propionanilide)
- (8)  $\alpha$ -Methylfentanyl (N-[1-( $\alpha$ -methylphenethyl)-4-piperidyl] propionanilide)
- (9)  $\alpha$ -Methylthiofentanyl (N-[1-methyl-2-(2-thienyl) ethyl]-4-piperidyl] propionanilide)
- (10) 3-Methylfentanyl (N-(3-methyl-1-phenethyl-4-piperidyl) propionanilide)
- (11) 3-Methylthiofentanyl (N-[3-methyl-1-[2-(2-thienyl) ethyl]-4-piperidyl]propionanilide)
- (12) Sufentanil (N-[4-(methoxymethyl)-1-[2-(2-thienyl)ethyl]-4-piperidyl] propionanilide)
- (13) Thiofentanyl (N-[1-[2-(2-thienyl)ethyl]-4-piperidyl]propionanilide)
17. Tilidine (ethyl12-(dimethylamino)-1-phenyl-3-cyclohexene-1-carboxylate), its salts, derivatives and salts of derivatives

## SCHEDULE II

### (Sections 2,3, 4 to 7, 10, 29, 55 and 60)

1. Cannabis, its preparations, derivatives and similar synthetic preparations, including:
  - (1) Cannabis resin
  - (2) Cannabis (marihuana)
  - (3) Cannabidiol (2-[3-methyl-6-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol)
  - (4) Cannabinol (3-n-amy-6,6,9-trimethyl-6-dibenzopyran-1-ol)
  - (5) Nabilone (( $\pm$ )-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hyaxhydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one)
  - (6) Pyrahexyl (3-n-hexyl-6,6,0-trimethyl-7,8,9,10-tetrahydro-6-dibenzopyran-1-ol)
  - (7) Tetrahydrocannabinol (tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d]pyran-1-ol)
- but not including
  - (8) Non-viable Cannabis seed
  - (9) Mature Cannabis stalks do not include leaves, flowers, seeds or branches; and fibre derived from such stalks

## SCHEDULE III

### (Sections 2 to 7, 29, 55 and 60)

1. Amphetamines, their salts, derivatives, isomers and analogues and salts of derivatives, isomers and analogues including:
  - (1) amphetamine ( $\alpha$ -methylbenzeneethanamine)
  - (2) methamphetamine (N, $\alpha$ -dimethylbenzeneethanamine)



- (3) N-ethylamphetamine (N-ethyl- $\alpha$ -methylbenzeneethanamine)
- (4) 4-methyl-2,5-dimethoxyamphetamine (2,5-dimethoxy-4, $\alpha$ -dimethylbenzeneethanamine)
- (5) 3,4-methylenedioxyamphetamine ( $\alpha$ -methyl-1,3-benzodioxole-5-ethanamine)
- (6) 2,5-dimethoxyamphetamine (2,5)-dimethoxy- $\alpha$ -methylbenzeneethanamine)
- (7) 4-methoxyamphetamine (4-methoxy- $\alpha$ -methylbenzeneethanamine)
- (8) 2,4,5-trimethoxyamphetamine (2,4,5-trimethoxy- $\alpha$ -methylbenzeneethanamine)
- (9) N-methyl-3,4-methylenedioxyamphetamine (N, $\alpha$ -dimethyl-1,3-benzodioxole-5-ethanamine)
- (10) 4-ethoxy-2,5-dimethoxyamphetamine (4-ethoxy-2,5-dimethoxy- $\alpha$ -methylbenzeneethanamine)
- (11) 5-methoxy-3,4-methylenedioxyamphetamine (7-methoxy- $\alpha$ -methyl-1,3-benzodioxole-5-ethanamine)
- (12) N,N-dimethyl-3,4-methylenedioxyamphetamine (N,N, $\alpha$ -trimethyl-1,3-benzodioxole-5-ethanamine)
- (13) N-ethyl-3,4-methylenedioxyamphetamine (N-ethyl- $\alpha$ -methyl-1,3-benzodioxole-5-ethanamine)
- (14) 4-ethyl-2,5-dimethoxyamphetamine (DOET) (4-ethyl-2,5-dimethoxy- $\alpha$ -methylbenzeneethanamine)
- (15) 4-bromo-2,5-dimethoxyamphetamine (4-bromo-2,5-dimethoxy- $\alpha$ -methylbenzeneethanamine)
- (16) 4-chloro-2,5-dimethoxyamphetamine (4-chloro-2,5-dimethoxy- $\alpha$ -methylbenzeneethanamine)
- (17) 4-ethoxyamphetamine (4-ethoxy- $\alpha$ -methylbenzeneethanamine)
- (18) Benzphetamine (N-benzyl-N, $\alpha$ -dimethylbenzeneethanamine)
- (19) N-Propyl-3,4-methylenedioxyamphetamine ( $\alpha$ -methyl-N-propyl-1,3-benzodioxole-5-ethanamine)
2. Methylphenidate ( $\alpha$ -phenyl-2-pyridineacetic acid methyl ester) and any salt thereof
3. Methaqualone (2-methyl-3-(2-methylphenyl)-4(3H)-quinazolinone) and any salt thereof
4. Mecloqualone (2-methyl-3-(2-chlorophenyl)-4(3H)-quinazolinone) and any salt thereof
5. Lysergic acid diethylamide (LSD) (N,N-diethyllysergamide) and any salt thereof
6. N,N-Diethyltryptamine (DET) (3-[2-diethylamino) ethyl]indole) and any salt thereof
7. N,N-Dimethyltryptamine (DMT) (3-[(2-dimethylamino)ethyl]indole) and any salt thereof
8. N-Methyl-3-piperidyl benzilate (3-[(hydroxydiphenylacetyl)oxy]-1-methylpiperidine) and any salt thereof
9. Harmaline (4,9-dihydro-7-methoxy-1-methyl-3H-pyrido(3,4-b)indole) and any salt thereof
10. Harmalol (4,9-dihydro-1-methyl-3H-pyrido (3,4-b)indol-7-ol) and any salt thereof
11. Psilocin (3-[2-(dimethylamino)ethyl]-4-hydroxyindole) and any salt thereof
12. Psilocybin (3-[2-(dimethylamino)ethyl]-4-phosphoryloxyindole) and any salt thereof
13. N-(1-phenylcyclohexyl)ethylamine (PCE) and any salt thereof
14. 1-[1-(2-Thienyl) cyclohexyl]piperidine (TCP) and any salt thereof

15. 1-Phenyl-N-propylcyclohexanamine and any salt thereof
16. 1-(1-Phenylcyclohexyl)pyrrolidine and any salt thereof
17. Mescaline (3,4,5-trimethoxybenzeneethanamine) and any salt thereof, but not peyote (*lophophora*)
18. 4-Methylaminorex (4,5-dihydro-4-methyl-5-phenyl-2-oxazoline) and any salt thereof
19. Cathinone ((-)- $\alpha$ -aminopropiophenone) and any salt thereof
20. Fenetylline (d.1-3,7-dihydro-1,3-dimethyl-7-(2-[(1-methyl-2-phenethyl)amino]ethyl)-1H-purine-2,6-dione) and any salt thereof
21. 2-Methylamino-1-phenyl-1-propanone and any salt thereof
22. 1-[1-(Phenylmethyl)cyclohexyl]piperidine and any salt thereof
23. 1-[1-(4-Methylphenyl)cyclohexyl]piperidine and any salt thereof

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#### SCHEDULE IV

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#### (Sections 2 to 4, 5 to 7, 29, 55 and 60)

1. Barbiturates, their salts and derivatives including
  - (1) Allobarbitol (5,5-diallylbarbituric acid)
  - (2) Alphenal (5-allyl-5-phenylbarbituric acid)
  - (3) Amobarbitol (5-ethyl-5-(3-methylbutyl)barbituric acid)
  - (4) Aprobarbitol (5-allyl-5-isopropylbarbituric acid)
  - (5) Barbitol (5,5-diethylbarbituric acid)
  - (6) Barbituric Acid (2,4,6(1H,3H,5H)-pyrimidinetrione)
  - (7) Butabarbitol (5-sec-butyl-5-ethylbarbituric acid)
  - (8) Butalbital (5-allyl-5-isobutylbarbituric acid)
  - (9) Butallylonal (5-(2-bromoallyl)-5-sec-butylbarbituric acid)
  - (10) Butethal (5-butyl-5-ethylbarbituric acid)
  - (11) Cyclobarbitol (5-(1-cyclohexen-1-yl)-5-ethylbarbituric acid)
  - (12) Cyclopal (5-allyl-5-(2-cyclopenten-1-yl)barbituric acid)
  - (13) Heptabarbitol (5-(1-cyclohepten-1-yl)-5-ethylbarbituric acid)
  - (14) Hexethal (5-ethyl-5-hexylbarbituric acid)
  - (15) Hexobarbitol (5-(1-cyclohexen-1-yl)-1,5-dimethylbarbituric acid)
  - (16) Mephobarbitol (5-ethyl-1-methyl-5-phenylbarbituric acid)
  - (17) Methabarbitol (5,5-diethyl-1-methylbarbituric acid)
  - (18) Methylphenobarbitol (5-ethyl-1-methyl-5-phenylbarbituric acid)
  - (19) Propallylonal (5-(2-bromoallyl)-5-isopropylbarbituric acid)
  - (20) Pentobarbitol (5-ethyl-5-(1-methylbutyl)barbituric acid)
  - (21) Phenobarbitol (5-ethyl-5-phenylbarbituric acid)
  - (22) Probarbitol (5-ethyl-5-isopropylbarbituric acid)
  - (23) Phenylmethylbarbituric Acid (5-methyl-5-phenylbarbituric acid)
  - (24) Secobarbitol (5-allyl-5-(1-methylbutyl)barbituric acid)
  - (25) Sigmodal (5-(2-bromoallyl)-5-(1-methylbutyl) barbituric acid)
  - (26) Talbutal (5-allyl-5-sec-butylbarbituric acid)
  - (27) Vinbarbitol (5-ethyl-5-(1-methyl-1-butenyl) barbituric acid)
  - (28) Vinylbital (5-(1-methylbutyl)-5-vinylbarbituric acid)
2. Thiobarbiturates, their salts and derivatives including:
  - (1) Thialbarbitol (5-allyl-5-(2-cyclohexen-1-yl)-2-thiobarbituric acid)
  - (2) Thiamylal (5-allyl-5-(1-methylbutyl)-2-thiobarbituric acid)
  - (3) Thiobarbituric Acid (2-thiobarbituric acid)
  - (4) Thiopental (5-ethyl-5-(1-methylbutyl)-2-thiobarbituric acid)
3. Chlorphentermine (1-(p-chlorophenyl)-2-methyl-2-aminopropane) and any salt thereof

4. Diethylpropion (2-(diethylamino)propiofenone) and any salt thereof
5. Phendimetrazine (d-3,4-dimethyl-2-phenylmorpholine) and any salt thereof
6. Phenmetrazine (3-methyl-2-phenylmorpholine) and any salt thereof
7. Pipradol ( $\alpha,\alpha$ -diphenyl-2-piperidinemethanol) and any salt thereof
8. Phentermine ( $\alpha,\alpha$ -dimethylbenzeneethanamine) and any salt thereof
9. Butorphanol (1-N-cyclobutylmethyl-3,14-dihydroxymorphinan) and any salt thereof
10. Nalbuphine (N-cyclobutylmethyl-4,5-epoxy-morphinan-3,6,14-triol) and any salt thereof
11. Gluethimide (2-ethyl-2-phenylglutarimide)
12. Clotiazepam (5-(o-chlorophenyl)-7-ethyl-1,3-dihydro-1-methyl-2-H-thieno [2,3-e]-1,4-diazepin-2-one)
13. Ethchlorvynol (ethyl-2-chlorovinyl ethynyl carbinol)
14. Ethinamate (1-ethynylcyclohexanol carbamate)
15. Mazindol (5-(p-chlorophenyl)-2,5-dihydro-3H-imidazo[2,1-a]isoindol-5-ol)
16. Meprobamate (2-methyl-2-propyl-1,3-propanediol dicarbamate)
17. Methypylon (3,3-diethyl-5-methyl-2,4-piperidinedione)
18. Benzodiazepines, their salts and derivatives, including:
  - (1) Alprazolam (8-chloro-1-methyl-6-phenyl-4H-s-triazolo[4,3-a][1,4] benzo-diazepine)
  - (2) Bromazepam (7-bromo-1,3-dihydro-5-(2-pyridyl)-2H-1, 4-benzodiazepin-2-one)
  - (3) Camazepam (7-chloro-1,3-dihydro-3-(N,N-dimethylcarbamoyl)-1-methyl-5-phenyl-2H-1,4-benzodiazepin-2-one)
  - (4) Chlordiazepoxide (7-chloro-2-(methylamino)-5-phenyl-3H-1,4-benzodiazepine-4-oxide)
  - (5) Clobazam (7-chloro-1-methyl-5-phenyl-1H-1,5-benzodiazepine-2,4(3H,5H)-dione)
  - (6) Clonazepam (5-(o-chlorophenyl)-1,3-dihydro-7-nitro-2H-1,4-benzodiazepin-2-one)
  - (7) Clorazepate (7-chloro-2,3-dihydro-2,2-dihydroxy-5-phenyl-1H-1,4-benzodiazepine-3-carboxylic acid)
  - (8) Cloxazolam (10-chloro-11b-(o-chlorophenyl)-2,3,7,11b-tetrahydrooxazolo[3,2-d][1,4] benzodiazepin 6-(5H)-one)
  - (9) Delorazepam (7-chloro-5-chlorophenyl)-1,3-dihydro-2H-1,4-benzodiazepin-2-one)
  - (10) Diazepam (7-chloro-1,3-dihydro-1-methyl-5-phenyl-2H-1,4-benzodiazepin-2-one)
  - (11) Estazolam (8-chloro-6-phenyl-4H-s-triazolo[4,3-a][1,4]benzodiazepine)
  - (12) Ethyl Loflazepate (ethyl 7-chloro-5-(o-fluorophenyl)-2,3-dihydro-2-oxo-1H-1,4-benzodiazepine-3-carboxylate)
  - (13) Fludiazepam (7-chloro-5-(o-fluorophenyl)-1,3-dihydro-1-methyl-2H-1,4-benzodiazepin-2-one)
  - (14) Flunitrazepam (5-(o-fluorophenyl)-1,3-dihydro-1-methyl-7-nitro-2H-1,4-benzodiazepin-2-one)
  - (15) Flurazepam (7-chloro-1-[2-(diethylamino) ethyl]-5-(o-fluorophenyl)-1,3-dihydro-2H-1,4-benzodiazepin-2-one)
  - (16) Halazepam (7-chloro-1,3-dihydro-5-phenyl-1-(2, 2,2-trifluoroethyl)-2H-1,4-benzodiazepin-2-one)
  - (17) Haloxazolam (10-bromo-11b-(o-fluorophenyl)-2,3,7,11b-tetrahydrooxazolo[3,2-d][1,4]benzodiazepin-6(5H)-one)



- (18) Ketazolam (11-chloro-8,12b-dihydro-2,8-dimethyl-12b-phenyl-4H-[1,3]-oxazino-[3,2-d][1,4] benzodiazepine-4,7(6H)-dione)
- (19) Loprazolam (6-(o-chlorophenyl)-2,4-dihydro-2-[(4-methyl-1-piperazinyl)methylene]-8-nitro-1H-imidazo[1,2-a][1,4]benzodiazepin-1-one)
- (20) Lorazepam (7-chloro-5-(o-chlorophenyl)-1,3-dihydro-3-hydroxy-2H-1,4-benzodiazepin-2-one)
- (21) Lormetazepam (7-chloro-5-(o-chlorophenyl)-1,3-dihydro-3-hydroxy-1-methyl-2H-1,4-benzodiazepin-2-one)
- (22) Medazepam (7-chloro-2,3-dihydro-1-methyl-5-phenyl-1H-1,4-benzodiazepine)
- (23) Nimetazepam (1,3-dihydro-1-methyl-7-nitro-5-phenyl-2H-1,4-benzodiazepin-2-one)
- (24) Nitrazepam (1,3-dihydro-7-nitro-5-phenyl-2H-1,4-benzodiazepin-2-one)
- (25) Nordazepam (7-chloro-1,3-dihydro-5-phenyl-1 (2H)-1,4-benzodiazepin-2-one)
- (26) Oxazepam (7-chloro-1,3-dihydro-3-hydroxy-5-phenyl-2H-1,4-benzodiazepin-2-one)
- (27) Oxazolam (10-chloro-2,3,7,11b-tetrahydro-2-methyl-11b-phenyloxazolo [3,2-d][1,4]benzodiazepin-6(5H)-one)
- (28) Pinazepam (7-chloro-1,3-dihydro-5-phenyl-1-(2-propynyl)-2H-1,4-benzodiazepin-2-one)
- (29) Prazepam (7-chloro-1-(cyclopropylmethyl)-1,3-dihydro-5-phenyl-2H-1,4-benzodiazepin-2-one)
- (30) Temazepam (7-chloro-1,3-dihydro-3-hydroxy-1-methyl-5-phenyl-2H-1,4-benzodiazepin-2-one)
- (31) Tetrazepam (7-chloro-5-(cyclohexen-1-yl)-1,2,3-dihydro-1-methyl-2H-1,4-benzodiazepin-one)
- (32) Triazolam (8-chloro-6-(o-chlorophenyl)-1-methyl-4H-s-triazolo [4,3-a][1,4]benzodiazepine)
19. *Catha edulis* Forsk., its preparations, derivatives alkaloids and salts, including:
  - (1) Cathine (d-threo-2-amino-1-hydroxy-1-phenylpropane)
20. Fencamfamin (d,1-N-ethyl-3-phenylbicyclo[2,2,1]heptan-2-amine) and any salt thereof
21. Fenproporex (d,1-3-[( $\alpha$ -methylphenethyl)amino]propionitrile) and any salt thereof
22. Mefenorex (d,1-N(3-chloropropyl)- $\alpha$ -methylbenzeneethanamine) and any salt thereof
23. Anabolic steroids and their derivatives including:
  - (1) Androisoxazole (17 $\beta$ -hydroxy-17 $\alpha$ -methylandrostando[3,2-c]isoxazole)
  - (2) Androstanolone (17 $\beta$ -hydroxy-5 $\alpha$ -androstan-3-one)
  - (3) Androstenediol (androst-5-ene-3 $\beta$ ,17 $\beta$ -diol)
  - (4) Bolandiol (estr-4-ene-3 $\beta$ ,17 $\beta$ -diol)
  - (5) Bolasterone (17 $\beta$ -hydroxy-7 $\alpha$ ,17-dimethylandrostand-4-en-3-one)
  - (6) Bolazine (17 $\beta$ -hydroxy-2 $\alpha$ -methyl-5 $\beta$ -androstan-3-one azine)
  - (7) Boldenone (17 $\beta$ -hydroxyandrosta-1,4-dien-3-one)
  - (8) Bolenol (19-nor-17 $\alpha$ -pregn-5-en-17-ol)
  - (9) Calusterone (17 $\beta$ -hydroxy-7 $\beta$ ,17-dimethylandrostand-4-en-3-one)
  - (10) Clostebol (4-chloro-17 $\beta$ -hydroxyandrostand-4-en-3-one)
  - (11) Drostanolone (17 $\beta$ -hydroxy-2 $\alpha$ -methyl-5 $\alpha$ -androstan-3-one)
  - (12) Enestebol (4,17 $\beta$ -dihydroxy-17-methylandrosta-1,4-dien-3-one)
  - (13) Epitiostanol (2 $\alpha$ , 3 $\alpha$ -epithio-5 $\alpha$ -androstan-17 $\beta$ -ol)
  - (14) Ethylestrenol (19-nor-17 $\alpha$ -pregn-4-en-17-ol)

- (15) 4-Hydroxy-19-nor testosterone
- (16) Fluoxymesterone (9-fluoro-11 $\beta$ ,17 $\beta$ -dihydroxy-17-methylandrosta-4-en-3-one)
- (17) Formebolone (11 $\alpha$ ,17 $\beta$ -dihydroxy-17-methyl-3-oxoandrosta-1,4 di-2n-2-carboxaldehyde)
- (18) Furazabol (17-methol-5 $\alpha$ -androstan[2,3-c]furazan-17 $\beta$ -ol)
- (19) Mebolazine (17 $\beta$ -hydroxy-2 $\alpha$ ,17-dimethyl-5 $\alpha$ -androstan-3-one azine)
- (20) Mesabolone (17 $\beta$ -[(1-methoxycyclohexyl)oxy]-5 $\alpha$ -androsta-1-en-3-one)
- (21) Mesterolone (17 $\beta$ -hydroxy-1 $\alpha$ -methyl-5 $\alpha$ -androstan-3-one)
- (22) Metandienone (17 $\beta$ -hydroxy-17-methylandrosta-1,4-dien-3-one)
- (23) Metenolone (17 $\beta$ -hydroxy-1-methyl-5 $\alpha$ -androsta-1-en-3-one)
- (24) Methandriol (17 $\alpha$ -methylandrosta-5-ene-3 $\beta$ ,17 $\beta$ -diol)
- (25) Methyltestosterone (17 $\beta$ -hydroxy-17-methylandrosta-4-en-3-one)
- (26) Metribolone (17 $\beta$ -hydroxy-17-methylestra-4,9,11-trien-3-one)
- (27) Mibolerone (17 $\beta$ -hydroxy-7 $\alpha$ ,17dimethylestra-4-en-3-one)
- (28) Nandrolone (17 $\beta$ -hydroxyestra-4-en-3-one)
- (29) Norboletole (13-ethyl-17 $\beta$ -hydroxy-18,19-dinorpregn-4-en-3-one)
- (30) Norclostebol (4-chloro-17 $\beta$ -hydroxyestra-4-en-3-one)
- (31) Norethandrolone (17 $\alpha$ -ethyl-17 $\beta$ -hydroxyestra-4-en-3-one)
- (32) Oxabolone (4,17 $\beta$ -dihydroxyestra-4-en-3-one)
- (33) Oxandrolone (17 $\beta$ -hydroxy-17-methyl-2-oxa-5 $\alpha$ -androstan-3-one)
- (34) Oxymesterone (4,17 $\beta$ -dihydroxy-17-methylandrosta-4-en-3-one)
- (35) Oxymetholone (17 $\beta$ -hydroxy-2-(hydroxymethylene)-17-methyl-5 $\alpha$ -androsta-3-one)
- (36) Prasterone (3 $\beta$ -hydroxyandrosta-5-en-17-one)
- (37) Quinbolone (17 $\beta$ -(1-cyclopenten-1-yloxy)androsta-1,4-dien-3-one)
- (38) Stanozolol (17 $\beta$ -hydroxy-17-methyl-5 $\alpha$ -androstan[3,2-c]pyrazole)
- (39) Stenbolone (17 $\beta$ -hydroxy-2-methyl-5 $\alpha$ -androsta-1-en-3-one)
- (40) Testosterone (17 $\beta$ -hydroxyandrosta-4-en-3-one)
- (41) Tibolone (17-hydroxy-7 $\alpha$ -methyl-19-norpregn-5(10)-en-20-yn-3-one)
- (42) Tiomesterone (1 $\alpha$ ,7 $\alpha$ -bis(acetylthio)-17 $\beta$ -hydroxy-17-methylandrosta-4-en-3-one)
- (43) Trenbolone (17 $\beta$ -hydroxyestra-4,9,11-trien-3-one)
24. Zeranol (3,4,5,6,7,8,9,10,11,12-decahydro-7,14,16-trihydroxy-3-methyl-1H-2-benzoxacetyldecalin-1-one)

## SCHEDULE V

### (Sections 2, 4, 6, 55 and 60)

1. Phenylpropanolamine (2-amino-1-phenyl-1-propanol) and any salt thereof
2. Propylhexedrine (1-cyclohexyl-2-methylaminopropane) and any salt thereof
3. Pyrovalerone (1-(1-pyrrolidinyl)butyl p-tolyl ketone and any salt thereof)

## SCHEDULE VI

### (Sections 2, 6, 55 and 60)

1. Benzyl methyl ketone (P2P (1-phenyl-2-propanone))
2. Ephedrine (1-erythro-2-(methylamino)-1-phenylpropan-1-ol)
3. Ergometrine (9,10-didehydro-N-(2-hydroxy-1-methylethyl)-6-methylergoline-8-carboxamide)

- 4. Ergotamine (12'-hydroxy-2'-methyl-5'-(phenylmethyl)ergotaman-3',6',18-trione)
- 5. Lysergic acid (9,10-didehydro-6-methylergoline-8-carboxylic acid)
- 6. Pseudoephedrine (d-threo-2-(methylamino)-1-phenylpropan-1-ol)

SCHEDULE VII

(Sections 5 and 60)

Substance	Amount
1. Cannabis resin	3 kg
2. Cannabis (marihuana)	3 kg

SCHEDULE VIII

(Sections 4 and 60)

Substance	Amount
1. Cannabis resin	1 g
2. Cannabis (marihuana)	30 g















